THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Reportable

Case No: C1112/18

In the matter between:

GOLDEN ARROW BUS SERVICES (PTY) LTD **Applicant**

And

THE SOUTH AFRICAN ROAD PASSENGER BARGAINING COUNCIL OF SOUTH AFRICA **First Respondent**

STEPHEN BHANA, N.O. **Second Respondent**

TRANSPORT AND OMNIBUS WORKERS UNION **Third Respondent**

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA **Fourth Respondent**

SOUTH AFRICAN TRANSPORT AND ALLIED

WORKERS UNION **Fifth Respondent**

UNITED ASSOCIATION OF SOUTH AFRICA **Sixth Respondent**

NON-UNIONISED EMPLOYEES LISTED IN

ANNEXURE "A" HERETO **Seventh Respondent**

Heard: 01 March 2019

Delivered: 02 April 2019

JUDGMENT

NIEUWOUDT, AJ

Introduction

[1] The applicant is an employer carrying on business within the road passenger transport industry, based at Cape Town. It is registered as an employer with the first respondent, the South African Road Passenger Bargaining Council

(the bargaining council) and it is a member of the Commuter Bus Employers Organisation (the employers' organisation).

[2] The second respondent is the member of the exemption appeal body (the appeal authority) who made the decision that is the subject of this application. The third to sixth respondents are trade unions who represent employees of the applicant and the seventh and further respondents are non-unionised employees of the applicant.

[3] The parties to the bargaining council, including the employers' organisation and the third to fifth respondents, bargain collectively at centralised level. They concluded a main collective agreement (MCA) for the period from 1 April 2018 to 31 March 2020. The exemption procedure is contained in Annexure "C" of the MCA.

[4] The applicant unsuccessfully applied to the exemption authority for exemption from the following provisions of the MCA:

4.1. Clause 3, which provides for a 9% across-the-board increase on actual wages.

4.2. Clause 30 which contains a status quo provision. It provides that all substantive terms and conditions of employment and benefits that were applicable at the effective date of the MCA, and not regulated by the MCA, shall remain in force and effect. This includes wages and benefits that are higher or better than those provided for in the MCA.

[5] The applicant appealed to the appeal authority and the second respondent was appointed to chair the appeal. He dismissed the appeal on two grounds:

5.1. The applicant had frozen the minimum levels of remuneration of some of its employees. A dispute about whether the applicant was entitled to do so had been referred to the bargaining council. The outcome of this dispute would give clarity on the issue and the second respondent found that he did not have the authority "*to confirm what is already a*

fait accompli". Presumably he meant that the determination of the dispute would dispose of the issues before the appeal authority.

5.2. The applicant was not seeking an exemption from applying the increases to the minimum notch levels in existence at the applicant, but an amendment to apply the agreed increases differently to the notches. It was beyond his powers to grant amendments to the MCA.

[6] The applicant applies in terms of section 158(1)(g) Labour Relations Act[1] (the LRA) to have the appeal ruling reviewed and set aside.

Preliminary issues

[7] Before dealing with the merits of the application, it is necessary to resolve some preliminary issues.

Jurisdiction

[8] Does this Court have jurisdiction to entertain an application for the review of a decision of an exemption appeal body established in terms of a collective bargaining agreement entered into at a bargaining council? This issue was not addressed in argument as the parties were in agreement that section 158(1)(g) of the LRA was applicable, but this fact does not discharge this Court from the obligation to consider whether it has jurisdiction to entertain a matter.

[9] In *National Union of Metalworkers of SA on behalf of Members v Metal and Engineering Industries Bargaining Council & Others*[2] this Court dealt with an application for the review of a decision of an exemption appeal body. The Court held that the consideration and finalising of the appeal by the appeal body was not a function provided for in the LRA and, more particularly not one envisaged by section 158(g). Accordingly, the Court held that it does not have jurisdiction to entertain an application for the review of such a decision. If this

[1] 66 of 1995, as amended.
[2] (2019) 40 ILJ 399 (LC).

judgment is correct, that would be the end of the application before Court as the Court would not have jurisdiction to entertain it.

[10] In *Argent Steel Group t/a Sentech Industries v MIBCO and Others*[3], this Court dealt with a review relating to the refusal by both an exemption board of a bargaining council and an exemption appeal board to grant an employer an exemption. The Court held that it did have jurisdiction and stated the following in paragraph 1 of the judgment:

> Consequently, the application concerns both a review of the dismissal of the appeal against original decision and the original exemption ruling itself. The court's jurisdiction to hear the reviews is derived from s158 (1)(g) of the Labour Relations Act, 66 of 1995 ('the LRA') which provides that it may "... subject to section 145, review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law; …

[11] *National Bargaining Council for the Clothing Manufacturing Industry (Cape) and Others v Zietsman NO and Others*[4] also concerned an application for review of the decision of an exemption appeal body. The Court held that it was a review in terms of section 158(1)(g).

[12] The Court is accordingly faced with two conflicting approaches on jurisdiction. Fortunately, it is not necessary to analyse the conflicting principles in the *NUMSA* and *Argent* and the *Zietsman* cases. This is due to the fact that the Labour Appeal Court (LAC) had dealt with this issue in the matter of *Trafford Trading (Pty) Ltd v National Bargaining Council for the Leather Industry of South Africa*[5]. In that matter, the appellant had applied to the respondent for exemption from its collective agreement. The appellant was unsuccessful both at the respondent and at the appeal body. It then applied to this Court to have the decision of the exemption appeal body reviewed and set aside. It again failed to succeed and then appealed to the LAC. On the issue of jurisdiction, the LAC said the following:

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[3] Unreported Judgment (Case No: PR150/14) [2018] ZALCPE 2 (Delivered on 30 January 2018).
[4] (2013) 34 ILJ 151 (LC).
[5] Unreported judgment (Case No: DA11/09) [2011] *ZALAC* 35.

[21] The decision that was the subject of the review application is that of the second respondent. One can say that the second respondent was established *inter alia*, as a result of sec 32(3) of the Act. I say this because sec 32(3) (e) provides that a collective agreement may not be extended in terms of subsections (2) unless the minister is satisfied that, *inter alia*, provision is made in the collective agreement for an independent body to hear and decide, as soon as possible, any appeal brought against the bargaining council's refusal of a non-party's application for exemption from the provisions of the collective agreement; and the withdrawal of such an exemption by the bargaining council. The appellant in this matter is a non-party to the collective agreement and is bound by the provisions of the collective agreement as a result of the minister's extension of the collective agreements referred to above to non-members.

[23] The application to review the decision of the second respondent was brought in terms of section 158(1)(g) read together with sec 32(3)(e)(i) of the Act. Section 158(1)(g) provides that the Labour Court may review the performance or purported performance of any function provided for in the Act on any grounds that are permissible in law. In this case the second respondent when considering the application referred to it was performing a function under s32(3)(e)(i) of the Act.

[13] In *Trafford* the appellant was not a member of a party to the collective agreement and the applicant in this matter is a member of a party to the collective agreement. Does this make a difference? I do not believe so. Although s32(3)(e)(i) specifically deals with an exemption application brought by a non-party, the exemption appeal body that was created in terms of s32(3)(e) had the obligation to entertain appeals by parties and non-parties, both in *Trafford* and in this matter. There is no indication in the reasoning of the LAC that it intended to differentiate between parties and non-parties to a bargaining council when deciding whether an exemption appeal body performed a function provided for in the LRA and there is no reason to do so.

[14] Thus, the Court has jurisdiction to hear the matter.

Second bite at the cherry

[15] During argument, the issue of whether, in the event of a remittal, a future appeal authority would have the power to consider material that was not before the appeal authority when it declined the appeal, came up.

[16] The applicant is understandably frustrated by the fact that the third to fifth respondents, having presented an extremely limited case to the second respondent, may now have a further opportunity to present a more extended case to a future appeal authority if the matter is remitted and not substituted. It would afford them a second bite at the cherry, so to speak.

[17] However, as would become apparent during the course of this judgment, this factor could only be relevant to the extent that the exemption procedure provided that, on appeal, the parties are bound to the record of the proceedings before the exemption authority.

[18] None of the parties were able to refer the Court to any authority on the point and the Court requested them to deliver a note, if they wished to, on any authority on the point. The Court cautioned the parties not to deliver additional heads but merely to bring the relevant authorities to its attention. Despite this all the parties filed additional heads. These heads exceeded their intended ambit but did assist the Court in coming to a decision in this matter. The applicant adopted the approach that the exemption procedure confined the appeal authority to the record on appeal. Not surprisingly, the third to fifth respondents adopt a contrary approach. The first respondent enters the fray to the extent that it prays that the Court should not preclude a future appeal authority from exercising a discretion in this regard.

Does the decision fall to be reviewed?

[19] The third to fifth respondents initially disputed that the decision falls to be reviewed but in argument the parties agreed that it does. It is thus not necessary to enter into an analysis as to whether the decision is subject to review in terms of the common law, the Promotion of Administrative Justice

Act[6] (PAJA) or the principle of legality. This court will apply the strictest test that may be applicable, namely that relating to a gross irregularity in the conduct of arbitration proceedings, as set out in *Goldfields Investment Ltd v City Council of Johannesburg*[7] and quoted with approval in *Telcordia Technologies Inc v Telkom SA Ltd*[8]:

> The law, as stated in *Ellis v Morgan* (*supra*) has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and *bona fide*, though mistaken, may come under that description. *The crucial question is whether it prevented a fair trial of the issues.* If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. *Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial*. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the Court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the inquiry, or of its duties in connection therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial. *I agree that in the present case the facts fall within this latter class of case, and that the magistrate, owing to the erroneous view which he held as to his functions, really never dealt with the matter before him in the manner which was*

[6] 3 of 2000.
[7] 1938 TPD 551 at 560-561.
[8] 2007 (3) SA 266 (SCA) at para 73.

contemplated by the section. That being so, there was a gross irregularity, and the proceedings should be set aside.[9]

[20] The second respondent did not even begin to consider the appeal. He did do so because he thought that he was precluded from doing so, due to the fact that there was a dispute pending before the bargaining council and that he was being asked to amend the MCA. This view was erroneous and it prevented him from dealing with the matter before him as required by the exemption procedure.

[21] The decision thus falls to be reviewed and set aside on the ground that the second respondent totally failed to consider the issues that he was charged with considering.

Substitution or remittal

[22] This aspect was vigorously debated. The applicant contended that the decision should be substituted with a decision granting the exemption that it had prayed for. The first respondent submitted that substitution should not be the remedy. The third to fifth respondents hedged their bets; they contended that substitution should only be ordered if the exemption appeal was declined; if not, they contended that the matter should be remitted.

[23] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*[10] the Constitutional Court dealt with exceptional circumstances as contemplated in section 8(1)(c)(ii)(aa) of PAJA.

[24] The applicant argued that section 8 of PAJA did not apply to reviews in terms of section 158(1)(g). Again, it is not necessary to decide whether PAJA applies. In *Trencon* the Constitutional Court held that courts were called on to determine the circumstances under which the granting of an order of substitution would be appropriate long before the advent of PAJA. The usual

[9] The emphasis is that of the Court in Telcordia Technologies Inc (supra).
[10] 2015 (5) SA 245 (CC)

course in administrative review proceedings always was to remit the matter to the administrator for proper consideration. It referred to the judgment in *Johannesburg City Council v Administrator, Transvaal, and Another*[11] with approval. In that matter it was held that the usual approach (to remit) would be departed from under two circumstances, namely:

> (i) Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter. This applies more particularly where much time has already unjustifiably been lost by an applicant to whom time is in the circumstances valuable, and the further delay which would be caused by reference back is significant in the context.
>
> (ii) Where the tribunal or functionary has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdiction again.

[25] The Constitutional Court reminded courts that they should recognise their own limitations and appreciate that they are not necessarily vested with the skills and expertise required from an administrator.

[26] The applicant argued that the appeal authority was a person with the same labour law experience that this Court has and no particular experience in any other field. This begs the question; the exemption procedure provides that the appeal authority should have experience deemed by the first respondent to be relevant, which may include, but is not limited to, experience in financial matters, the road passenger transport industry, labour relations and/or labour law. It is clear that this Court is not an expert in the majority of these areas. It may be able to decide matters in all of them, provided that it has the necessary expert evidence presented to it. This does not mean that it has experience in them.

[27] The first respondent should appoint a person or persons with skills and experience in all of the fields to hear the appeal should this matter be

[11] 1969 (2) SA 72 (T) p76 E to H.

remitted. If it simply appoints another labour lawyer, the matter may very well again end up in this Court.

[28] The Constitutional Court held that judicial deference should continue in the constitutional era, due to the fact that it gives recognition to the expertise of administrators in policy laden or polycentric issues and because the requirement of separation of powers requires this.

[29] It then held that a court, in deciding whether to substitute should:

29.1. First decide whether it is in as good a position as the administrator to make the decision.
29.2. Then decide whether the decision of an administrator is a foregone conclusion.
29.3. Decide these two factors cumulatively.
29.4. Thereafter consider all other relevant factors such as, delay, bias or incompetence.

[30] In deciding the first question, it immediately becomes apparent that the fact that the second respondent did not decide the issue, means that the Court does not have the benefit of his thinking. There is no doubt that the issue is a polycentric one; it is not guided by particular rules or legislation. Further, as already stated, this Court does not have experience in most of the areas required. The Court is thus not in as good a position as a future appeal authority, properly constituted, to make the decision.

[31] The first respondent submitted that the decision of the appeal authority is not a foregone conclusion as the application involved grave issues, that it is novel, with differences between the parties on issues of law and principle, and that it brings into focus the purpose of collective bargaining at sectoral level. The applicant argued that the result is a foregone conclusion, based on its submission that, in the event of a remittal, a future appeal authority would be bound to the record that served before the second respondent. As stated earlier in the judgment, the Court requested the parties to file additional notes

on whether a future appeal authority would be bound by the record that served before the second respondent. It is now necessary to consider issues relating to this question.

Nature of appeal

[32] In *Tikly and Others v Johannes NO and Others*[12] the Supreme Court drew a distinction between three different types of appeal and held as follows:

> The word 'appeal' can have different connotations. In so far as is relevant to these proceedings it may mean:
> (i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information (*Golden Arrow Bus Services v Central Road Transportation Board*, 1948 (3) SA 918 (AD) at p. 924; S*.A. Broadcasting Corporation v Transvaal Townships Board and Others*, 1953 (4) SA 169 (T) at pp. 175 - H 6; *Goldfields Investment Ltd v Johannesburg City Council*, 1938 T.P.D. 551 at p. 554);
> (ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong (e.g. *Commercial Staffs (Cape) v Minister of Labour and Another*, 1946 CPD 632 at pp. 638 - 641);
> (iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly (e.g. *R v Keeves*, 1926 AD 410 at pp. 416 - 7; *Shenker v The Master*, 1936 AD 136 at pp. 146 - 7).

[33] In its founding affidavit, the applicant stated that the appeal to the appeal authority was an appeal in the wide sense *"that is, a complete rehearing of, and fresh determination on, the merits of the exemption application".* This echoes the case set out by the applicant before the appeal body. None of the respondents took issue with this proposition in their affidavits. This position is the first of the categories in *Tikly*.

[12] 1963 (2) SA 588 (T) at 590F-591A.

[34] The applicant repeated this position in its heads of argument but did an about turn in its supplementary note. There, it sought to contend that the appeal was an appeal in the ordinary sense as contemplated by the second category in *Tikly*. The reason for this change lies in the fact that its interpretation of the exemption procedure changed.

[35] It correctly submitted that the type of appeal is determined by the empowering provision, which is the exemption procedure, properly interpreted.

[36] The exemption procedure has a number of provisions dealing with the initial exemption process which, in terms of clause 23.4 thereof, are made applicable to the appeal process. They are, amongst others:

36.1. Clause 10 which provides that the [appeal authority] may request the parties to attend the hearing.

36.2. Clause 11 which provides that the [appeal authority] has the right to call

any other party that it feels might be able to assist in arriving at a decision.

36.3. Clause 13, which provides that the [appeal authority] must take into account all relevant factors, including but not limited to:

36.3.1. the applicant's past record of compliance;

36.3.2. any special circumstances that exist or any precedent that

might be set;

36.3.3. the interests of the industry in relation to unfair competition,

centralised bargaining, and the economic stability of the industry;

36.3.4. the interests of employees regarding exploitation, sound conditions of employment and other matters;

36.3.5. the interests of the employer regarding its financial stability, the impact on productivity and other matters.

36.4. Clause 14, which provides that the [appeal authority] must provide each of the parties and the general secretary of the bargaining council with a written advice of its decision, the nature and extent of the relief granted and any special conditions that might apply.

[37] The aforegoing provisions suggest that an appeal to the appeal authority is an appeal in the wide sense. It is not limited to the record before it and may consider issues and hear parties that did not serve before the exemption authority of the first instance.

[38] However, the applicant argues that the exemption procedure does not permit the parties to supplement their submissions during the appeal phase due to the fact that clause 1 of the exemption procedure, which deals with submissions in the initial phase, is not made applicable to the appeal phase. Thus, so that the contention goes, the appeal authority is confined to the record that served before the exemption authority. This contention loses sight of the fact that, as stated, the appeal authority may hear people that did not even participate in the proceedings before the exemption authority. It also does not take into account the fact that the Court in *Tikly* foresaw that a wide appeal may be heard without additional evidence or information. The appeal authority must take its own decision, it is not charged with deciding whether the exemption authority was right or wrong.

[39] The appeal is one in the wide sense and a future appeal authority would thus be in a better position than this Court to decide the matter.

The record on appeal

[40] The submission by the applicant that the record on appeal must be confined to the record that served before the exemption authority, deserves further attention. It is based on the fact that the provisions of clause 1 of the exemption procedure, that deals with the material to be placed before the exemption authority, are not incorporated in the appeal phase.

[41] The provision that provides that the exemption authority must consider the exemption application and submissions received from interested parties, including third parties, is incorporated in the appeal phase. Does this refer to the same material that served before the exemption authority or does it contemplate an “appeal exemption application” and “appeal submissions” by virtue of the fact that the provision is incorporated in the appeal phase?

[42] The answer lies in the interpretation of clause 1. The introductory part of the clause reads as follows:

> Employers to whom the terms of a Collective Agreement or applicable may apply to SARPBAC for exemption from any term(s) of the Collective Agreement, provided that exemption applications shall comply with the following requirements:

The clause then proceeds to list a number of requirements.

[43] As stated, this clause is not incorporated in the appeal phase. All that the appeal phase provides is that an appeal must be lodged in writing not more than fifteen days after receipt of the decision of the exemption authority against which the appeal is being lodged.

[44] A comparison of the two clauses indicate that a lot more is required from employers wishing to apply for exemption than from employers wishing to appeal. This does not have the result contended for by the applicant, namely that the parties on appeal are bound to the record of the initial exemption phase. The fact that the appeal authority is, amongst other things, charged with considering submissions received from interested parties, including third parties, indicate that such submissions must be sought. If the exemption procedure had intended that only the submissions in the initial phase would serve in the appeal phase, there would have been no reason for the inclusion of this clause.

[45] Thus, the exemption procedure does not contemplate that the appeal authority is bound by the record of the proceedings of the initial exemption phase.

Other factors

[46] It is not suggested that the second respondent was biased or that a future appeal authority would be biased. Provided that a future appeal authority is properly constituted, with the necessary relevant skills and experience, it can also not be suggested that such a body would be incompetent.

[47] Delay: the appeal authority has 30 days from the date of the lodging of the appeal to decide the matter. This is a very tight timeline and a remittal would not lead to any delay in the matter. The Court will issue directives to ensure that the timelines for an appeal are complied with.

Conclusion

[48] The exemption appeal ruling issued by the second respondent on 9 October 2018 dismissing the applicant's appeal against the dismissal of its exemption application on 12 August 2018, falls to be reviewed and set aside. The appeal should be remitted to a properly constituted appeal authority, which will not be bound to the record that served before the second respondent.

[49] The parties were in agreement that no costs order should be made.

[50] In the premises, I make the following order:

Order:

1. The exemption appeal ruling issued by the second respondent on 9 October 2018 dismissing the applicant's appeal against the dismissal of its exemption application on 12 August 2018, is reviewed and set aside.

2. The appeal is remitted to a properly constituted appeal authority, which will not be bound to the record that served before the second respondent.

3. Directives:

3.1. The first respondent is directed to appoint a new appeal authority that has experience and skills in financial matters, the road passenger transport industry, labour law and labour relations in order to decide the applicant's appeal within 7 calendar days of the date of this judgment.

3.2. The new appeal authority must comply with the provisions of clause 13 of the exemption procedure, annexure "C" to the MCA.

3.3. The record of the proceedings before the appeal authority must serve before the new appeal authority.

3.4. Such of the respondents as may wish to oppose the exemption appeal by the applicant, must deliver such written material (being affidavits if it relates to facts and submissions if it relates to argument) that they intend to rely on in the appeal (both with regard to whether the exemption should be granted or not and, if it is granted, the nature and extent thereof and any special conditions that may be applicable) within 7 calendar days of the date of this judgment.

3.5. The applicant must deliver its response, if any, to these materials within 14 calendar days of the date of this judgment.

3.6. The new appeal authority must hear oral submissions by those of the parties who have presented it with written material and the applicant, should they wish to be heard, within 21 calendar days of this judgment.

3.7. The new appeal authority must render its decision within 30 calendar days of this judgment.

3.8. The applicant and the third to fifth respondents may amend any time limit contained in these directives by agreement between them. An agreement will be deemed to have been reached if the applicant and the majority of the third to fifth respondents have agreed.

4. There is no order as to costs.

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H. Nieuwoudt

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: A Freund SC and G Leslie

Instructed by: ENS Africa

For the First Respondent: F Le Roux

Instructed by: Ivings McFariane Attorneys

For the Third to Fifth Respondents: S Harvey and C. Kruyer

Instructed by: Justine Del Monte & Associates Incorporated