IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN DURBAN

D 598/07
Reportable

TRAFFORD TRADING (PROPRIATARY) LIMITED **APPLICANT**

AND

NATIONAL BARGAINING COUNCIL FOR THE LEATHER INDUSTRY OF SOUTH AFRICA **FIRST RESPONDENT**

EXEMPTION APPEAL COMMITTEE OF THE NATIONAL BARGAINING COUNCIL FOR THE LEATHER INDUSTRY OF SOUTH AFRICA **SECOND RESPONDENT**

MARK FUTCHER N O **THIRD RESPONDENT**

GINO BARBIERI NO **FOURTH REPONDENT**

JUDGEMENT

CELE J

INTRODUCTION

[1] This application has been brought in terms of section 158 (1) (g) of the Labour Relations Act 66 of 1995 ("the Act) to review and set aside a determination dated 28 August 2007, issued by the third and fourth respondents under the auspices of the second respondent, in terms of clause 14 (11) of the collective agreement of the footwear junction of the first respondent ("the collective agreement"). In the event of the review application being granted, the applicant seeks to be granted an exemption from the provisions of the collective agreement as extended to non parties and in particular from the payment of:

(a) the regulated wages rates,

(b) payment of contributions to:

(i) the Provident Fund

(ii) the Sick Benefit Fund

(iii) the Technological Fund

(c) payment of administrative levies.

The first respondent opposed the application in its capacity as the body under whose auspices the National Exemption Committee ("the Exemption Committee") issued a decision refusing an exemption application of the applicant.

[2] While the review application was pending, the applicant instituted two interlocutory applications. The first was an application for the postponement of the review application pending an application for access to information under the Promotion of Access to Information Act No 2 of 2000 (PAIA). The second was in the alternative, where the applicant sought an extension of the rules of discovery to the review application. The information sought by the applicant related to the exemption applications granted by the Exemption Committee to other employers falling under the same collective agreement as the applicant. The first respondent opposed both applications but supplied the needed information in its answering affidavit to the application to extend rules of discovery. The result is that both interlocutory applications were abandoned, what remains for consideration by this court though, is the costs issue of the two applications.

BACKGROUND FACTS

[3] During or about November 1998 parties to the first respondent concluded various agreements, namely:

- the Footwear Section Collective Agreement;
- the Provident Fund Collective Agreement;
- the Sick Benefit Fund Collective Agreement;

- the Administration Expenses Collective Agreement and
- the Footwear Section Technological Fund Collective Agreement.

[4] The collective agreements have been renewed from time to time by notice in the Government Gazette, and the terms thereof are binding on all employers who are members of the employers' organisation and all employees of the trade unions and who are engaged in the Leather Industry. The applicant fell within the registered scope of the first respondent by virtue of the collective agreements which were extended to non-parties by the Minister of Labour in terms of Section 32 (2) of the Act. In terms of S 33 A of the Act, the first respondent is empowered to monitor and to enforce compliance with its collective agreements. The applicant registered with the first respondent on 12 May 2003.

[5] In January 2005 the first respondent sued the applicant, *inter alia*, for the recovery of R366 828, 58 and R 117 490, 39 on the basis of an alleged breach of the provisions of the collective agreements. That it did by launching private arbitration proceedings against the applicant. Professor Alan Rycroft was appointed to arbitrate the dispute between the parties. A pre-arbitration agreement was drawn and filed by the parties to lay down the procedural rules. Just before the hearing commenced, parties agreed that the issue of quantum would be separated from the merits and that it would be held over for later agreement, failing which, determination would be done by the arbitrator. On 31 May 2005 the arbitrator found that the applicant was bound by the collective agreements and liable to pay the amounts of

the claim to be agreed upon by the parties or to be determined by him. After some investigations into the financial records of the applicants, attorneys of both parties deliberated on the issue of quantum and the matter was finally resolved by agreement on 8 September 2005. it was agreed that the quantum owed by the applicant was:

1. R 205 363, 02 for the under payment of wages for 1 May 2003 to 16 February 2004; and

2. R 77, 490 51 emanating from the statement of claim and for the period 1 May 2003 to 18 February 2004.

The agreement was made an award on 2 November 2005.

[6] The first applicant made numerous attempts to recover the two amounts owed by the applicant. Correspondence was exchanged by the parties, when it failed to recover the monies it lodged an application for the liquidation of the applicant in the High Court of South Africa, Durban and Coast Local Division. On 2 March 2007 an order was taken by consent between the parties in the liquidation application in the following terms:

"IT IS ORDERED: - (BY CONSENT)

1

That the application is adjourned sine die, with all questions of costs reserved.

2

That the applicant's Exemption Committee is directed to consider and decide on Respondent's Exemption Application within 4 (four) weeks of the date hereof and if such applications are unsuccessful, to communicate such decision and the reasons therefore to the Respondent within the (four) 4 week period aforesaid.

3

If the Exemption Applications are unsuccessful, and the Respondent elects to appeal outcome to the Independent Appeal Body, then the respondent is directed to do so within four weeks of the decision of the applicant's Exemption Committee refusing such applications.

4

If, following on the outcome of such appeal, the respondent elects to bring any review proceedings in the Labour Court, it is directed to do so within four (4) weeks of the outcome of the Appeal (such four 4 weeks beginning to run from the date upon which the outcome of the Appeal is communicated to the respondent).

5.

In the event that a Review eventuates at the instance of the Respondent, then it is recorded that this Consent Order is taken without prejudice to the Respondent's rights to raise in such Review, inter alia:-

(a) Applicant's initial refusal to consider Respondent's Exemption Applications,

(b) Applicant's refusal to do so on the ground that such Exemption Applications were not competent on the basis that:-

(i) in respect of the period 1 May 2003 to February 2004 onward had been made;

(ii) in respect of the other periods, it was not competent to bring Exemption Applications retrospectively.

6

That the record all in paragraph 5 of this order is made without prejudice to the Applicant's right to challenge, in any such Review, the correctness of what is set out in paragraphs 5 (a) and (b) of this order." (Sic)

[7] It is clear from paragraph 5 of the order that the applicant had applied for exemption but that the first respondent had initially refused to consider it. Then on 21 June 2006 the applicant filed with the first respondent an application for exemption as described herein before. The exemptions were sought for the periods:

(a) 1 March 2003 to 30 June 2003

(b) 1 July 2003 to 30 June 2004

(c) 1 July 2004 to 30 June 2005

(d) 1 July 2005 to 30 June 2006

[8] The general basis upon which the exemption application was made was that:

1. If the applicant was not to be granted exemption. Its viability would be affected with the potential for far-reaching job losses.

2. The applicant by way of exemption would not gain a competitive advantage over any other manufacturer operating within the industry but would instead simply remain in business.

3. The exemption would not infringe upon the basic conditions of employment rights of the applicant's employees.

4. The collective bargaining process would not be undermined.

5. The applicant would at all times be compliant with other obligations, including but not limited to the payment of Unemployment Insurance Fund contributions and PAYE taxes on behalf of its employees.

6. The employees currently and previously working with applicant had expressed their continued support for the

exemption application, primarily on the basis that payment of reduced wages was preferable to unemployment.

[9] The Exemption Committee refused to grant the applicant exemption citing various reasons, including the following:

> "(1) **FAIRNESS TO EMPLOYER, EMPLOYEES AND OTHER EMPLOYERS AND EMPLOYEES IN THE INDUSTRY**.
>
> Applicant operates a business based on a model which it describes as a cut, measure and trim service to Spectrum. The essence of the arrangement however appears as one in which Applicant provides a low cost labour service to Spectrum who in turn competes in the retail market.
>
> Applicant justifies its low labour cost strategy by claiming that it is necessary to compete with the low labour costs of the footwear producers operating within Far Eastern countries. It is not surprising in this regard that Applicant only lists footwear importers as its competitors. When challenged on this claim Applicant's Mr Moosa conceded that there were local competitors who perform a similar function to the Applicant.
>
> To give Applicant license to continue on the basis of being viable only because of its low labour cost regime would be unfair to these other employers.
>
> Besides being unfair to competing employers it is also extremely unfair towards Applicant's employees. In this regard Applicant claims that it pays 60 % of the prescribed wage of the applicable Collective Agreement. On a consideration of the wage schedules filed by Applicant it becomes apparent that Applicant has not given its employees any increase for the

period relevant to the exemption applications. It is furthermore apparent that Applicant currently pays substantially less that 60% of the applicable prescribed wage rates. Compounding its employees' agony in this regard is the fact that Applicant does not contribute to the social benefit funds installed by the provident and sick fund Collective Agreements. It is submitted that this situation is a social injustice and smacks of exploitation of labour desperate for work.

Applicant attempts to justify its low wage regime, *inter alia* on the basis that its employees have agreed to working under these conditions. In support of this contention Applicant filed affidavits from four senior employees as well as what appears to be an agreement with all of its employees.

As regards the affidavits, the averments contained therein should be seen in the light of the employees' weak bargaining position.

If the employees are as desperate for employment as what Applicant claims to be the case then it is likely that they would have signed those affidavits only for the sake of holding on to employment that they currently have.

With regard to the wage agreement, the employees not being represented by a union would be vulnerable to threats of loosing their employment. This would make it easy for Applicant to extract from them an undertaking that they would allow it, at its discretion to pay a minimum of 60 % of the prescribed wage rates. Of importance in this regard is the fact that notwithstanding its undertaking in terms of the agreement, Applicant continues to pay its employees less than a minimum of 60% of the prescribed wages rates.

Clearly Applicant's business strategy is not only unfair towards employers but also extremely unfair and unjust towards its employees.

(2) **WHETHER AN EXEMPTION, IF GRANTED, WOULD UNDERMINE THIS AGREEMENT OR THE COLLECTIVE BARGAINING PROCESS**.

By extending Collective Agreements to non- party employers the Bargaining Council is able to effectively discharge one of its functions i.e. to ensure the even-handed and fair application of basic terms and conditions of employment to all employees within the Industry under its jurisdiction.

To grant the applications in question would be to undermine an important function of Collective Agreements which are to establish a consistent labour cost and benefit regime applicable to all employers and employees of the industry. (Sic)

When considered from a party employer point of view, allowing the applicant to continue on its current path constitutes a serious threat to these employer enterprises who generally comply with the applicable terms of the Council Collective Agreements. If applicant were allowed to continue paying lower wages and other conditions of employment there would be little, if any point, in any other employers seeking or maintaining membership of a party to the Bargaining council. To condone Applicant's business model would be to seriously discourage Council party membership by employers which in turn would be detrimental to orderly collective bargaining in general and collective bargaining at sectoral level in particular. This in turn would defeat one of the primary objects of the Act.

(3) **WHETHER IT WILL MAKE A DIFFERENCE TO THE VIABILITY OF A NEW BUSINESS OR A BUSINESS PREVIOUSLY OUTSIDE THE COUNCIL'S JURISDICTION**

Mr Shaikh, the joint Managing Director of the Applicant and Spectrum is no stranger to the Industry. According to records, Mr Shaik has been involved in the shoe manufacturing Industry (Spectrum and Fargo Shoes) for a while prior to the dates relevant to the exemption applications in question. Whereas it is accepted that to grant the exemption will contribute to the viability of the Applicant based on its current business model, it is submitted that Applicant cannot be allowed to trade on the back of its labour. It is submitted that it is a social injustice to allow the employees to sacrifice their right to fair terms and conditions of employment so that the current business model of the Applicant may be promoted.

(4) **UNEXPECTED ECONOMIC HARDSHIP OCCURING DURING THE CURRENCY OF THE AGREEMENT AND JOB CREATION AND/OR LOSS THEREOF**

The economic conditions within the National Footwear Industry can hardly be described as unexpected. These conditions have been around for a while and at least for a time longer than the period relevant to the exemption applications. Mr Shaik was aware of the trading conditions and applicable legal framework when he designed his business model. He must have been aware that the only way that his business model would succeed is by flouting the laws relevant to the applicable legal framework. It is submitted that an entrepreneur cannot allowed to commence a business, the viability of which depends solely on its failure to comply with applicable laws.

Applicant through its representatives has hinted that imposing full compliance with applicable Collective Agreement and Council levies could potentially force a situation of job losses. Applicant's representatives stopped short of stating categorically that jobs will as a matter of fact be lost. In this regard it is not too far fetched for the committee to conclude that, Mr Shaikh will rearrange his business affairs to accommodate the adjusted operating costs of managing the Applicant through appropriate increases to the sale price of Applicant's shoes to Spectrum. It is submitted that to allow Applicant to continue undisturbed would be jeopardizing the job security of employees employed by compliant employers. Furthermore it is unlikely that if Applicant were to close its doors that the job opportunities created by the demand for shoes by Spectrum would be lost. It is likely that Spectrum would source its shoes from other employers operating within the industry.

(5) **INFRINGMENT OF BASIC CONDITIONS OF EMPLOYMNET RIGHTS**

It is submitted that Applicant's actions constitute a social injustice. Applicant severely undermines employees' right to fair basic conditions of employment by depriving its employees of retirement funding benefits as well as sick fund benefits. These benefits are considered basic rights relative to the Leather Industry. By paying the low wages its does, coupled with the failure to contribute to sick fund and retirement fund; Applicant severely undermines employees' ability to prepare themselves for retirement or access medical attention when they or their dependents require it. (Sic)

(6) **THE FACT THAT A COMPETITIVE ADVANTAGE MAY BE CREATED BY THE EXEMPTION**

There is no doubt that Applicant's low labour cost business practices give it substantial advantage over local competitors who are compliant. If one considers that Affidavit deposed to by Mr Shaik, it appears that his business strategy is based on competing with imports on the basis of denying his employees the wage rates and benefits determined by the applicable Collective Agreements of the Industry. This strategy clearly gives the Applicant a substantial advantage over compliant employers when competing for a share of the local footwear or market.

(7) **COMPARABLE BENEFITS OR PROVISIONS**

It was conceded by Applicant's counsel that Applicant provides no benefits comparable to the sick and provident funds provided by applicable Collective Agreements. Access to retirement funding benefits, as well as medical health benefits are considered to be a basic right of employees. In this regard clause 17 of the Footwear Collective Agreement provides that:

"Employers and employees and/or the unions may enter into collective agreements at plant level, which may vary or amend the terms and conditions of this agreement. Any such agreement and variation may not:-

- vary or amend an employee's entitlement to his/her provident and sick fund benefits."

(8) **APPLICANT'S COMPLIANCE WITH OTHER STATUTORY REQUIREMENTS**

It appears that Applicant complies with the Unemployment Insurance Act and the Act on the taxation of employees. Conspicuous by its absence is the

claim or proof of Applicant's obligations in terms of the Skills Development Act.

(9) **OTHER FACTORS**

Applicant also seeks exemption from contributing to the technological fund and paying Bargaining Council levies.

To without further ado grant exemptions from the technological fund would be to reduce the fund's capability of sponsoring (as it does) research and development intended to promote the Industry at large. In this regard the technological fund plays an important role in contributing to the growth and viability of the Industry. It would be unfair to allow Applicant to benefit from development of the Industry without contributing towards the costs thereof as its competitors do.

The Bargaining Council is statutorily charged with inter alia the following functions:

- To conclude Collective Agreements;
- To enforce those Collective Agreements;
- To prevent and resolve labour disputes;
- To perform the dispute resolution functions referred to in section 51;
- To establish and administer a fund to be used for resolving disputes etc.

The council funds these functions from the proceeds of the levies collected from the Industry. To grant exemption from payment of these levies will effectively render the Bargaining Council incapable of performing its statutory functions. Equally it would prevent the Council from discharging

its functions in regard to exemptions and providing for appeal mechanisms against decisions of the Council regarding exemption applications.

It is submitted that exemptions are intended for employers to cater for exceptional and mainly unexpected circumstances. The main complaints of the Applicant are the challenges posed by the importing of footwear at costs they find difficult in matching. This situation is not unexpected, exceptional or unique to the Applicant. All employers in this Industry operate subject to the same challenges. Many have adapted and now conduct viable business. This is evident by the growth of the industry from 140 registered employers in 2000 to 149 in 2006."

[10] The applicant lodged an appeal with the second respondent as envisages in clause 14 (9) of the collective agreement. The third and fourth respondents dismissed the appeal through a determination they issued on 28 August 2007, hence the present application.

THE CHIEF FINDINGS OF THE SECOND RESPONDENT

[11] Having considered the applicable legal principles and the nature of the application before it, namely whether it was a review or a wide appeal, the second respondent dealt with issues before it in the following manner:

- "In terms of whether there are any grounds for reviewing the decision of the Exemptions Committee, the Independent Appeal Body is satisfied that there is nothing before it which establishes that the Exemptions Committee misdirected itself in coming to its decision. To this end, the Independent Appeal Body accepts the arguments set out by the Respondent in its Heads of Argument at paragraph

18. The Independent Appeal Body is satisfied that the Exemptions Committee applied its mind properly to the criteria as set out in the Collective Agreement and determined that an exemption should not be granted.

- Were the Independent Appeal Body to consider the appeal in terms of a "wide appeal", the Independent Appeal Body's determination remains the same. There is no new evidence before the Independent Appeal Body which takes the matter further for the Appellant.

- In any event, the Independent Appeal Body accepts the Respondent's argument that the only criterion established by the Appellant is the fact that three out of 52 employees consented to the exemption application. This is simply one of a number of criteria and the Independent Appeal Body concurs with the determination made by the Exemption Committee in this regard.

- Further, there is simply nothing before the Independent Appeal Body which indicates that were the Appellant to be granted the exemption, this is the breathing space it requires within a defined period to enable it to "catch up" and eventually pay the requisite minimum wages and benefits to its employees.

- Having regard to the above, the provisions of section 14 (6) of the Collective Agreement and the evidence and argument presented by the Appellant and Respondent, the Independent Appeal Body is satisfied that the Appellant has failed to establish any grounds upon which the appeal should succeed.

- The Independent Appeal Body is furthermore satisfied that the Respondent's refusal to grant the exemption is fair and reasonable in the circumstances".

GROUNDS OF REVIEW

[12] The applicant submitted that:

(1) The second respondent failed to take into account all those grounds set out in clause 14(3) of the collective agreement when making its decision.

(2) The second respondent made a wrong statement in saying that the applicant only relied on the fact that it purportedly had the consent of three employees to bring the exemption application. Why the statement is wrong is because-

- the consent was that of all of the employees of the applicant,
- the three employees to whom the second respondent refers to were employees who had deposed to affidavits. For example, at paragraph 9 of the affidavit of Mr Kurmiah Naidoo, it is stated that the senior employees "speak for and on behalf of all the respondent's employees"
- the first respondent conducted investigations as to whether the applicant's employees supported the exemption and found that there was such support.

(3) The statement that the applicant relied on no further grounds was simply wrong. The applicant infact relied upon the following grounds-

- If it were compelled to (abide) by the collective agreement, there was a distinct possibility of "the potential loss of some eighty jobs".
- The applicant was facing severe competition and a serious loss of market share as a result of cheaper imports of foot wear into the country.

(4) The second respondent showed a fatal misunderstanding of the affidavits of the three employees when it said that: "the consent of the three employees seems to be the cornerstone of the appellant's case. Subtract this and there is nothing left, other than the fact that the appellant is having a hard time in the industry". All three employees made an allegation that Mr Abdul Kader Hoosen Shaikh, (the deponent to the founding affidavit) spoke on behalf of the entire body of employees.

(5) The second respondent was also misguided in finding that the only basis for review would be that the Exemptions Committee ignored material evidence, or

took into account irrelevant evidence, or reached a conclusion without substantiation.

(6) The second respondent failed to apply its mind properly to the submissions of the applicant or even to read properly the affidavits of the employees and thus failed to take into account relevant considerations when reaching its decision.

(7) It was simply wrong of the second respondent to have indicated that "the onus rests on the appellant for exemption to prove that it differs from other employers." Nowhere in clause 14(3) does it specify that the applicant for exemption must prove any form of difference from other employers, a requirement which would be nearly impossible to meet for various reasons. The second respondent misdirected itself in applying a test that required the applicant to discharge an onus to prove a difference from other employers, when it was required to prove that it was entitled to an exemption, taking into account the factors listed in clause 14(3) of the Collective Agreement.

PROCEDURAL IRREGULARITIES

(1) On 25 May 2007 the matter was adjourned because of the failure of the first respondent to index and paginate a set of papers for the second respondent yet the second respondent ordered that costs should follow the cause, the effect of which was that the applicant was ordered to pay those costs, an absurd result.

(2) On 11 June 2007 (a date to which the matter was adjourned) applicant's counsel was unavailable. A formal application for an adjournment was made on 8 June 2007. Second respondent refused to grant it. The effect was to bar the applicant from seeking proper representation and more particularly from engaging the presentation of its choice.

(3) A refusal of an adjournment, even after a substantial application and on grounds of unavailability of counsel should be seen against the immediate grant of an adjournment without a costs order, when the first respondent's counsel was delayed due to technical problems with the airline on which he was traveling to Durban. The delay was recorded as being not the fault of the first respondent. The approach is simply wrong and illustrative of the favour shown to the first respondent by the second respondent. The delay was quiet simply the fault of improper planning on the part of the first respondent's counsel who could have arrived on the night before. It should have, at the very least, occasioned an adverse costs order.

(4) These irregularities suggest that the second respondent's ruling falls to be set aside as having been made in bad faith.

SECOND RESPONDENT'S COUNTER SUBMISSIONS

[13] The second respondent denied that its ruling or determination ought to be reviewed for its failure to consider the grounds outlined in clause 14(3) of the collective agreement.

[14] The applicant was said to have mistaken the recordal by the second respondent of the argument of the first respondent's counsel being a statement by the second respondent. The statement referred to was that of Advocate Grogan, made in his heads of argument submitted on behalf of the first respondent. Any and all references to the same statement were denied as being of the second respondent. It was submitted that the affidavits of the three employees of the applicant were of hearsay nature and that they were not to be accepted at face values as they had little evidential value. It was disputed that the second respondent failed to apply its mind properly to the submissions of the applicant or even to read the affidavits of the employees properly.

[15] In relation to whether the second respondent misdirected itself in applying a test that required the applicant to discharge an onus to prove a difference from other employers, the applicant was said to

have misconstrued the second respondent's recordal of Advocate Grogan's argument as being a statement on the part of the second respondent.

[16] That the entire reasoning of the second respondent's ruling was tainted by the considerations in respect of the affidavits of the employees, it was said that it was not evident that the second respondent placed any reliance on them.

PROCEDURAL FAIRNESS

[17] It was disputed that the costs for 25 May 2007 were awarded in favour of the first respondent. In respect of 11 June 2007, the submission was that counsel for the first respondent was indeed delayed in arriving for the hearing. An application to postpone the hearing made by the applicant was then acceded to by the second respondent notwithstanding a request by the first respondent to have the matter stood down for its counsel. In postponing the matter, the second respondent reserved the question of costs despite the applicant being the one who was seeking the indulgence of a postponement. It was disputed that the second respondent's ruling was visited by irregularities suggestive that the ruling falls to be reviewed and set aside as having been made in bad faith.

FRESH CONSIDERATIONS

[18] The applicant made submissions in support of court ruling on the application for exemption itself, in the event that the decisions of various exemption boards are reviewed and set aside. As the consideration of the fresh submissions depends on the success of the review application, the review application must therefore be firstly considered.

SUBMISSION BY PARTIES

SUBMISSION ON BEHALF OF THE APPLICANT

[19] Mr Moosa appeared for the applicant. He highlighted the grounds of review by weighing them against the findings of the first and the second respondent and the evidence in general. His further submissions are dealt with below.

[20] Although this is a review of a decision of the second respondent it is in effect also a review of the decision of the first respondent considering that the decision of the second respondent was given by it on appeal from the decision of the first respondent. Fairness is the cornerstone of the manner in which the second respondent is required to carry out its function regard being had to the provisions of section 32(3) (f) of the Act. When approaching the appeal the starting point for the second respondent ought to have been that the first respondent had initially refused to entertain the applicant's exemption

applications. The first respondent had already displayed unfairness in refusing to even consider the applicant's exemption applications. These in circumstances *inter alia* where:

- the applicant had made an application to be registered as a member of the first respondent but this application was never acknowledged by the first respondent
- the applicant was never informed as to who constituted the first respondent's exemption committee.
- the managing director of the applicant had brought an exemption application in the name of another entity Fargo Footwear (Pty) Ltd and that application had simply been refused with no reasons furnished in circumstances where competing entities were receiving exemptions.
- the first respondent had no rules or procedure whatsoever in regard to exemption applications.

[21] If regard is had to the finding of the first respondent it is evident that the first respondent simply paid lip service to the criteria set out in clause 13(3) by stating each criterion and concluding that same was against the applicant's application without alluding to any facts or evidence in support of each conclusion. If that was the correct way of considering exemption applications then no exemption applications could ever be granted.

[22] In terms of clause 14(10) of the Footwear Section Collective Agreement, the second respondent must consider all applications with reference to the criteria in sub-clause 3 of the agreement. In other words the second respondent is enjoined to consider the matter afresh. When it did so, it entirely misdirected itself. For example it concluded that the only case made out by the applicant was the support of its three employees (being a reference to the affidavits of the three senior employees put up in the liquidation application). However, it simply failed to consider the affidavit of Gcinaphi Zulu, a designated agent of the first respondent who confirmed that he had interviewed 26 employees of the applicant and all of those employees were aware of and supported the exemption application.

[23] It appears that other than the summary schedule which has been discovered in the discovery application the first respondent did not, when it considered applicant's applications for exemption, have any other information or records concerning the basis on which it granted exemptions to other employees. The irresistible inference is that the first respondent was deliberately withholding disclosing the information as it knew that the disclosure would be highly damaging to it. In the absence of the relevant information, first respondent could not have determined whether applicant's application for exemption should be granted in that such information is directly relevant under the criteria fairness to the employer and other employers, whether a competitive advantage may be created by the exemption and comparable benefits or provisions where applicable. It is even more disturbing that the second respondent did not enquire into this.

[24] In all the circumstances it is evident that the second respondent not only failed to apply its mind but that it showed an overt bias against the applicant. The applicant has made out a case under each criterion set out in section 14(3) of the Footwear Section Collective Agreement and its applications for exemption should accordingly be granted. In the premises the applicant asks that this court should set aside the decision of the second respondent and that it should grant to the applicant its application for exemption to pay a wage rate of 60% of the prescribed rate and total exemption from payment of contributions to the provident fund, the sick fund, the technological fund and the payment of administrative levies in respect of the periods 1 March 2003 to 30 June 2003, 1 July to 30 June 2004 and 1 July 2004 to 30 June 2005.

SUBMISSIONS ON BEHALF OF THE FIRST AND SECOND RESPONDENTS

[25] Mr Broster SC appeared for the first and second respondents. He similarly highlighted the findings of the first and second respondents against the background of evidence filed. His further submissions follow here under.

[26] When seeking an exemption, it is incumbent upon the applicant to demonstrate the special circumstances which exist in order to warrant a deviation from the provisions of the collective agreement. This is the approach set out in *Ram International Transport Pty Ltd v National*

Bargaining Council for the Road Freight Industry (2002) 23 ILJ 1943 BCA at 193. Where it was said:

"…. the primary consideration for deciding an exemption application is whether or not the applicant has established a justifiable reason why the main agreement should not be complied with, as it was intended, namely in a uniform manner in respect of every enterprise in the industry and why the principle underlying the operation of the main agreement in the sector of the economy governed by sectoral collective bargaining should be determined."

[27] At no stage either before the exemptions committee or the independent appeal body did the applicant seeks to identify the special circumstances which is sought to rely upon. In practical terms, for the period 1 May 2003 to February 2006, it ought to have paid amounts in excess of R1 million in order to comply with its obligations in terms of the collective agreement. Instead, it steadfastly refuses to do so. The extent of the cynical approach adopted by the applicant throughout these proceedings is demonstrated by the fact that the applicant opposed the original arbitration held before Professor Rycroft in this way:-

" To answer the Council's claim by saying that it is not liable because in this particular claim the copies of the collective agreement put up are not the original ones or the very ones that resulted in the Minister's extension, is, in my view, an evasive and inadequate argument. It is, effectively, a concession that if the Council put up the original agreements it would be liable."

[28] Throughout the proceedings the applicant has accepted that it is unable to pay the amounts due to the first respondent and has throughout contended that because it operates its business in a "break-even" manner it is simply unable to bear the increased costs required to comply with its lawful obligation. In this application the applicant's case is pitched exclusively on the basis that if the exemptions are not granted, the employees, which it has consistently underpaid, would be unemployed. The exemptions committee convincingly dealt with this contention in this way:-

> "It is submitted that the applicant's actions constitute a social injustice. Applicant severely undermines employees' rights to fair basic conditions of employment by depriving its employees of retirement funding benefits as well as sick fund benefits. These benefits are considered basic rights relative to the Leather Industry. By paying the low wages it does, coupled with the failure to contribute to the sick fund and retirement fund, Applicant severely undermines employees' ability to prepare themselves for retirement or access medical attention when they or their dependants require it"

[29] The second ground upon which the applicant relies proceeds on the basis that the exemption committee simply paid lip service to the criteria it was obliged to consider. This submission overlooks the careful analysis by the exemption committee under separate headings of each of the requirements it was obliged to consider. The reasoning is carefully set out and contains a rejection of each of the applicant's submissions. To suggest, as the applicant does, that the independent appeal body failed to apply its mind at all ignores this finding:

"Having regard to the above, the provisions of section 14 (6) of the Collective Agreement and the evidence and argument presented by the Appellant and the Respondent, the Independent Appeal Body is satisfied that the Appellant has failed to establish any ground upon which the appeal should succeed. The Independent Appeal Body is furthermore satisfied that the Respondent's refusal to grant the exemption is fair and reasonable in the circumstances."

[30] It is apparent from the information put before the first respondent that all the applicant's employees accepted the wage regime imposed upon them by the applicant. In this regard the exemptions committee said:

"Besides being unfair to competing employers it is also extremely unfair towards Applicants employees. In this regard Applicant claims that it pays 60% of the prescribed wage of the applicable Collective Agreement. On a consideration of the wage schedules filed by applicant it becomes apparent that Applicant has not given its employees any increase for the period relevant to the exemption applications. It is furthermore apparent that Applicant currently pays substantially less than 60% of the applicable prescribed wage rates. Compounding its employees' agony in this regard is the fact that Applicant does not contribute to the social benefit funds installed by the provident fund and sick fund Collective Agreements. It is submitted that this situation is a social injustice and smacks of exploitation of labour desperate for work.

Applicant attempts to justify its low wage regime, inter alia on the basis that its employees have agreed to working under these conditions. In support of this contention Applicant filed affidavits from four senior employees as well as what appears to be an agreement with all of its employees"

[30] It is submitted that not only was the exemption committee fully aware of the applicant's claim that all its employees supported the exemption application, it trenchantly rejected the cynical approach of the applicant on the sound basis set out above. The applicant accordingly submits that when the reasonableness test is applied to both the first and the second respondent's decision it cannot be concluded that their approach and reasoning is not reasonable in the circumstances of the matter. The respondents accordingly submit that the application for review should be dismissed with costs.

EVALUATION

[32] Two decisions are the subjects of the review in these proceedings. The one is of the first respondent and the other is that of the second respondent. Initially this application was premised on the provisions of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). Mr Moosa conceded that, in the light of the decision in *Sidumo and Another v Rustenburg Platinum Mines Ltd And Another [2007] 12 BLLR 1097 CC,* Paja was not applicable. It falls to be determined whether the decisions reached by the first and the second respondents are decisions that a reasonable decision maker could not reach, in the circumstances. Further, the applicant submitted that the second respondent failed to apply its mind properly to the submissions of the applicant and to take into account relevant considerations when reaching its decision. Effectively the applicant is alleging that the second respondent committed a gross irregularity in various ways in this matter.

[33] The concept of a gross irregularity was discussed in *Goldfields Investments Limited & Another v City Council of Johannesburg & Another 1938 TPD 551*, where court held *inter alia: "*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". In *County Fair Foods (Pty) Limited v CCMA & Other (1999) 4 LLD 459 LAC at Para [30]* Zondo3AJA (as he then was) stated:

> "In Ellis v Morgan 1909 TPD 576 Mason J is reported to have said an irregularity in proceedings does not mean an incorrect judgment it refers not to the result but to the method of a trial, such as, for example, some high-high handed or mistaken action which has prevented the aggrieved party from having his case fully and fairly determined."

[34] The second consideration in this application will be whether or not the decisions of the first and second respondents are reasonable, as already indicated. When commenting on the Sidumo decision the Labour Appeal Court in Fidelity Cash Management Services v CCMA & Others [2008] 3 BLLR 197 LAC, posed the question in paragraph 102: "What is the different between the approach enunciated in Carephone and that enunciated in Sidumo with regard to the grounds of review set out in section 145 of the Act?" In answering this question court *inter alia* said: "It seems to me that, even if there may have been a debate under Carephone and prior to Sidumo on whether a commissioner's decision for which he or she has given bad reasons could be said to be justifiable

if there were other reasons based on the record before him or her which he or she did not articulate but which could sustain the decision which he or she made, there can be no doubt now under Sidumo that the reasonableness or otherwise of a commissioner's decision does not depend-at least not solely – upon the reasons that the commissioner gives for the decision. In many cases the reasons which the commissioner gives for his decision, finding or award will play a role in the subsequent assessment of whether or not such decision or finding is one that a reasonable decision maker could or could not reach. However, other reasons upon which the commissioner did not rely to support his or her decision or finding but which can render the decision reasonable or unreasonable can be taken into account. This would clearly be the case where the commissioner gives reasons A, B and C in his or her award but legitimately before him or her, one finds that there were reasons D, E and F upon which he did not rely but could have relied which are enough to sustain the decision".

[35] I remind myself that the present review application is premised on the provisions of section 158 (1) (g) of the Act, which reads:

"The Labour Court may-

(a)

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(g) 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."

[36] I turn to the merits of the review application. From the authority in Fidelity Cash Management Case it follows that the reasons given by the second respondent for its determination are not the be all and end all. They are rather, part and parcel of those facts upon which the

second respondent may not have relied to support its decision but which can render the decision reasonable or unreasonable.

[37] When considering the exemption application the first respondent had to consider the grounds in clause 14 (3) of the collective agreement. The first respondent did consider each of the grounds. It did not just list these grounds but dealt with each in relation to the application. In my view the first applicant acquitted itself in the manner it handled each of the 6 general bases upon which the exemption application was premised. Each and every critical finding made by the first respondent was not only relevant to the issue in point but dealt exhaustively with considerations attendant thereto. The first respondent accepted the fact that the application was supported by all employees of the applicant. It looked at the submissions by the employees in support of the application against their weak bargaining position. In my view, it correctly realised that the employees were vulnerable to threats of loosing their employment.

[38] The first respondent noted as of importance the fact that notwithstanding its undertaking in terms of the agreement, the applicant had continued to pay its employees, less than a minimum of 60% of the prescribed wages rates. During the liquidation application, the applicant had admitted that it was unable to pay its debts. In my view there is overwhelming evidence in this application that the liabilities of the applicant, including a claim premised on the arbitration award, had exceeded its assets. The applicant was infact not breaking even, as it said.

[39] The first respondent correctly held that the applicants' actions constituted a social injustice by severely undermining employee's rights to fair basic conditions of employment by depriving its employees of retirement funding benefits as well as sick fund benefits. These benefits are certainly basic rights relative to the Leather Industry.

[40] There is overwhelming evidence that the applicant's low labour cost business practices give the applicant substantial advantage over local competitors who are compliant. A denial of the employees the wage rates and benefits determined by the collective agreement does indeed give the applicant a substantial advantage over compliant employers when competing for a share of the local footwear or market. An exemption under such circumstances would dissuade other employers from complying with the collective agreement and the objective of collective bargaining would be easily frustrated.

[41] The applicant was, in my view, entitled to the information relating to the exemption applications granted to other employers falling under the same collective agreement. However, as there were other considerations in this regard, such failure did not have fatal consequences to the case of the second applicant.

[42] There is another consideration of importance in this application. It relates to the nature of the applicant's enterprise. To qualify for a wage reduction of 60% of the prescribed rate, the enterprise had to be

a semi-formal sector establishment, which it is not, in terms of its classification form. The exemption should accordingly not apply to the period relevant to the applicant's indebtedness to the respondents, at least until September 2005.

[43] In my view, it was not necessary that I had to traverse each of the 9 grounds covered by the first applicant, even after I had considered them. The critical finding of the second respondent in this matter is, in my view that:

> "In terms of whether there are any grounds for reviewing the decision of the Exemptions Committee, the Independent Appeal Body is satisfied that there is nothing before it which establishes that the Exemptions Committee misdirected itself in coming to its decision……. The Independent Appeal Body is satisfied that the Exemptions Committee applied its mind properly to the criteria as set out in the Collective Agreement and determined that an exception should be granted"

[44] The reference to there being no evidence brought before the Independent Appeal Body, bears reference to the right of the applicant to bring new evidence for the consideration of the appeal. In my view the further comments by the second respondent were unnecessary in the circumstances. To the extent that there may be well founded criticism on such further comments; such do not, in my findings amount to there having been any reviewable irregularity amounting to there having not been a full and fair trial of the issues in this matter. As already indicated, a solid foundation had already been laid in the manner by which the first respondent dealt with the application. I accordingly, find it unnecessary that I should deal individually with

every ground of review, having considered each against the conspectus of all evidential material.

[45] In respect of procedural fairness, the applicant ought not to be responsible for costs for 25 May 2007 and 11 June 2007. The postponement of the matter on 11 June 2007 was clearly at the instance of the respondent as the application by the applicant had been turned down. The decision in *Carephone Pty Ltd v Marcus No and others (1998) 191 ILJ 1425 (LAC)*, serves as a reminder that a litigant's rights to being represented by a representative of its choice is a right, the exercise of which may be circumscribed, depending on how it is being exercised. This ground is accordingly devoid of any merits. The decision I have reached makes it unnecessary to consider the fresh submissions of the applicant to be granted an exemption by this court. I have considered the issue of costs in relation to the law and fairness of this matter.

[46] In the premises, the appropriate order I make is the following:

1. The review application in this matter is dismissed.
2. The applicant is ordered to pay the costs of this application.
3. Costs of 25 May 2007 and 11 June 2007 occasioned at the initial application for exemption are to be borne by the first respondent.
4. Costs for the interlocutory application, for a postponement of the review application, pending access to information are to be borne by the second respondent.

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CELE J

APPEARANCES

FOR THE APPLICANT: ADVOCATE O.A MOOSA
INSTRUCTED BY: C M SARDIWALLA & CO

FOR THE RESPONDENT: ADVOCATE L.B BROSTER
INSTRUCTED BY: COX YEATS

Date of Judgment: 29 April 2009