THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

CASE NO: JR 1969-18

Reportable

In the matter between:

PUTCO (PTY) LTD	**Applicant**
and	
SA ROAD PASSENGER BARGAINING COUNCIL	**First Respondent**
BHANA, STEPHEN *N.O*	**Second Respondent**
JAMODIEN, TARIQ *N.O*	**Third Respondent**
FENN, DOUGLAS *N.O*	**Fourth Respondent**
HAMBIDGE, ELEANOR *N.O*	**Fifth Respondent**
NATIONAL UNION OF METALWORKERS OF SA	**Sixth Respondent**
SOUTH AFRICAN TRANSPORT AND ALLIED WORKERS UNION	**Seventh Respondent**

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TIRISANO TRANSPORT AND SERVICES

WORKERS UNION **Eighth Respondent**

TRANSPORT AND ALLIED WORKERS

UNION OF SA **Ninth Respondent**

Application heard: 29 March 2019

Judgment delivered: 11 April 2019

Summary: Labour Court has jurisdiction in terms of s 158 (1) (g) to review decisions by exemption and exemption appeal authorities established by bargaining councils. The threshold for review is the *Sidumo* test of reasonableness. Decision-makers are required to make decisions on the basis of the evidence before them, with affordability as the primary criterion where that is the basis of the application for exemption. It is not for exemption authorities to engage in Solomonic decision-making more suited to wage arbitrations. Affordability is a factual issue, and must be resolved as such. Exemption authorities must give reasons for their decisions. A failure to do so constitutes a material irregularity. Question remains whether outcome of process is reasonable. Remedy – where employer justifiably has no faith in exemption authorities and where all relevant information is available to the court, appropriate for the court, given the statutory imperative of expeditious dispute resolution, to substitute its decision for that of the decision-maker.

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VAN NIEKERK J

Introduction

[1] This is an application to review and set aside a number of decisions relating to applications for exemption from provisions of the main agreement concluded under the auspices of the South African Road Transport Passenger Bargaining Council (the bargaining council).[1] Specifically, the applicant seeks respectively to review and set aside an exemption ruling issued by the exemption authority (comprising the third and fourth respondents) on 15 August 2018 and an appeal ruling issued by the second respondent on 2 September 2018.[2]

[2] The application is opposed only by the sixth respondent (NUMSA).

Factual background

[3] The factual background is not in dispute. The applicant is a provider of commuter bus services in the provinces of Gauteng, Limpopo and parts of Mpumalanga. It is a party to the bargaining council, and a party to the substantive agreement (the 2018 main agreement) from which it sought partial exemption.

[4] On 13 June 2018, the applicant applied for exemption from clauses 3.2, 3.3, 4.1 and 25 of the main agreement. The applicant made submissions that recorded its financial position in detail. The applicant had been experiencing financial losses due to the underfunding of bus contracts for a number of years. In particular, during the current financial year, the applicant had suffered a loss of R146.7 million and was under severe cash flow pressure, to the extent that it had

[1] The exemptions sought relate to clauses 3.23 and 3.3, read with Annexure A, which require across the board increases on the hourly rate paid to all employees on the basis of an across the board increase of 9% on the base rate pay which became due on 14 May 2018, until 31 March 2019; and back pay of 9% on the base rate of pay (excluding benefits and allowances) for the period 1 April to 17 April 2018. Exemption was also sought in respect of clause 4.1, which sets a minimum hourly wage for employees at not less than R33.96 per hour, to be implemented from 31 March 2019 and clause 25, which provides for the payment of a bonus equivalent to one month's wages, pro rata.

[2] The relief initially sought extended to what were described as the first exemption and exemption appeal rulings, issued on 12 July 2018 and 8 August 2018 respectively. The relief sought at the hearing was confined to the (second) rulings referred to, the first rulings of the exemption authority and exemption appeal authority having been overtaken.

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exhausted all the facilities available to it. A month-long industry strike had further exacerbated the situation. A review of the financial results to 31 December 2017 had indicated that drastic action needed to be taken in order for the applicant to continue as a going concern. One of the consequences of underfunding had been the suspension of the bus replacement program, resulting in an aging fleet, unreliable, expensive to maintain and inefficient. The consequent poor quality of service contributed to passenger dissatisfaction and translated into declining passenger numbers and declining passenger revenue.

[5] The root causes of the applicant's financial and operational problems were described in detail. The fundamental problem lay with the bus contracts and their chronic underfunding. Contracts that were intended to be short-term remained in effect more than 20 years later on account of the provincial department of transport wavering between two policy options – putting bus contracts on open tender or negotiating contracts with existing operators. The bus contracts operate fixed schedules with fixed trips and fixed kilometers, and operators are not able to add additional trips where demand is high without approval from the provincial department of transport. Likewise, operators cannot reduce trips where demand is low, without approval. The applicant recorded that since 2009, very few changes to bus schedules had been approved. Further, during the last nine years, major cost items such as fuel, labour and inflation of outstripped increases and by subsidies by far. Since 2009, by subsidies had not been increased in accordance with the contract escalation formula, and the department had failed to do increased subsidies in accordance with the escalation formula contained in the interim contracts. To put the problem in context, the applicant stated that the subsidies it had received between 2009 to the 2017/18 financial year were approximately R1.3 billion less than what should have been paid in terms of the escalation formula in the bus contracts. Further, the escalation provided for in the public transport operational grant had been reduced from 4.97% to 3.24% as part of the measures adopted by treasury to reduce state expenditure.

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[6] The consequences of the difficulties experienced with bus contracts and the underfunding of these contracts over a protracted period were listed as a loss of profitability, cash flow problems, negative reaction from financial institutions shareholders and investors, pressure on procurement, pressure on preventative maintenance, inability of the company to invest in capital expenditure, a loss in passenger numbers and the loss of subsidy revenue on account shifts not operate.

[7] The applicant set out in some detail its efforts to address these problems through political and legal means. It also disclosed its survival strategy and recorded that without intervention, the applicant ran the risk of being the subject of the business rescue process, which in turn would place the employment of some 3300 staff members at risk. The applicant had involved in a number of cost-cutting measures in order to bring its expenditure in line with revenue and was required to reduce costs by approximately R20 million per month in order to sustain its profitability and viability. The cost rationalisation measures were disclosed in detail. What was posited was the delayed implementation of the wage increase of 9% to April 2019 that would provide the company with a measure of cash flow relief during this period, in the hope that the shortcomings in the outdated contracts would be addressed by the department transport in this time.

[8] The executive summary that forms part of the motivation for the application for exemption reads as follows:

> This application for exemption is based on Putco's serious financial position and the risk of the company not being able to continue as a going concern unless drastic and immediate cost savings can be achieved. This is necessary to bring the company's total expenditure outline for the total revenue available, to ensure the survival of the company and to enable Putco to continue operating, until the problems associated with the bus contracts and funding of these contracts have been addressed and resolved.

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> A survival strategy has been put in place which requires the reduction of total expenditure by R20 million per month or R240 million per year in all Putco operations. While this survival strategy requires cost savings across all expenditure items (including fuel, maintenance and other costs) a key component thereof is to achieve significant savings in employment cost, which forms nearly 40% of total expenditure.
>
> The reduction in employment cost is based on two initiatives firstly, a major CCMA facilitated S189A retrenchment process has just been completed, resulting in the abolishment of more than 380 positions across all Putco operations, and the actual retrenchment of220 employees. Secondly, the granting of exemption from the 2018 SARPBAC wage increase (for the period 14 May 2018 to 31 March 2019) and the payment of annual bonuses in 2018, will enable Putco to achieve the required cost savings needed to ensure the survival of the company, until the funding and structural problems in bus contracts have been resolved.

[9] In these circumstances, the applicant sought partial exemption from clause 3.2 of the main agreement to the extent that no across the board increase be implemented for eligible employees as from 1 April 2018 to 31 March 2019. In other words, the applicant sought to delay the implementation of the 9% across-the-board increase payable in terms of the main agreement by some 10 ½ months. In so far as the exemption from clause 4.1 and clause 5.1.4 were concerned, the applicant sought for the same exemption from the minimum hourly wage. In so far as the bonus contemplated by clause 25 of the main agreement was concerned, the applicant sought exemption for the period 14 May 2018 to 31 December 2018, meaning effectively that no annual bonus would be paid to the applicant's employees in 2018.

[10] On 12 July 2018, the applicant was granted partial exemption by the exemption panel, comprising the third and fourth respondents. The terms of the exemption required the applicant to pay a 7% wage increase for the period 1 April 2018 to 31 March 2019, backdated to the implementation date of 14 May 2018. An additional 2% increase would apply from 1 January 2019. Further, employees

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were to receive back pay of 7% on the base rate of pay for the period 1 April 2018 to 17 April 2018. Further, a wage increase of 8% on the base rate of pay would become due from 1 April 2019 until 31 March 2020. Regarding minimum hourly rates, the exemption authority ruled that where the 7% increase did not take certain employees to the minimum hourly rate, those employees were be given a further increase until they reach the minimum hourly rate. Finally, in regard to the bonus payment, the exemption authority expressed the view that any ruling in this regard was premature and that the applicant seek exemption closer to the time and finish the exemption authority with audited financial statements for June 2018 to review and consider whether any such exemption was warranted.

[11] On 27 July 2018, the applicant lodged an appeal against the exemption authority's ruling. In terms of the ruling of the appeal authority issued on 8 August 2018, the appeal was upheld in a one page ruling to the effect that the appeal authority was '*persuaded to find that a compelling argument is made out for the exemption authority to reconsider its findings*'. In terms of the ruling, the matter was remitted to the very same panel that had issued the first exemption ruling, for that panel to reconsider its decision issue a fresh ruling.

[12] On 16 August 2018, the exemption panel issued the second exemption ruling, one of the two rulings that are the subject of these proceedings. That ruling records the following:

> DETAILS OF FINDNGS
>
> 1. The exemption Authority had handed down a ruling in the exemption application of the Applicant, Putco (Pty) Ltd., for exemption from certain provisions of the Main Collective Agreement of the Respondent. The Respondent trade unions as cited above opposed the application. The Applicant had appealed against the ruling with the result that the Appeal Panel had ruled that the Exemption Authority should reconsider its findings.
>
> FINDINGS

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2. We have acknowledged previously that the Applicant is indeed under financial stress. We have further reviewed the additional information and explanations provided to the Appeal Panel. We remain cognizant of the need to be equitable in acknowledging that employees' economic and living conditions need to be taken into account as well. Hence we are not prepared to give the Applicant a full exemption on the terms sought and are persuaded that the Applicant is able to sustain a 6% wage increase for 2018. The details of the ruling will be considered hereunder.
3. Regarding the bonus payment for 2018, the Exemption (sic) has initially ruled that the Applicant would have to apply for it closer to the time of payment which would be in December 2018. The Appeal Panel has ordered the Exemption Panel to reconsider this approach and is of the view that we should make a ruling on it in order to comply with the Exemption Procedure which stipulates that a decision should be made on the application within 30 days of the conclusion of the Main Collective Agreement. …

6. The Applicant has comprehensively motivated the reasons for seeking the exemption from the aspects of the Main Collective Agreement as contained above. Financial constraints and cash flow difficulties are driving these considerations. Having considered the information and the financial situation of the Applicant we order that the Applicant pay 100% of the December 2018 bonus on 1 June 2019. Ten (10%) interest will accrue monthly on a compounded basis from end December 2018 to end May 2019.

[13] The exemption authority ruled accordingly. The applicant appealed against that ruling. This time, in a ruling issued on 5 September 2018, the exemption ruling was upheld. The salient portion of the ruling reads as follows:

> ANALYSIS OF SUBMISISONS AND ARGUMENTS
>
> I need to decide whether or not to grant exemption on any of the clauses applied for, was an appropriate decision (sic). In deciding the matter, I must take cognisance of each party's submissions and the Main Collective Agreement.
>
> In dealing with the specific items that the applicant has raised and having carefully perused the comprehensive grounds for appeal, I have come to the following conclusions:

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> The Exemptions Authority has reconsidered the exemption application in line with the instruction from the previous Exemptions Appeal Authority. They have lowered the salary increases from the previous Exemptions Appeal Authority. They have lowered the salary increases and made a reasonable decision on the bonus payment issues. The second ruling was a direct result of the partially success appeal made previously and can thus not be considered a nullity. It replaces the first ruling. In any event, the second ruling is more favourable to the applicant and addresses its concern about the bonus payment.
>
> Having applied my mind and considered Annexure "C" to the Main Agreement (Exemption Procedure) I therefore see no reason to interfere with the ruling of the exemption panel.

Grounds for review

[14] The applicant seeks to review and set aside the decision of the exemption authority on the basis that the decision is not reasoned. In particular, and in respect of the increases in remuneration, the applicant contends that the exemption panel finds no more than that although the applicant is under financial stress, after having regard to employees' economic and living conditions, it is not prepared to grant the full exemption sought, and was persuaded instead that the applicant was able to sustain a 6% wage increase for 2018. The applicant submits that the decision did not consider the applicant's financial situation at all, that it thus did not take relevant facts into account, it considered irrelevant facts and that the decision ultimately bore no relationship between the facts and the purpose of the exemptions sought. In respect of the decision of the exemption appeal authority, the applicant contends that the decision is not reasoned in that it denies the appeal solely on the basis that the second exemption ruling was more favourable to the applicant.

[15] In short, the applicant contends that neither the exemption nor the appeal authorities took into account all of the facts, and that both rulings were issued without a proper consideration of each ground for exemption submitted by the applicant, and any proper evaluation of why the application should succeed or fail.

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Relevant legal principles

[16] There has been some doubt expressed as to whether this court has jurisdiction to entertain a review of an appeal authority in an exemption application. In *National Union of Metal Workers of SA v Metal and Engineering Industries Bargaining Council & others* (2019) 40 *ILJ* 399 (LC) the court held that the functions of an appeal authority are not susceptible to review under s 158(1) (g). This decision appears not to account for the judgment of the Labour Appeal Court in *Trafford Trading (Pty) Ltd v National Bargaining Council for the Leather Industry of South Africa and others* (DA 11/09) [2011] ZALAC 35 (1 January 2011). In that judgment, the LAC said the following:

> [23] The application to review the decision of the second respondent was brought in terms of sec. 158(1)(g) read together with sec 32(3)(e)(i) of the Act. Sec 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 sec. 32(3) (e) (i) of the Act. The first respondent is a body accredited by the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of the Act. That being the position the test for reviewing an award or decision of a tribunal such as the second respondent is as provided in *Sidumo and another v Rustenburg Platinum Mines Ltd and Other* namely whether the decision taken by the tribunal is a decision that a reasonable decision maker could not reach. See also an analysis of the test by this Court in *Fidelity Cash Management Services v CCMA & Others* [footnotes omitted].

[17] In their seminal work, 'Reviews in the Labour Courts', Myburgh and Bosch refer to *Trafford Trading* and a number of additional authorities to support the conclusion that the decisions of bodies tasked with determining exemption applications are subject to review in terms of s 158(1)(g) of the LRA (at p 425). After argument and in the course of preparing this judgment, I had occasion to read the judgment of Nieuwoudt AJ in *Golden Arrow Bus Services (Pty) Ltd v South African Road Passenger Bargaining Council of South Africa and others* (C

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1112/18, 2 April 2019). In its judgment, the court confirmed that decisions by exemption and exemption appeal authorities are reviewable in terms of s 158(1)(g) of the LRA and that this court thus has jurisdiction to entertain such applications. This finding is consistent with the authorities and obviously correct. On the facts, the court found it unnecessary to have regard to the nature of the review – it was satisfied that even on the strictest test (that established by *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551), the decision by the appeal authority stood to be reviewed and set aside on the basis that the authority had adopted an erroneous view to the effect that he was precluded from hearing the appeal. While the court referred to *Trafford Trading*, it made no reference to the finding that the basis for review in these circumstances is one of reasonableness.

[18] In short: this court has jurisdiction in terms of s 158 (1) (g) to review decisions by exemption authorities relating to decisions to grant or refuse exemption from binding collective agreements concluded under the auspices of bargaining councils. The threshold to be applied is one of reasonableness, in the sense contemplated by *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC).

[19] The application of the reasonableness threshold empowers a reviewing court to intervene, amongst other grounds, when the decision-maker commits a gross irregularity. This extends to latent gross irregularities or, put another way, instances where the decision-maker fails to apply him or herself to the available evidence, makes defect of factual findings and the like. In these instances, a party seeking to set aside an award or ruling must establish both the irregularity or defect relied on and that the *Sidumo* threshold is met. *In Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA & others* [2014] 1 BLLR 20 (LAC), the Labour Appeal Court noted that it is not sufficient for an award to be set aside simply to establish a gross irregularity in the conduct of the arbitration proceedings; it is incumbent on an applicant to establish that the result was unreasonable or '*put another way, whether the decision that the arbitrator*

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arrived at is one that falls outside the band of decisions to which a reasonable decision-maker could come on the available material'. In other words, the review court must consider whether despite the arbitrator's reasoning, the result is nevertheless capable of justification on the available material. Thus, material errors of fact on the part of the arbitrator, as well as the weight and relevance to be attached to particular facts or a failure to have regard to particular facts are not in themselves sufficient grounds for review; their effect must be to render the outcome unreasonable.

[20] Precisely how this determination is to be made has been the subject of guidance provided by the Labour Appeal Court. In head of the *Department of Education v Mofokeng & others* [2015] 1 BLLR 50 (LAC), Murphy AJA said the following:

> The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of interrelated questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisaged in the distinctive review grounds developed at common law, now codified and mostly specified in section 6 of the Promotion of Administrative Justice Act ("PAJA"); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith arbitrarily or capriciously etc. . The Court must nonetheless still consider with apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in light of the issues and the evidence (at paragraph 31)

Further:

> Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the

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> irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had on the arbitrator's conception of the enquiry, the determination of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. The material error of this order would point to at least a prima facie unreasonable result.

[21] In relation particularly to an irregularity in the form of a failure to provide reasons for a decision, it should be recalled that s 33(2) of the Constitution provides that '*Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons'*. Myburgh and Bosch (supra, at p 237) quote the following exposition form *De Smith's Judicial Review*:

> It is clear that the reasons given must be intelligible and must adequately meet the substance of the arguments advanced. It will not suffice to merely recite the general formula will restate a statutorily prescribed conclusion. It is also preferable if the reasons demonstrate that a systematic analysis has been undertaken by the decision-maker…The reasons must generally state the decision-makers material findings of fact (and, if the facts were disputed at the hearing, there evidential support), and to me to the substance of the principal arguments that the decision-maker was required to consider. If a decision is made on the basis of the evidence of witnesses or experts, reasons for preferring one witness we expect to have another should generally be explained. In short, the reasons must show that the decision makers successfully came to grips with the main contentions advanced by the parties, and must tell the parties improve to why they lost, or as the case may be, won.

[22] When this exposition is applied in the context of a reasonableness review, and after a review of the case law, Myburgh and Bosch summarise the position as follows (at 238-9):

> Although the judgment is not consistent, the predominant position can be summarised as follows. Firstly, the failure or omission by Commissioner to provide reasons for his or her does not per se give rise to a reef. Secondly, where, though unreasoned, the decision in question is anticipated by findings

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> made in the award of the reasons the four self-explanatory, no reasonable effect arises. Thirdly, conversely, when the decision is unreasoned and its rationale cannot be determined from other findings and is not self-explanatory, then the decision will be liable to review. Fourthly, without his authority to the effect that the failure to provide reasons is immaterial if the decision is capable of justification on material the commissioner, the PW, in our opinion, is that a view arises in the circumstances mentioned in the third point above. Firstly, where a decision is set aside because of the absence of reasons, the issue will typically be remitted to the commissioner for reconsideration [footnotes omitted].

[23] The failure to give reasons has been considered more than once in the context of a rationality review. It is well-established that if there is a failure to take into account relevant material, and that failure has an impact on the rationality of the entire process, then the final decision may be rendered irrational (see *Democratic Alliance v President of the Republic of SA & others* 2013 (1) SA 248 (CC), at para 39), where Yacoob ADCJ said the following:

> If in the circumstances of a case, there is a failure to take into account relevant to material that failure would constitute part of the *means* to achieve the purpose for which the power was conferred. And if the failure had an impact on the rationality of the entire process, then the final decision may be rendered irrational and invented by the irrationality of the process as a whole.

[24] In *Judicial Service Commission & another v Cape Bar Council & another* 2013 (1) SA 170 (SCA), Brand JA said at para 44:

> As to rationality, I think it is rather cynical to say to an affected individual: you have a constitutional right to a rational decision but you are not entitled to know the reasons for that decision. How will the individual ever be able to rebut the defense by the decision maker: “Trust me, I have good reasons, but I am not prepared to provide them”? Exemption from giving reasons will be for almost invariably result in immunity from an irrationality challenge.

[25] There is no reason why the same principle ought not to be extended to a review where the threshold is one of reasonableness rather than rationality. A failure to provide reasons will ordinarily give rise to an inference that the decision-maker

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failed to apply his or her mind to the issues in dispute. If that failure caused the reviewing party to lose, then the decision, on the face of it, is unreasonable. However, consistent with the *Sidumo* principle, the applicant must establish that the decision was actually unreasonable.[3]

Analysis

[26] The primary ground for review, it will be recalled, is that neither the exemption authority nor the appeal authority gave reasoned decisions and that to the extent that the authority concerned had regard to the evidence, it did not take relevant evidence into account, considered irrelevant facts and that the decisions bore no relationship to the facts and the purpose for which the exemption was sought. This had the consequence that the outcome of the proceedings (in the case of the exemption authority's decision, the partial exemption granted and in the case of the appeal authority, the refusal of the appeal) is unreasonable.

[27] Measured against the standard articulated by *De Smith*, the rulings of both the exemption authority and the appeal authority fail to give effect to the right to reasons for any administrative action. There are no material factual findings recorded, and no reasons are afforded for what amounts to a rejection of the applicant's submissions. Even less is there any reasoned basis for the conclusions reached, and in particular that of affordability in relation to the 6% increase that was ordered. Stripped to its core, the ruling of the exemption authority says no more than that it remains cognisant of the '*need to be equitable*' and for that reason, is was not prepared to grant a full exemption on the terms sought Similarly, in relation to the exemption from the bonus payment for 2018, the exemption authority simply records that it has considered the information and the financial situation of the applicant and orders payment of the

[3] Myburgh and Bosch, *supra*, at p239-40.

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full bonus on 1 June 2019. Again, no substantive reasons are finished for this ruling.

[28] The ruling of the appeal authority is not dissimilar in form and content. It simply records that the decision-maker, the second respondent, has considered the appeal and on the basis that the exemption authority had '*lowered the salary increases and made a reasonable decision on the bonus payment issues'*, and concluded that the appeal should fail. The second respondent appears to have thought that since the second ruling made by the exemption authority was more favourable to the applicant and addressed the issue relating to the bonus payment, those were sufficient grounds in themselves to dismiss the appeal.

[29] The terms of the main agreement required the exemption authority to take into consideration all relevant factors, which may include but are not limited to criteria that address the applicants' court of compliance, any special circumstances that exist, the interests of the industry in relation to unfair competition and centralised collective bargaining, the interests of employees as regards exploitation, job preservation, sound conditions of employment, and the like; and the interests of the employer as regards its financial stability and the viability of its business. These factors are listed to fulfil the requirements of s 32(3) (f) of the LRA. Both the exemption authority in the appeal authority approach the applications before them in an entirely misguided fashion. The correct approach is that set out by the Labour Appeal Court in *Trafford Trading*. At paragraph 24 the judgment, the court said the following:

> [24] The exemptions committee as well as the second respondent correctly, in my view, approached the matter on the basis that the appellant was obliged to comply with the provisions of the collective agreement. For an exemption to be granted the appellant must establish a justifiable reason why the collective agreement should not be complied with. It is therefore incumbent upon the applicant for exemption to place facts and evidence, before the two tribunals, representing special circumstances that justify the exemption of the applicant from complying with the collective agreement. This approach makes sense since the purpose of the Act as stated in sec.1 is also the advancement of economic

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> development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of the Act. Subsection 1 (c) states as one of the primary objects of the Act, provision of a framework within which employees and their trade unions, employers and employers' organisations can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest and formulate industrial policy.

[30] The applicant, having placed before both the exemption and appeal authority special circumstances in the form of facts and evidence that clearly justify an exemption from compliance with the main agreement, were entitled to expect the respective exemption authorities to interrogate the evidence and to make a considered and reasoned decision, based on that evidence, as to whether or not the exemption sought ought to be granted. While the factors listed in the main agreement are generally relevant, the crisp issue in the present instance was one of affordability. It was not open to the exemption and appeal authorities to treat the matter as one would a wage arbitration, where the decision-maker's function is largely redistributive in the sense of a balancing of competing interests and the determination of a fair outcome that seeks as far as possible to reconcile those interests. The nature of a process in which a party seeks exemption from the terms of a binding collective agreement on the grounds of affordability, raised as starkly as they are in the present instance, is less about reconciling competing interests than the determination of a factual dispute. In this instance, the decision-maker is required, primarily at least, to ascertain whether on the evidence, a proper factual case has been made out for an exemption in the terms sought. In the present instance, there was no evidence submitted by the union parties opposing the granting of the exemption that seriously called into question the dire financial straits and issues of affordability recorded in the applicant's submissions. In those circumstances, it was not open to the exemption authorities to reject the applicant's version in the summary terms that they did, and impose their view of an equitable settlement on Solomonic terms.

[31] Turning to the grounds for opposition to the present proceedings, NUMSA opposes the application only on substantive grounds. First, it submits that the

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applicant's viability is not at risk because Stats SA has shown continuous growth in commuters using bus services as opposed to trains. This evidence is contradicted by the undisputed evidence in the exemption application and subsequent appeal detailing the applicant's dire financial position and forecasts. However, the fact that more commuters may be utilising the applicant's bus service does not translate into financial viability, particularly where government subsidies have been reduced to levels which make the applicant's business unsustainable if it is to comply with the 2018 main agreement.

[32] NUMSA further contends that the applicant has not put forward any other cost cutting measure other than the exemption application, and that the inflation complained of affects employees 'in more dire ways' than the applicant. Again, this assertion is contradicted by applicant's undisputed evidence detailing its costs rationalisation measures and cost rationalisation plan on costs items other than employment-related costs. While the granting of the exemption will no doubt prejudice NUMSA's members, the undisputed alternative painted by the applicant's submissions is one where they have no jobs at all.

[33] Those of the applicant's averments that relate to the process followed by the exemption and appeal authorities are met with bald denials by NUMSA and assertions that the exemption and appeal authorities applied their minds to the relevant submissions and discharged their duties competently. On the face of the rulings under review, as I have found, in neither case were any substantive reasons given for the conclusions reached.

[34] In summary, the failure by the third and fourth respondents in their capacities as the exemption authority, and the second respondent, in his capacity as the appeal authority, to interrogate properly the evidence before them, and to provide substantive reasons for their decisions, constitute material misdirections.

[35] In accordance with the authorities to which I have referred, the court must decide whether notwithstanding the misdirections that have been identified, the result of the proceedings under review are nonetheless sustainable. I would observe only that in most cases where a decision under review discloses a lack of reasoning

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(or a failure to finish reasons), it can seldom be said that the outcome of the proceedings is in any event reasonable. The record of unchallenged evidence clearly does not sustain the outcome at which the decision-makers arrived.

[36] Ordinarily, in a matter where a decision is set aside on account of a failure to provide reasons, the matter is remitted to the decision-making authority for rehearing. The applicant submits that the present case is exceptional in that the same issue has been considered four times by the same authorities and that given the outcome in each instance, they have no faith in those authorities to afford them a fair hearing. This court is inclined to substitute the decision-makers finding for one that is appropriate after considering whether the result is a foregone conclusion, any prejudice that would be caused to the applicant by further delay, whether the decision-maker has exhibited bias and whether the court is in as good a position to make the decision itself. In this court, the statutory imperative of expeditious dispute resolution is a primary factor in the exercise of the discretion to limit or substitute. In *Palluci Home Depot (Pty) Ltd v Heskowitz and others* [2015] 5 BLLR 484 (LAC), the Labour Appeal Court held that where all the facts required to make a determination of the disputed issues are before the reviewing court so that the court is in as good a position as the administrative tribunal to make the determination, the court should decide the matter itself. That approach, the court noted, was consistent with the powers of this court under s 158 of the LRA '*which are primarily directed at remedying a wrong, and providing the effective and speedy resolution of disputes.*' Expedited finality is thus an important consideration in the determination of whether to remit the matter for reconsideration, or to substitute.

[37] The court has before it all of the relevant material and given the applicant's justifiable lack of faith in the exemption and appeal authorities, and given further that the interests of expeditious dispute resolution are best served by an order of substitution, I intend to substitute the decisions under review for that reflected in the order recorded below. I should add that the present dispute has delayed the applicant's ability to engage in future financial planning, and that its employees

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have had to endure a long period of uncertainty regarding their remuneration packages. It is in the interests of all concerned and in the interests of justice that there be no further delay in bringing this matter to finality.

[38] The applicant has filed a supplementary affidavit in which it has provided evidence of its updated financial position. The deponent records that the most critical aspect of the exemption application is the ability of the applicant to pay its creditors in the short term. The financial facilities currently available to the applicant have been exhausted and financial institutions have informed the applicant that facilities will not be increased in circumstances where it continues to be in a loss-making situation. The applicant avers that it would be more beneficial to the financial recovery process if a full exemption, as applied for in the initial exemption application, were to be granted. However, in a good faith attempt to secure certainty by way of an agreement on the critical issue of the 2018 bonus payment, the applicant made an offer to its employees and their union representatives for a staggered payment of the bonus. The applicant is of the view that a payment on these terms would enable it to survive its cash flow crisis and thus contribute to the job security of its employees as the applicant, over time, returns to a viable and sustainable financial position. The applicant's efforts to address the situation were met with unprotected strike action during December 2018 and a refusal by the unions to accept the proposal.

[39] The applicant has further annexed audited financial statements for the financial year ending 30 June 2018. It is also annexed a document prepared by its financial director which deals with the applicant's current financial situation and financial projections made on the basis of a number of scenarios. The audited financial statements expose the stark reality which existed at the time and which persist in regard to the applicant's ability to survive the loss-making situation in which it presently finds itself, and the projected cash flow situation experienced in the 2018 financial year, and which persists. The deponent records that the payment of the full bonus on the terms awarded by the second exemption appeal panel (with the punitive interest payment that accompanies it) will place the

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applicant in an impossible financial situation in which the facilities available to it would be exceeded, and financial institutions will refuse (as they already have) to extend for those facilities. In the current financial year (1 July to 31 December 2018) the reported loss for this period is R38 million. That loss takes into account the cost realisation measures (including retrenchment) and is based on an assumption that the exemption application is successful.

[40] In my view, the undisputed averments contained in the supplementary affidavit regarding the applicant's liquidity and the tender that it incorporates, provide the basis for both a substitution of the decisions under review and the terms of the order that I intend to grant.

Costs

[41] The applicant does not seek costs, and I do not intend to make any order as to costs.

I make the following order:

1. The decisions relating to an application and appeal brought by the applicant for exemption from clauses 3.2, 3.3, 4.1 (read with Annexure A) for the period 1 April 2018 to 31 March 2019, and exemption from clause 25 of the main agreement concluded by the parties to the South African Road Passenger Bargaining Council of South Africa (SARPBAC) of:

    1.1 the second exemption ruling issued by the Exemption Authority comprising the third and fourth respondents dated 15 August 2018; and

    1.2 the second appeal ruling issued by the exemption appeal authority comprising the second respondent dated 2 September 2018;

    are reviewed and set aside.

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2. The decisions referred to in paragraph 1 above are substituted by an exemption on the following terms:

2.1 that an across the board increase of 7% on the base rate of pay (as defined in the SARPBAC main agreement) applies from 1 April 2018 to 31 March 2019;

2.2 employees must receive back pay of 7% on the base rate of pay (excluding benefits and allowances) for the period 1 April 2018 to 31 March 2019;

2.3 the amount must be paid at the end of May 2019;

2.4 the annual bonus must be paid in three installments as follows:

a) the first instalment must be paid in December 2019,

b) the second instalment must be paid in December 2020,

c) the third instalment will be paid in December 2021.

2.5 Employees who are eligible for the 2018 annual bonus and who leave the service of the applicant before all three instalments have been paid, shall not forfeit any unpaid portion of the 2018 annual bonus.

3. There is no order as to costs.

André van Niekerk

Judge

APPEARANCES

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For the applicant: Adv. T Ngcukaitobi, with him Adv. G Snyman, instructed by Bowman Gilfillan Inc.

For the sixth respondent: Union official

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