REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT DURBAN

CASE NO: **D608/2001**

In the matter between:

NELSON NCUNGAMA First Applicant

AND 60 OTHERS 2nd t 61st Applicants

and

BARGAINING COUNCIL FOR THE LIQUOR, CATERING AND ACCOMODATION TRADES, SOUTH COAST, KWAZULU-NATAL First Respondent

FEDSURE LIFE ASSURANCE LIMITED Second Respondent

JUDGMENT

PILLAY J

[1] This is an application in terms of Section 158(1)(g) of the Labour Relations Act No 66 of 1995 ("LRA") to review and correct or set aside the decision of the First Respondent Council dated 30 October 2000 in terms of which it refused to exempt the applicants from its Provident Fund Collective Agreement ("Fund Agreement").

[2] The applicants are employees engaged in the liquor catering and accommodation trade (the trades). The second respondent, Fedsure

Life Insurance Limited, has been cited as an interested party. No relief is claimed against it.

[3] In this case the applicants applied on various occasions for an exemption from the Fund Agreement administered by the Council because they wished to join the Hospitality Industry Provident Fund ("H.I.P.F."). Each time the applications were refused. Revised applications were resubmitted, the last submissions being in June 2000. The first batch of applications was made in August 1999 (the August applications). The Council disregarded the procedures and time limits prescribed in Clause 14 of the Fund Agreement in terms of which copies of written comments by parties to the Council had to be given to the applicants for their comments within thirty days.

[4] On 27 October 1999 the Council refused the August applications on the ground that "the Council's Provident Fund benefits are equal or better now than the benefits of the Hospitality Industry Provident Fund". The applicants requested the H.I.P.F. to pursue the matter on their behalf with the Council. The Council advised the H.I.P.F. that the August applications for exemptions were refused because the applicants had not confirmed in writing that they had been advised of the comparative benefits of the respective funds.

[5] In December 1999 certain applicants made further applications for exemption (the December applications). This time they confirmed in writing that they had been informed of the comparative benefits of the two funds. The Council again failed to comply with the procedures in

Clause 14.

[6] The H.I.P.F. invited the Council to attend a meeting at which the Council and the H.I.P.F. could present the benefits and costs of their respective Funds to workers to clear any misconceptions about them. The Council replied that it was not possible to attend the meeting.

[7] On 23 February 2000 the Council refused the December applications for exemption on the grounds that "the Council's Provident Fund is equal to or better than the Hospitality Industry Provident Fund". This conclusion was reached principally on the advice of the actuarial consultant for Fedsure, Mr Richard Farraday.

[8] The applicants protested to the Council about the rejection of the August and December applications and asked that they be referred to an independent exemptions body. The Council refused to establish the body until the applicants had complied with certain further requirements relating to their applications for exemption. The further requirements were communicated by Fedsure on behalf of the Council. A document which had to be signed by the applicants in the presence of their trade union stating that they understood and agreed with the applications for exemption had to accompany the application. Furthermore, it had to be confirmed in writing that the applicants had full knowledge of the comparative benefits of the Funds and the implications of the transfer after they had been explained "directly by and to each applicant from and by representatives of both the H.I.P.F. and the Bargaining Council Fund".

[9] The applicants pointed out to the Council that Fedsure offered in its letter of 3 March 2000 to conduct a workshop to explain the implications of the exemptions and transfer to the applicant; yet it had declined a similar invitation from H.I.P.F. on 23 February 2000. Furthermore, they also questioned how the Council had granted 300 applications in August 1999 but refused the August applications that had been made in substantially the same format.

[10] The Council's explanation was that when granting the 300 exemptions it had considered the benefits being offered by H.I.P.F. as being on the whole at least equal to those being offered by its fund. However, when it considered the further applications for exemption it no longer held that view. What brought about this change of opinion was not explained to the applicants.

[11] Despite their objections to the further requirements the applicants made a third batch of applications for exemption about June 2000 in compliance with the further requirements (the June applications). These applications were also refused in October 2000. The reason for the refusal was that on the advice of Fedsure, the Council believed that the comparison of interest of fifteen percent offered by the Council and eighteen percent by the H.I.P.F. was "incorrect or at least seriously misleading".

[12] Only the refusal of the June batch of applications for exemption is before me for review.

[13] That is the factual background to this dispute.

[14] The parties to the Council had concluded the Fund Agreement in terms of which they established a fund to be administered by the Council. The applicants sought an exemption from contributing to that fund. It is common cause that the applicants were bound by the Fund Agreement.

[15] With certain exceptions, membership of the Council's Fund is compulsory for all employees in the trade. [Clause 5(1) of the Fund Agreement.] Membership is not compulsory for certain employees if, in the opinion of the Council, the benefits of another fund, of which the employee was a member, are on the whole not less favourable than the benefits provided by the fund administered by the Council. [Clause 5(3) of the Fund Agreement.] Exemption from any part of the Fund Agreement may be granted on application to the Council.

[16] The Council decides all applications for exemption. However, applications for exemption by non-parties to the Council that are refused are to be referred to an independent body for consideration. Although Clause 14 prescribes the procedure for exemptions, the criteria for deciding them are not prescribed.

[17] This is how the parties to the Council chose to design its exemption procedure which, by ministerial extension, became applicable to the trades. Of special note is the fact that the Council was empowered to adjudicate applications for exemptions from its Fund Agreement despite

a potential conflict of interest. For instance, the Council derived revenue from administering the fund and would therefore have an interest in having as many members as possible.

[18] There are however advantages in such a system. Firstly, the costs of engaging independent adjudicators is avoided. Secondly, the decision is taken by specialists in the trades.

[19] The main disadvantage is the potential conflicts of interest between representatives on the Council amongst themselves, with their constituencies and with the Council as an entity. The system also permits members of parties to the Council to apply for exemptions from agreements to which they have been bound. This could seriously undermine the very objective for which the Council was established, that is centralised collective bargaining. However, it may also be necessary to have such a provision for the very survival of the system of bargaining.

[20] What the motivation for such a design was is not relevant. The design may, however, have some implications for the role of this Court in promoting administrative justice. I will return to this later. It is relevant, however, that the design was the choice of the parties to the Council to regulate themselves. Their rights and obligations arise both from contract and from legislation. They bind their respective constituencies to decisions taken by them as representatives at the Council, especially if they agreed with the decision.

[21] It is not clear from the pleadings whether the applicants were members of a trade union that was a party to the Council. Some appear to be members of the Hospitality Industry and Allied Workers Union ("H.I.A.W.U."), which is not a party to the Council. This issue is also relevant to deciding whether the refusal of exemptions ought to have been referred to the independent exemptions body established in terms of section 32(3)(e) of the LRA. If they were not members of a trade union that was party to the Council then the dispute about the refusal of the exemption had to be referred to the exemptions body and this court would have no jurisdiction. However, the parties have argued the matter on the assumption that the applicants were members of a trade union that was party to the Council. Hence there was no need for a referral to an exemptions body.

[22] The Council referred to Clause 5(3) of the Fund Agreement and decided to stipulate, as a criterion for exemption, that the benefits of the H.I.P.F. should be on the whole not less favourable than the benefits that it provided from its own Fund. The criterion is not arbitrary or unreasonable. It puts the interests of the applicants first.

[23] It is submitted for the applicants that the criterion was unlawful because firstly, it was a violation of section 18 of the Constitution of the Republic of South Africa Act, No 108 of 1996 relating to the right to freedom of association which implied a right to dissociate. Secondly, it was submitted that the criterion could not operate as a limitation in terms of section 36 of the Constitution as it was not a law of general application. Advocate Naidoo for the Council disputed that the matter had any

constitutional implications.

[24] The LRA recognises the right to freedom of association [Sections 4 and 6 of the LRA] and anticipates that it may be proscribed by collective bargaining. Part B of Chapter 3 of the LRA relating to the legal effect of collective agreements and agency and closed shop agreements authorizes the limitation of the right to freedom of association. These arrangements at the Council and in the LRA are expressly sanctioned by section 23(6) of the Constitution which provides:

"National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

[25] Assumed as it is for the purposes of this case that the applicants are members of a trade union party to the Council, my response to both submissions on constitutional grounds is that the applicants had acquiesced in the Fund Agreement. They therefore consented to the particular model for the exercise of the right to freedom of association. There is no evidence that their representative dissociated itself from the decision of the Council about the application of the criterion in clause 5(3) of the Fund Agreement. It is therefore also not open to the applicants to now challenge the reasonableness of the criterion for exemption.

[26] Advocate Moodley for the applicants, relied on *Young James and Webster v Government of the UK* [1981] IRLR 408. The reliance on that case is misplaced as it does not support his cause. It was held in that case that

a restriction on the right of freedom of association must be proportionate to the legitimate aim pursued. Proportionality is determined from all the facts. That case dealt with the application of a closed shop that led to the dismissal of employees, a somewhat extreme consequence of a restriction on the right to freedom of association. Here, one is concerned with the choice of provident funds. The effect of withdrawal from the Council's Fund would not lead to termination of employment. In both cases however, collective bargaining is affected.

[27] A further compelling fact in this case is that the limitation was self-inflicted as the applicants were bound to the Fund Agreement by virtue of their membership of a trade union that was party to the Council.

[28] The criterion for exemption set by the Council is, therefore, not an infringement of the provisions of section 18 of the Constitution. Nor is it an unreasonable limitation on the right to freedom of association.

[29] The applicants submitted that the decision to refuse the application for exemption was procedurally unfair. The first ground for this submission was that the Council failed to provide the applicants with the written comments to the applications for exemption as it was required to in terms of clause 14(2)(e). The applicants were not given an opportunity to respond to such comment. Accordingly, the Council refused the applications for exemption without having heard the applicants' response to the comments. So the argument went.

[30] Advocate Naidoo denied that there was any procedural unfairness. In so far as I were to find that there was an irregularity it was merely formal as, substantively, the applicants were fully appraised of all the relevant information.

[31] It was common cause that the written comments were not furnished to the applicants. However, they were contained in the bundle of documents presented by the Council as a record of all three batches of exemption applications. The Council was repeatedly requested to furnish these comments. In response to such a request on 22 February 2000 Fedsure, on behalf of the Council, replied that there was no obligation to provide copies of written comments to the H.I.P.F. The applicants' attorneys pointed out that the Council had accepted that the applicants would be represented by the H.I.P.F. Despite this, the written comments were not furnished to the applicants.

[32] In its answering affidavit the secretary for the Council, Mr Paul Van Gorkom stated that no such written comment had been made. The explanation tendered from the Bar for the Council was that the comments in the record under review did not relate to the exemptions refused on 30 October 2000.

[33] Firstly, the submission is patently wrong. The written comments were from, *inter alia*, Resort Maintenance CC. The first to sixth applicants inclusive were employed there. Each of them had been applicants for exemption in August, December 1999 and May 2000. Although the comments merely convey that employer's objection to the exemption

because it believed that the Council's benefits were superior, it was important for the applicants to have had an opportunity to respond to it. This is especially so as it was part of the record and might have been considered by the Council. Furthermore, negotiations in a bargaining council environment is multi-dimensional. Had the first to sixth applicants been aware of their employer's attitude they might have engaged with it directly.

[34] It was the Council and Fedsure who had been sticklers for compliance with procedures. Their approach to the applications for exemption had been formalistic in the extreme. They set the standard for engagement.

[35] The failure to furnish the comments was a material procedural defect.

[36] The second complaint about procedure was that the Council failed to refer the disputes to the exemptions body. The Council's reason for refusing to do so was that it wanted compliance with its requirements. It hardly lies with the applicants to raise this as a complaint since they have not identified themselves as non-parties to the Council.

[37] Having found that the criterion set by the Council is reasonable, I must now inquire whether it was applied rationally by the Council in refusing the exemptions. As submitted by Advocate Naidoo, a Court may interfere on very limited grounds when reviewing the exercise of a discretion by an administrative tribunal. (*Hira and Another v Booysen and Another* [1992] 41 at 69 at 93A-94A). However, in so far as the exercise of public power is objectively irrational or tainted by impropriety the Court

may intervene. (*Pharmaceutical Manufactures Association of South Africa and Another in re Ex Parté President of the Republic of South Africa* 2000(2) SA 674 (CC) at paragraph 90)

[38] There is an apparent dispute of fact as to whether the H.I.P.F. or the Council provided better benefits. I intend to determine the issue principally on the respondents' version. (*Plascon Evans Paints Limited v Van Riebeeck Paints (Pty) Limited* 1984(3) SA 623 A at 634H-I).

[39] The Council was generally satisfied that the H.I.P.F. benefits were not less favourable than the benefits its own Fund provided. Its concerns were about an apparent misrepresentation of the interest rates paid by each fund. The Council found that its Fund provided better benefits over a five-year period since 1994.

[40] I accept for the purposes of this case that that was so. Mr Farraday records the average rate over the five-year period from 1994 to be 15.92 percent for the Council and 11.71 percent for the H.I.P.F. [Document A245] However, one of the reasons for the applicants wanting the exemption and transfer was that H.I.P.F. paid better rates on withdrawal from the fund. On the version of Mr Farraday [Document A245 and Annexure B of document ACKH5 delivered in replication], the interest rate is seven percent for withdrawal from the Council's Fund. Mr Farraday recorded the H.I.P.F's withdrawal rates as an average of 11.71 percent. On the Council's version the rate of withdrawal was 10.93 percent. Both versions put the H.I.P.F's withdrawal rates as higher than that of the Council. The contradiction in the respondent’s

versions has implications for the remedy I devise.

[41] Mr Farraday's reason for disputing that the H.I.P.F. benefits were better was that the purpose of the Council's Fund was to provide benefits on retirement. It therefore provided better returns at retirement. Nevertheless, he had recommended to the Council to increase its withdrawal interest rate. Notwithstanding this information, the Council concluded that the benefits provided by H.I.P.F. were less favourable on the whole to the benefits that its Fund provided.

[42] The applicants reaffirm in their founding affidavits that the Council's Fund pays the capital bonus portion of interest only on retirement. This is not advantageous to members whose employment security and accordingly membership of the either fund is tenuous.

[43] The H.I.P.F. further established that of the 4516 members who had left its Fund between 1998 and 2000, 4223 were paid withdrawal benefits and 293 were paid retirement benefits.

[44] The Council had no knowledge of these statistics. It did not dispute them. As an administrator of its Fund one would have expected the Council to have some idea of trends in the trades from its own statistics. It gives no evidence in this regard. Instead, it doggedly clings to its belief that the object of its Fund is to encourage employees to remain in employment in the trades as members of its Fund until retirement in order to secure the best interest rates for their investments. Furthermore, it maintains that regular payment of withdrawal benefits is

inconsistent with the objects of its Fund and should not be encouraged.

[45] Clearly this was a reason for it refusing the exemption applications. This reason is not cogent given the realities of work in the trades, namely that job security is tenuous. The council ignored the applicants' submissions in their exemption applications that they wanted the transfer because the H.I.P.F. paid better rates on withdrawal. Whether motivated by paternalism or self-interest, it nevertheless concluded that a retirement benefit was more favourable for the applicants.

[46] In terms of Clause 14(3)(b) the Council may grant an application for exemption if, *inter alia*, it does not undermine the final Agreement and collective bargaining. It is now proffered as a reason for the refusal of the exemption that it would have undermined collective bargaining. That was not the reason for refusing the exemptions that are now the subject of this review. Consequently, it cannot be considered. Even if I did take it into account, as I have said above, the parties designed the exemptions system themselves. They must therefore have anticipated such applications. Furthermore, the Council set the criteria for granting the exemptions. This review is to test whether that criteria was applied lawfully and fairly.

[47] Applying the criterion that it set for itself, the Council ought to have granted the exemptions because:-

(i) it was aware that the withdrawal benefits of H.I.P.F. were more favourable than the benefits provided by its Fund;

(ii) the applicants desired better withdrawal benefits instead of retirement

benefits;

(iii) the applicants desired other benefits such as superior and cheaper housing, loan facilities, parents' funeral cover and better administration offered by H.I.P.F. and, that these were superior benefits, were not in issue in the exemption applications;

(iv) the only consideration underpinning the refusal being the welfare of the applicants, they are as adults capable of rationally deciding what is in their best interests;

(v) the applicants complied with all the procedural requirements stipulated by the Council.

[48] The refusal of the exemption is not only wrong but also a misdirection amounting to a reviewable irregularity as the Council failed to consider all the material properly before it. Consequently, its decision is not justifiable. However, the following further considerations warrant the setting aside of the Council's decision.

(i) The credibility of the Council officials has been seriously challenged. The Council falsely denied not having received any written comments to the exemption application.

(ii) The Council presented its withdrawal interest rates as an average of 10.93 percent. This conflicts directly with Mr Farraday's letter [Document A245-6] and the agreement between the Council and Fedsure, (Annexure ACKH5), both of which peg the rate at seven percent.

(iii) The Council was not impartial. Firstly, it shifted the goalposts after each batch of applications to insist on more onerous requirements. Secondly, the Council derived revenue from Fedsure for administering

the fund. The probabilities are that it would be favourably disposed to Fedsure. Conversely, the fact that negotiations for its merger with H.I.P.F. fell through because the latter refused to pay a fee to the Council could cause it to be less disposed to the H.I.P.F. However, some 300 applications were granted after the merger negotiations. While this suggested the Council was not averse to granting such applications in favour of H.I.P.F. it does not imply that it was favourably disposed to doing so. The fact that this application is opposed suggests otherwise.

(iv) The Council has fettered its discretion by delegating its authority to decide on the exemptions to Fedsure. There is no evidence that it exercised a discretion independent of Fedsure. It simply accepted its advice. Hence its omission to consider other reasons in support of the applications for exemption.

[49] There are allegations and counter-allegations of false rumours and misinformation being spread amongst the employees by agents of the Council. There are also conflicting explanations for the withdrawal of certain applications for exemptions and their subsequent reinstatement. In view of my decision it is not necessary to resolve these disputes of fact.

[50] Turning to the relief sought, the general principle is that a reviewing court may not substitute its decision for that of an administrative tribunal that has been especially empowered for that purpose. However, special circumstances may warrant otherwise. [*Administrative Law*, Lawrence Baxter, 1984, page 305.]

[51] In this case the parties designed the exemption's procedure in such a manner that it ignores or underplays the potential conflict of interests, particularly the conflict that the Council may have as decision-maker. Mostly, the system must work or else the parties would change it. This Court enables that system to work by exercising a review function. However, it needs to do more to address the procedural lacuna in the system, that is, when disputes arise between the Council and the parties.

[52] I cannot in the circumstances of this case refer the matter back to be determined afresh by the Council. Hence I must determine the matter finally. The evidence is sufficient to enable me to substitute the decision of the Council with my own.

[53] In the circumstances I grant an order in the following terms:

(i) The decision of the Council dated 30 October 2000 in terms of which it refused to grant the individual applicants' exemption from the Council's Provident Fund Collective Agreement is hereby reviewed and set aside.

(ii) The individual applicants are exempted from the Council's Provident Fund Collective Agreement.

(iii) The Council is directed to pay the applicants' costs.

PILLAY D, J

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16 April 2002

18 April 2002

4 JUNE 2002

ANTS: ADVOCATE I MOODLEY

CHEADLE, THOMPSON & HAYSOM

ON BEHALF OF RESPONDENT: ADVOCATE L R NAIDOO

INSTRUCTED BY: GARLICKE & BOUSFIELD INC