IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO : C 662/2002

In the matter between:

CAPE MANUFACTURING ENGINEERS (PTY) LIMITED Applicant

and

METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL

THE INDEPENDENT EXEMPTIONS APPEAL

BOARD OF THE METAL AND ENGINEERING

INDUSTRIES BARGAINING COUNCIL Second Respondent

NATIONAL EMPLOYEES TRADE UNION Third Respondent

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA Fourth Respondent

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JUDGMENT

TIP A J

INTRODUCTION

1 The applicant is a company which manufactures components for the arms industry and, in a separate division, automotive components. It is indirectly affiliated to the Steel and Engineering Industries Federation of South Africa. The latter is the co-ordinating body for the engineering industry; it is a member of the first respondent.

2 The first respondent, the Metal and Engineering Industries Bargaining Council ("the Council"), is a national bargaining council registered in terms of section 29 of the Labour Relations Act 66 of 1995 ("the LRA"). It operates in terms of a duly approved constitution in accordance with which committees have been established in various regions throughout South Africa. These are referred to as regional councils. In relation to the events material to this matter, the applicant has dealt at all times with the Cape Regional Council ("the Cape Council").

3 Many aspects of the metal and engineering industries are governed and regulated through the consolidated Main Agreement. The current agreement was promulgated on 31 March 1998. It has been re-enacted with amendments from time to time. Clause 23 deals with exemptions and provision is made in clause 23(5)(a) for the appointment of the second respondent, being the Independent Exemptions Appeal Board ("the Board").

4 The third and fourth respondents are trade unions whose members are affected by the present proceedings. The third respondent is the National Employees Trade Union. As described more fully below, its appeal against an exemption granted to the applicant has led to the present review.

THE EXEMPTION AND THE APPEAL

5 The main agreement provides for the payment to scheduled employees of an annual leave enhancement pay. In essence this is an annual lump sum bonus payment. On 25 October 2001 the applicant sought an exemption in respect of this payment from the Cape Council. That application was made in consequence of certain changes in the market place that had resulted in a marked negative impact on the applicant's

turnover. Not all the details thereof are relevant for the purpose of this judgment. It is sufficient to record that the applicant contended that it had sustained a materially reduced turnover; it had been required to make significant capital expenditure in order to redirect its business; as a result, it was experiencing a cashflow crisis which directly affected its capacity to make bonus payments.

6 These considerations were set out in the application for exemption, which was accompanied by:

6.1 a profit and loss statement for the period ending August 2001;

6.2 an actual vs budget variance analysis in relation to costs and overheads;

6.3 a graphical representation of the applicant's bank balance from 4 July 1995 to 18 September 2001;

6.4 a cash flow forecast for the period January 2001 to February 2002;

6.5 a graphical representation of *inter alia* the relationship between wages and sales for the period February 1999 to July 2001.

7 The application for exemption was granted by the Cape Council. This decision was communicated to the applicant in a letter dated 13 December 2001. The letter included the following statement:

> "*The National Employees Trade Union have however submitted an appeal against the decision of the Cape Regional Council, copy attached, which will be forwarded to the Independent Exemption Board for consideration on the 15 January 2002.*"

8 The notice of appeal is dated 6 December 2001, which appears to have been the date on which the Cape Council granted the exemption. The letter of appeal is in the following terms:

> "*Met hierdie skrywe versoek NETU u om die besluit wat vanmôre (06/12/01) geneem is om CME se versoek toe te staan i.v.m. vrystelling om hierdie jaar nie verlof bonusse te betaal* ***dringend*** *hersien word.*
>
> "*CME het korttyd opgeskort en 'n skrywe aan u gestuur waar hulle aansoek doen om meer oortyd te werk gedurende die* '*shutdown*'.
>
> "*Hierdie werknemers van CME en lede van NETU (90%) verdien hulle bonuses, en is in dispuut met hierdie besluit.*
>
> "*Sal u asseblief dringend die vrystelling hersien en 'n regstelling maak. Hou in gedagte dat myself en Wendy van Consani Eng aan u aanbeveel het dat dit nie moet toegestaan word*

nie."

9 Three aspects of this letter are to be noted at this stage. They are inter-related considerations, which I will consider more fully below:-

9.1 The terms of the letter suggest that the third respondent was requesting the Cape Council to itself reconsider and correct the exemption that it had granted.

9.2 Two particular factual grounds are identified, namely that the applicant had suspended short time and that it had requested to work more overtime during the shut down period.

9.3 It appears also that the writer of the letter, being the regional organiser of the third respondent, as well as another engineering manufacturer had recommended to the Cape Council that the exemption should not be granted. What the terms of those communications were is not reflected in the letter. It is similarly not apparent that these objections were brought to the attention of the applicant, so that it could respond thereto.

10 In the founding affidavit lodged for the purpose of the present review, the managing director of the applicant dealt with the contentions that it had suspended short time and applied for work during the shut down. In essence the response is that whilst there was an overall shortage of work, certain work centres within a division of the applicant were overloaded. It was also important to ensure that orders that were received were rapidly dealt with. In consequence, it was said that the termination of short time "*did not in any way indicate that the financial or cash flow position had improved*. *On the contrary, it reduced the savings which had been made and so placed a further strain on cashflow.*" Likewise, the request to work during the shut down was justified on the basis of a need to deal immediately with orders from European customers. This too "*did not indicate that the financial position had improved*".

11 Curiously, these explanations together with the relevant documentation were not placed before the Board, or for that matter, before the Cape Council. Indeed, the applicant appears not to have reacted at all to the third respondent's notice of appeal.

12 A few days before the appeal, which was determined on 15 January 2002, the applicant was contacted by Ms Kelly who is the administrative manager of the first respondent. A request was made that the applicant

should furnish a copy of its last audited financial statements for consideration by the Board. Somewhat unhelpfully, the applicant took up the position that such information was irrelevant, because the financial difficulties which had led to the application for exemption had mainly arisen after February 2001.

13 I should add that the application for exemption form, which was completed by the applicant and submitted to the Cape Council, provides that:

> "*For a wage exemption, the most recent audited financial statements and auditors report together with management accounts covering the period from the date of the last audit to two months prior to the date of application, must be attached to this application.*"

One imagines that the purpose of that requirement is to ensure that an objective and vouched statement of the applicant's financial position is made available, to which more recent un-audited management accounts can be related. The applicant had not put up audited statements with its initial application. Strictly speaking, its application was to that extent defective. However, no query was raised by the first respondent in relation to this, nor did it form any part of the appeal against the granting of the exemption.

14 Although I have observed that the applicant was not especially helpful in electing not to provide the information requested by Ms Kelly, that does not imply that I consider its *bona fides* to be at issue. Viewing the documentation as a whole, it is plain that the applicant was satisfied that all relevant information setting out its financial affairs in relation to the exemption application had been disclosed by it in support of its application. I should add further that Ms Kelly evidently did not suggest to the applicant that the fate of the appeal might be determined by the presence or absence of the last audited statements.

15 On 15 January 2002 the Board met. It *inter alia* considered the appeal lodged by the third respondent. On the following day it announced its decision in these terms:

> "*The Independent Exemptions Appeal Board considered the appeal in the above at the meeting which was held on 15 January 2002 and decided to grant the appeal against the granting of the exemption. The reason is that the financial statements do not provide sufficient information to enable the Board to establish what the savings will be if the exemption is granted or that the financial hardship warrants the granting of an exemption.*"

16 It is this decision which forms the subject matter of the present review. After this decision, the applicant was called upon to make the bonus payments. In time this led to submissions being tabled at a meeting of the Board held on 21 May 2002. The Board recorded its views as

follows:-

> "*The submission made by the company was tabled at the meeting of the Independent Exemptions Appeal Board on 21 May 2002.*
>
> "*The Board were of the opinion that the decision which was made, that being to uphold the appeal of the trade union was the correct decision based on the available information. The Board, in furtherance, is a body of final instance in the structures of the Bargaining Council and cannot review its own decisions.*"

17 In its founding affidavit, the applicant has set out various grounds. Those that have been persisted with may be summarised as follows:-

17.1 The Board did not follow the procedures set out for it in the main agreement, in that it did not give proper consideration to the information that had been placed before it.

17.2 The Board did not comply with the requirements of the *audi alterim partem* rule, in that the applicant was not afforded an opportunity to be heard.

17.3 The decision of the Board was so unreasonable as to be unjustifiable and did not deal rationally with the material before it.

18 The application for review, insofar as it is founded on the above grounds, is not opposed by any of the respondents. However, an explanatory affidavit was filed on behalf of the first and second respondents. The affidavit *inter alia* sets out aspects of the procedure followed by the Board. Its procedure thus described, includes the following components:-

18.1 "*The Independent Exemptions Appeal Board considers the appeal entirely upon the documentation provided by both parties to the Regional Council. Oral representations are not received.*"

18.2 "*In the event of the Independent Exemptions Appeal Board not being able to make a decision on the tabled documents, it will request the Regional Council to submit the relevant additional information.*"

18.3 "*If the additional information constitutes a material difference to the outcome of the appeal the Independent Exemptions Appeal Board will refer the appeal back to the Regional Council for reconsideration. Either party will then be at liberty to appeal against the decision of the Regional Council.*"

18.4 "*The Independent Exemptions Appeal Board's decision is based on the documents as set out above. It relies entirely upon the representations presented to it by the* [Bargaining Council] on behalf of the parties. The Main Agreement or any other agreement and the Labour Relations Act are taken into account when the decision to uphold or dismiss the appeal is taken."

18.5 "*Written reasons for the decision are not automatically given. However if the parties request written reasons for the decision, the Independent Exemptions Appeal Board will provide such written reasons.*"

19 Before turning to an evaluation of the Board's conduct in relation to the present appeal, and aspects of the procedure described by it, it will be appropriate to set out the relevant provisions of clause 23(5) of the Main Agreement:-

> "*(a) An independent body, referred to as the Independent Exemptions Appeal Board (the Board), is hereby appointed and shall consider, in accordance with the provisions of section 32(e) and (f) of the Act, any appeal against an exemption granted or refused by the Council, or a withdrawal of an exemption.*
>
> *(b) The Council Secretary will, on receipt of an appeal against a decision of the Council, submit it to the Independent Exemptions Appeal Board for consideration and finalisation.*
>
> (c) *In considering an appeal the Board shall consider the recommendations of the Council, any further submissions by the employers or employees and shall take into account the criteria set out above and also any other representations received in relation to the application.*"

20 The reference to "*the criteria set out above*" is evidently a cross reference to clause 23(2) which catalogues "*fundamental principles for consideration*" in relation to the grant or refusal of exemptions by the first respondent. Save for indicating that those principles are calculated *inter alia* to promote a process in which the Council has regard to the views and interests of all interested parties, it is not necessary for the purpose of this judgment to detail the content of this clause.

POWERS AND FUNCTIONS

21 The reference in clause 23(5)(a) of the Main Agreement to section 32(e) and (f) of the LRA is neither precise nor fully efficacious. It is evidently intended to be a reference to provisions of section 32(3), which deals with conditions that must be satisfied in order for a collective agreement to be extended to non-parties. The applicant has deliberately elected not to pursue any point in relation to this aspect of the statutory framework and. On this basis neither the first nor the second respondents have entered the fray. Accordingly, I refrain from dealing with this question, since it appears to be common cause that, notwithstanding the relevant elements in clause 23(5) of the Main Agreement, it has at all times been the intention of its subscribing members that the Board should deal with matters such as those that have arisen in the present case, subject of course to other regulatory aspects.

22 More germane to this matter are the provisions of clause 23(5)(c) of the Main Agreement, which I have set out above. That clause stipulates what the Board is to take into account when it considers an appeal. It spans the 'recommendations' of the Council, further submissions by employers and employees, the criteria to be taken into account when considering an exemption application and 'any other representations received in relation

to the application'. Clearly, this clause cannot be interpreted as one that exhaustively described the material to be placed before the Board since it makes no mention of, for instance, the most fundamental material of all, being the application itself with its supporting documentation, as well as the notice of appeal and any documentation that might have accompanied it.

23 At the same time, however, it is equally plain that the Main Agreement contemplates an appeal in the conventional sense, namely that the original record should be placed before the appeal tribunal together with any 'further submissions' that immediately affected parties may wish to make in relation to the issues raised by the appeal. In this context, it is to be noted that the reference to 'other representations' is confined to those that had been made in relation to the original application; it does not amount to a broad power to receive such representations in relation to the appeal.

24 More pertinently, it is clear that the Main Agreement does not envisage that the Board should set about a process akin to further investigation in relation to the merits of the application. In the particular context of this case, I agree with Mr Leslie, who appeared for the applicant, that the Board is not empowered through clause 23(5)(c) to call for additional

information.

25 I have set out above passages from the affidavit of Ms Kelly in which the *modus operandi* of the Board has been described. Scrutiny of those passages reveals a logical anomaly it its approach:

25.1 If it has been provided with a full record of the proceedings in the Council, the Board will inevitably be in a position to determine whether the Council's decision was correctly reached in relation to the material before it. In my view, that properly delimits the nature of its function.

25.2 It follows that it is a faulty premise to form the view that a decision on the appeal cannot be taken unless additional information is furnished.

25.3 A further faulty premise underlies the approach that, once such additional information is provided, no decision will be taken on the appeal if the outcome of the appeal will be affected by the very same additional information – without which it was considered that no decision could be made in the first place.

25.4 In that event, according to the Board's procedure, the case is

referred back to the initial decision maker, in this case the Cape Council. Precisely what the status and mechanism of such referral back might be is unclear. Because the Appeal Board has taken no decision, the original decision of the Council would of course still be in place. Ordinarily, the effect of this would be to constitute the Council as its own appeal or reviewing authority, a result which directly affronts the operation of the *functus officio* rule. I set out this conclusion subject to the provisions of clause 23(4)(d) of the Main Agreement, with which I will shortly deal.

25.5 Conversely, if the additional information solicited by the Board will not affect the outcome of the appeal, then the question presents itself: why could a decision on the appeal not be taken in the absence of such information.

25.6 A further fundamental difficulty arises from the procedure followed by the Board, in relation to the application of the *audi alteram partem* rule. As it is reflected in Ms Kelly's affidavit, the process of the Board gathering additional information appears not to be accompanied by any collateral facility for pertinent representations to be made by parties. Indeed, in this case, there was a direct approach by the Board to the applicant. That appears to have been

entirely unilateral in nature.

25.7 That represents one face of the difficulty inherent in an appeal body pursuing the acquisition of additional – and original – information. The obverse is that if representations were to be received in relation to additional information, the appeal body would to one or other degree convert itself into a forum of first instance. If it then takes a decision to refer the matter back, it will have taken up a position, that might compromise it in the event of a subsequent appeal based on the same information.

26 In short, the procedure that has been adopted by the Board is neither compatible with the common law principles governing administrative action, nor consistent with the particular provisions of clause 23(5)(c) of the Main Agreement. In the present case, it has followed that procedure. Although its request for audited statements was fruitless, it is clear that this played an important if not decisive role in its decision to uphold the appeal. For the reasons outlined above, its decision cannot stand.

27 There is a further ground on which the review must succeed. This arises from the dichotomy between the grounds set out in the appeal notice lodged by the third respondent. They are directed, in essence, to the

issues of short-time and overtime. Those grounds raise factual questions as to the extent of that work and its relationship to the financial capacity of the applicant to pay bonuses. Even within its own paradigm of operation, the Board made no attempt to obtain information in relation to those questions. Its request for the last audited statements could patently not assist it in relation to the complaints raised by the third respondent. Likewise, the stated reasons for the Board's decision as reflected in its letter of 16 January 2002 (cited above) bear no direct or materially discernible relationship with the grounds of appeal advanced by the National Employees Trade Union. *Prima facie* those grounds were neither considered nor decided.

THE RELIEF SOUGHT

28 The relevant part of the relief sought by the applicant in the event that the Board's decision be set aside is as follows: "…*that the third respondent's appeal be remitted to the second respondent for fresh consideration, and that the applicant and any other interested party be granted an adequate opportunity to make such representations and submit such documentation as they may see fit prior to any decision being made on the merits of the appeal*."

29 Relief in those terms would reproduce the difficulties that I have already set out concerning, in short, the conflation of an original and an appeal jurisdiction, particularly insofar as it envisages the submission of such fresh evidential material as the applicant or any other interested party "*may see fit*." Plainly, to the extent that the Board could ever receive supplementary evidence, that would have to be limited and exceptional and, in the normal way, subject to application and not as of unbounded right.

30 In order to determine the appropriate relief, it is necessary to return to the point of delivery of the 'appeal' letter from the third respondent on 6 December 2001. As I have already indicated, that letter purports to be a request for the Cape Council itself to reconsider its grant of the exemption. In appropriate circumstances, the Council and its regional committees has the power to do so, in terms of clause 23(4)(d): "*The Council may withdraw the exemption at its discretion*."

31 This provision and its implications were not fully argued before me and I will give no definitive judgment on its purpose or scope. Nonetheless, it is clear that the Council is empowered to revoke an exemption at its own instance or on application to it. That is a power that is entirely independent of the appeal mechanism contained in clause 23(5). It is by

no means an unfettered power and requires, as a minimum, that the exercise of the discretion to act is not only in accordance with the ordinary requirements of natural justice but also in a manner that is reasoned and reasonable. Arbitrary withdrawals would be subject to challenge.

32 It is also clear that the exercise of this power would normally be in consequence of new facts and circumstances relevant to the exemption being placed before the Council. Those facts and circumstances might arise after the decision to grant the exemption, with the result that the exemption is no longer objectively justifiable, or they may have been present before the decision but having been in one or other fashion withheld from the Council's consideration. In either of those eventualities, it would generally be artificial and incompetent to submit the matter to the Board as though it were an appeal.

33 In the context of those general remarks, there is an important lacuna in the narrative of events that has been placed before me. That concerns the timing of the third respondent's complaint. It appears that the complaint was made directly after the Cape Council's approval of the exemption. What is entirely unclear, however, is when the underlying facts arose. The letter does not indicate when short-time was stopped. It also does not indicate when overtime was started. The applicant's papers are similarly

silent on this aspect.

34 It follows that it is impossible for me to determine whether the third respondent is raising new facts and circumstances, properly so described, or whether it is raising facts and circumstances in existence at the time of the granting of the exemption. Likewise, it is not apparent from the papers whether or not these considerations were brought to the attention of the Cape Council before it reached its decision and, collaterally, whether the applicant was aware of this, were that indeed the position.

35 The upshot of this is that there is no demonstration through the papers filed in this review that the first respondent has considered whether the third respondent's objections fall to be dealt with in terms of clause 23(4)(d) or through some other process. *Prima facie* if the third respondent's letter does not deal with matters already placed before the Council, it is difficult to see that it could give rise to an appeal in a manner appropriate for the attention of the Board. Resultantly, it is my view that the Council has not discharged a necessary preliminary function, being to evaluate whether or not the provisions of clause 23(4)(d) should be addressed. Instead of doing so, it has – on the face of what is before me – routinely and incorrectly transmitted the third respondent's letter to the Board as though it were self-evidently an appeal. As already described, the Board

compounded the fault by routinely treating the letter as though it were precisely that. It follows that the first respondent should be required to address this matter in relation to clause 23(4)(d). Plainly, it is undesirable that I should give any directions as to what should take place thereafter.

36 I make the following order:

1 The decision of the second respondent taken on 15 January 2002 to uphold an appeal against the exemption granted by the first respondent on 6 December 2001 is hereby reviewed and set aside.

2 This matter is remitted to the first respondent for consideration by it in relation to the provisions of clause 23(4)(d) of the Main Agreement.

3 For that purpose, the applicant, the third respondent and any other interested party may make representations to the first respondent, which may include relevant documentation.

4 There is no order as to costs.

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K S TIP

Acting Judge of the Labour Court

Date of hearing : 8 May 2003

Date of judgment : 27 June 2003

For the applicant : Adv G A Leslie, instructed by Bagraims Attorneys