IN THE LABOUR COURT OF SOUTH AFRICA
SITTING IN DURBAN
REPORTABLE

CASE NO **D203/03**

DATE OF HEARING: 2004/09/07

DATE OF JUDGMENT: 2004/09/08

In the matter between

THOMPSON SAVAGE & COMPANY (PTY) LTD **APPLICANT**

and

NATIONAL BARGAINING COUNCIL FOR THE CLOTHING MANUFACTURING INDUSTRY **1ST RESPONDENT**

KWAZULU-NATAL REGIONAL CHAMBER **2ND RESPONDENT**

B CALDER N.O. **3RD RESPONDENT**

L SMART N.O. **4TH RESPONDENT**

A KRIEL N.O. **5TH RESPONDENT**

L DEETLIFS N.O. **6TH RESPONDENT**

SOUTH AFRICAN CLOTHING & TEXTILE WORKERS UNION **7TH RESPONDENT**

JUDGMENT DELIVERED BY
THE HONOURABLE MADAM ACTING JUSTICE PILLAY
ON 8 SEPTEMBER 2004

ON BEHALF OF APPLICANT: ADVOCATE C NEL

ON BEHALF OF RESPONDENTS: MS S DAVIDSON

JUDGMENT 8 SEPTEMBER 2004

PILLAY J

[1]This is a review of a decision of the third to the sixth respondents, the exemption committee, dated 4 March 2003, refusing to grant the applicant exemption from the provisions of clause 36(3)(a) and (4)(a) of the second respondent's Main Agreement in respect of the termination of employment of certain employees in April 2001. The second to sixth respondents constituted the exemption committee of the second respondent. The exemption application was heard on 6 December 2002, and the reason for the decision of the exemption committee issued on 4 March 2003 was that it was not empowered to grant exemption in relation to the amount of severance pay.

[2]Clause 36(3)(a) of the Main Agreement provides:

"The employer shall furnish the council and the union with the following information:

(a) the reasons for the proposed retrenchments."

Clause 36(4)(a) of the Main Agreement provides:

"An employer must pay an employee who is retrenched severance pay equal to one week's wage for each completed year of continuous service with that employer unless the employer has been exempted from the provisions of the sub-clause."

[3] The Main Agreement incorporating these clause was gazetted on 27 November 1998. At that time the statutory obligation to pay severance pay was contained in section 196(1) of the Labour Relations Act 66 of 1995 ("the LRA"). Exemptions from its provisions had to be obtained from the Minister in terms of the Basic Conditions of Employment Act No 3 of 1983, ("the old BCEA"). The Basic Conditions of Employment Act No 75 of 1997 ("the new BCEA"), although promulgated on 28 November 1997, only came into effect on 1 December 1998. Neither the LRA nor the old BCEA had a provision similar to section 49(1) of the new BCEA, which provides:

"A collective agreement concluded in a bargaining council may alter, replace or exclude any basic condition of employment if the collective agreement is consistent with the purpose of this Act and the collective agreement does not ..."

reduce certain core protection afforded to employees such as leave, sick leave and maternity leave. The payment of severance pay is not listed as a core protection, and is open to variation, replacement or exclusion in a collective agreement in terms of section 49(1).

[4] The reason the exemption committee advanced for not being empowered to grant the exemption is summarised in the following extract from its decision:
"In our view, the clause 36 of the Main Agreement which refers to the possibility that an employer may be exempted from the obligation to pay severance pay, is not "*a collective agreement concluded in a bargaining council*" as envisaged in section 49 of the BCEA. The provision of the Main Agreement in question was agreed following the enactment of the LRA and made reference to the granting of an exemption by the Minister of Labour. Clause 36 of the Main Agreement has not been amended since the introduction of the BCEA and, in our view, does not indicate a clear intention to "*alter, replace or exclude*" the obligation to pay severance pay, as is required by section 49 of the BCEA."

[5] In a nutshell, the exemption committee's view and the submission made on its behalf in this application was that the reference to exemptions in clause 36(4)(a) was to exemptions granted by the Minister, not by or on behalf of the second respondent because, when the Main Agreement was gazetted, only the Minister could grant such exemptions in terms of the LRA, read with the old BCEA. That being the legislative framework at the time, it was then and always remained the intention of the parties to the Main Agreement (despite its subsequent amendments and renewal) that severance pay exemptions be granted by the Minister. Clause 36(4)(a) therefore is not an alteration, replacement or exclusion of the severance pay provisions, as contemplated in section 49 of the new BCEA, so it was submitted for the respondents.

[6] For the applicant it was submitted that the reference to exemptions in clause 36(4)(a) had to be to exemptions granted by the second respondent, otherwise the clause was superfluous. The Main Agreement was gazetted about

four days before the new BCEA came into effect. It must have been in anticipation of and with full knowledge of the fact that the new BCEA permitted the second respondent to alter, replace or exclude the severance pay provisions. If the intention was not to assume that power for the second respondent, then clause 36(4)(a) should have been omitted from the Main Agreement altogether. The Main Agreement has subsequently been amended with clause 36(4) intact, so it was submitted for the applicant.

[7] I agree with Ms *Nel* that the plain meaning of clause 36(4)(a) is that the exemptions application would be considered by the second respondent, not the Minister. The Main Agreement is a public document, enjoying the status equivalent to that of subordinate legislation. Any member of the public who reads clause 36(4)(a) in the context of the whole Main Agreement will come to no other conclusion than that the second respondent is the body responsible for exemptions.

[8] To uphold the respondents' interpretation would be to give effect to a manifest misrepresentation which the respondents are party to perpetuating, as the Main Agreement has not been amended to delete 36(4)(a), to give effect to what they allege is the true intention of the parties to the second respondent.

[9] I accordingly find that the second respondent had the power to consider applications for exemptions from the payment of severance pay.

[10] The second ground of review was that the exemptions committee was not properly constituted, as it was not made up of an equal number of representatives from the employer and trade union parties. It was submitted for the applicant that, by resolution of the first respondent, the second respondent was empowered to continue performing its functions and duties as it did before the registration of the first respondent. In the past the committees were joint committees of labour and employer representatives. Furthermore,

the composition of the exemption committee did not comply with clause 18 of the constitution of the first respondent.

[11] Clause 18(3) of the constitution of the first respondent provides that the executive or the council, if no executive exists, must grant or refuse applications for exemption made to a regional chamber such as the second respondent. The constitution of the first respondent did not authorise the second respondent to establish a sub-committee to consider exemptions. More specifically, it did not authorise it to appoint substantially a one-party exemption committee. Such a committee is contrary to the spirit of the constitution of the first respondent and its purpose. In effect, the composition of the committee of representatives of the employer party only amounted to the application for exemption being considered by the applicant's (potential) competitors without any input or balance from the trade union party. The resolution to form a sub-committee to determine exemptions is therefore *ultra vires*. The exemption committee was therefore improperly constituted.

[12] In referring the matter back to the second respondent, I should give effect to clause 18. My concern about issuing a directive that the third to sixth respondents be precluded from presiding at the exemption hearing is that the remaining members may not be sufficient to constitute a balanced and proper composition of either the executive or the council of the second respondent. The lesser of the two evils is to refer the exemption application back to the executive and, in its absence, the council of the second respondent for determination.

[13] In view of the finding I have made on these two preliminary grounds of review, it is not necessary for me to deal with the other grounds which relate to alleged bias by the exemption committee and the obtaining of legal advice by the second respondent without affording the applicant an opportunity to respond to that advice before the decision was taken.

[14] The order I make therefore is the following:

(a) The decision of the respondents under reference T4, communicated to the applicant by the second respondent on 4 March 2003 in which they rejected and dismissed the exemption application brought by the applicant, is hereby reviewed and set aside, the respondents to pay the applicant's costs jointly and severally.

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Pillay D, J