



**THE LABOUR COURT OF SOUTH AFRICA
PORT ELIZABETH**

Not Reportable

Case No: PR 209/14

In the matter between:

**FORMEX INDUSTRIES
T/A FORMEX ENGINEERING**

Applicant

and

MIBCO

Respondent

Heard: 07 June 2016

Delivered: 07 June 2016

Date edited and signed: 07 June 2017

JUDGMENT

PRINSLOO, J

- [1] This is an application for the review in setting aside of the decision of the Second Respondent's (MIBCO) Appeal Committee where it dismissed the Applicant's appeal application in respect of a wage exemption application.

Brief background

- [2] A brief background to this matter is as follows; in terms of the MIBCO main agreement wage increases are annually implemented for the period 1 September to 31 August.
- [4] The Applicant falls under Division C of Chapter 3 of the main agreement and approximately 201 Formex employees falls under these wage increase provisions.
- [5] In 2010, 2011 and 2012 Formex was granted exemption from the stipulated percentage wage increase. This was granted by application or appeal or review to this court. The 2013 increase was paid in accordance with a special agreement between the Applicant and the relevant unions.
- [6] For the period 1 September 2013 a written wage agreement was concluded for a period of 3 years from 1 September 2013 to 31 August 2016, referred to as the 'exemption period', and that is the period relevant for this application.
- [7] The Applicant's case is that in light of its ongoing financial difficulties it applied for partial exemption from wage increases for the period 1 September 2013 to 31 August 2016. The application for exemption was in accordance with the wage agreement.

- [8] The wage exemption application was submitted on 14 January 2014 and amplified submissions were filed on 13 February 2014. The Applicant sought exemption from paying the full increase of the wage percentage increments and sought to be exempted to the extent that only partial increases would be payable.
- [9] On 31 March 2014 the Applicant received the outcome of the exemption application MIBCO as follows *“Please be advised that your application was considered at the Wage Exemption Board meeting held on 27 March 2014 and the board agreed that your application be declined.”*
- [10] The Applicant subsequently lodged an appeal in respect of the outcome of its exemption application on 14 April 2014. On 5 August 2014 the Applicant received the outcome of the appeal wherein it was stated that; *“Please be advised that your appeal application was heard at the committee of party officials held on 25 July 2014 and the committee agreed to uphold the decision of the Wage Exemption Board.”* No reasons were provided for the outcome of the appeal and the Applicant’s legal representative requested reasons for the decision.
- [11] On 26 August 2014 the following reasons were provided in a letter from MIBCO addressed to the Applicant. The reasons provided to the Applicant were as follows: *“The Wage Exemption Board on 27 March found that the following requirements were not met.*
- “1. Financials. The projection supplied does not make sense. The employer also applied for 3 years exemption when this application can only be considered annually.
 2. Proof of consultation. The minutes were not confirmed or signed off. There was no indication of which employees were present. There was no Annexure A signed off and included in the application. The appeal application was

therefore dismissed and the decision of the Wage Exemption Board was upheld.”

Summary

[12] In summary, the appeal was dismissed for mainly two reasons. Firstly, because the submitted projections did not make sense, and secondly because minutes were not signed off and there was no indication of who was present. The dismissal of the exemption as well as these reasons are the subject of this current review application.

[13] The record filed in this matter shows that the Applicant’s appeal submissions comprised of 225 pages in total. The Applicant’s grounds for review was set out in paragraph 32 to 37 of the founding affidavit and 21 to 25 of the supplementary affidavit.

[14] In the heads of argument the Applicant submitted that its grounds for review are three main grounds and those appear from paragraph 31.1 to 31.3 in the heads of argument. Those grounds are as follows.

1. The Appeal Committee failed to consider Formex appeal application in the manner which was required of it in terms of the main agreement, namely, by considering Formex appeal submissions and in particular the exemption criteria instead of treating the application as a review of the Exemption Board’s prevision decision.
2. There is no evidence that the Appeal Committee attempted to apply its mind to the application before it or to seek to obtain further clarity when the issues were apparent and clear.
3. The conclusion to which the appeal board came as described in the appeal reasons and set out in MIBCO’s answering affidavit

are, it is submitted not indicative of a body which had considered properly at all the application which was before it, nor are they sufficient to justify turning down the appeal application.

- [15] The first ground for review relates to the Appeal Committee's failure to consider the appeal application as required by the main agreement.
- [16] The Respondent's case, and as it was argued in court today, is that the application for exemption was defective from the onset and because there was no reason for the Exemption Board and subsequently the Appeal Committee to consider that application in its entirety.
- [17] The reason why the Respondent argues that the application was defective from the onset relates to the reasons provided relating to the financial statements Mr Quixley for the Respondent argued that the financial statements submitted by the Applicant were not sufficient and the second issue deals with the issue of consultation and the fact that Annexure A to the application for exemption was not properly signed as is required by the Respondent.

Grounds for review

- [18] I will deal with the first grounds for review namely that the Appeal Committee failed to consider the appeal as required by the main agreement.
- [19] The Applicant's case is that the main agreement in item 8.2(7) thereof provides for the exemption criteria the Appeal Committee must consider with reference to all appeals. There are 10 factors set out as criteria to be considered and those are, *inter alia*, that a written motivation must be submitted by the Applicant addressing the extent

of the consultation that took place, the scope of the exemption required and special economic or other circumstances which warrant exemption.

- [20] Mr Ellis, for the Applicant, submitted that there is no merit in the Respondent's case to say that there was no reason for the Respondent to consider the wage exemption application or the subsequent appeal application on the basis that there was no compliance with the main agreement. Mr Ellis argued that there was compliance in a material and substantive respect in that Annexure A, although not signed by the employees made cross reference to a record of attendance contained in the bundle that accompanied the application and it made reference to page 6 thereof.
- [21] Be that as it may, the main agreement is clear in item 8.2(7) where it stated that the Exemption Board must consider all appeals with reference to the said criteria. The appeal application that the Applicant submitted to the Respondent dealt with all the criteria and it was addressed in the submissions that accompanied the appeal application. The outcome of the appeal was communicated to the Applicant and that outcome was simply communicated as follows, *"Be advised that your appeal application was heard by the committee of party officials on 25 July 2014. The committee agreed to uphold the decision of the Wage Exemption Board."*
- [22] When reasons were requested the issues about the financial projections that did not make sense and the signing of the minutes were raised. The Appeal Committee stated that the minutes were not signed off, there was no indication of who were present and that there was no annexure signed off and included in the application.
- [23] The Applicant's case is that the minutes were not signed off but the attendance register was signed and it was explained that the unions

did not want to participate in the process around an exemption application. The attendance register in fact shows who was present and Annexure A was in fact included in the appeal application, and as I already alluded to made cross reference to the record of attendance.

[24] These were the reason for the reason for dismissing the appeal application as set out by the Respondent. Glaringly absent from the reasons is any reference to the criteria set out in item 8.2(7) of the main agreement. Whether the factors were indeed considered is unclear from the reasons provided and is thus necessitates a consideration of the transcript of the appeal proceedings. The transcript shows that the entire deliberation of the Appeal Committee in relation to the Applicant's appeal lasted for approximately 5 minutes and comprised 6 typed pages.

[25] My concern is not the fact that it lasted for 5 minutes because it is quite possible to take a proper decision in a few minutes' time. My concern is the content of the discussion that had been described and placed before this court. From the record placed before me it is apparent that the committee never properly considered the Applicant's application but rather took the view that the issue would any in event go to court and that they would meet the Applicant in court and that they would defend the matter in court.

[26] There was no proper analysis of the grounds for appeal or consideration of any of submissions made by the Applicant when the matter served before the Appeal Committee. It is evident from the transcript as well as the reasons provided for dismissing the appeal that there was no independent consideration of the appeal and the submissions made by the Applicant. There was rather an agreement to uphold the decision of the Wage Exemption Board.

- [27] In argument before Court Mr Quixley for the Respondent referred me to the very first paragraph in the transcript where the chairperson set out that this is an application for Formex and the technicalities experienced as *“the financial projects were not making sense. They also applied for 3 years whereas they can only apply for 1. And the proof of consultation we found to be inadequate as the minutes were not confirmed or signed off. And there is no indication of which employees exactly were present. There was no signed Annexure A.”*
- [28] I canvassed this issue with Mr Quixley in court and requested him to show me in the record, even if his argument was correct to say that these were the reasons provided by the Wage Exemption Board and accepting that his argument is correct, that the Appeal Committee had considered the argument or the reasons provided by the Wage Exemption Board, where the Appeal Committee embarked on an independent exercise to consider and analyse the reasons as provided by the Wage Exemption Board.
- [29] What I would have expected from the Respondent in considering the appeal was to take those reasons and to consider whether the financial projections indeed were not making sense, whether indeed there was any provision to say that the Applicant could not apply for 3 years and I am not repeating all the other reasons provided by the Respondents.
- [30] There was no assessment and there was no consideration. The Appeal Committee simply sent a message to the Applicant to say your appeal was heard and the committee agreed to uphold the decision of the Wage Exemption Board.
- [31] That is exactly the crux of this review application that there was no consideration of the factors to be considered by the Appeal Committee and that it was simply an agreement of the decision by the

Wage Exemption Board and that is what the Respondent communicated to the Applicant.

- [32] This ground for review is linked with the second ground for review in that the Appeal Committee did not apply its mind to the application before it and sought no clarity where the issues were unclear. In my view there is merit in these grounds for review.
- [33] The third ground for review is that the conclusion to which the Appeal Board came are not indicative of a body that has considered the appeal properly. In my view this ground for review relates to the outcome of the appeal process.
- [34] Mr Quixley argued that the Respondent was reasonable in dismissing the appeal application because there was no compliance with the main agreement from the onset and that the application was defective from the moment it was filed. I, however, cannot agree with that argument.
- [35] In the matter of *Trafford Trading (Pty) Ltd v the National Bargaining Council for the Leather Industry of SA*¹ this Court held that when considering an application such as this one the bargaining council has to consider the grounds for exemption as set out in the collective agreement, to look at the submissions and to make findings on those issues and considerations.
- [36] In *Trafford Trading*² the Court confirmed that the standard of review in exemption proceedings is reasonableness and the question to be considered is whether the decision is one that a reasonable decision-maker could not reach in the circumstances. The reasons given for

¹ (2010) 31 ILJ 761 (CC)

² *Supra*

the decision are not the sole determinant but all the material facts before the committee should be taken into account.

[37] *In casu* it is evident that the Appeal Committee did not consider the substantial appeal application before it. It provided reasons not only disconnected from the issues it had to decide, but that were not sufficient or convincing to justify the dismissal of the application for appeal in its entirety. The Appeal Committee had no regard for the criteria set out in the main agreement and did not consider the appeal application independently. Even on the grounds that they considered the reason for dismissal from the Wage Exemption Board, it is evident there was no independent consideration of those reasons. It follows that the outcome of the decision of the Appeal Committee was not reasonable.

[38] I canvassed the issue of costs with both representatives and both parties argued that costs should follow the result. I can see no reason to disagree.

Order

[39] In the premise I make the following order.

1. The ruling of the Respondent's Exemption Board dated 5 August 2014 is reviewed and set aside.
 2. The Applicant's appeal in respect of its exemption application is remitted to the Respondent for consideration *de novo*.
 3. The Respondent is to pay the costs.
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Connie Prinsloo
Judge of the Labour Court

APPEARANCES:

For the Applicant : Advocate Ellis

For the Respondent: Advocate Quixley