(1) Reportable: No
(2) Of interest to other Judges: Yes
(3) Revised

Signature Date

THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Of interest to other judges

Case no: PR237/23

In the matter between:

ENOCH MGIJIMA LOCAL MUNICIPALITY **Applicant**

and

THE SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL **First Respondent**

ADV M FOUCHE NO **Second Respondent**

INDEPENDENT MUNICIPAL & ALLIED WORKERS TRADE UNION **Third Respondent**

SOUTH AFRICAN MUNICIPAL WORKERS UNION **Fourth Respondent**

Heard: **12 February 2026**

Delivered: **This judgment was handed down electronically by emailing a copy to the parties. 30 October 2026 is deemed to be the date of delivery of this judgment.**

LABOUR COURT

JUDGMENT

KROON AJ

Introduction

[1] The Applicant (the Municipality) seeks the review, setting aside, and/or correction of the exemption ruling (the Ruling) issued by the Second Respondent (the Panellist), acting under the auspices of the First Respondent (the Bargaining Council). Both the Third Respondent (IMATU) and the Fourth Respondent (SAMWU) oppose the application.

[2] In terms of the Ruling, the application for exemption from the three-year Bargaining Council Wage and Salary Collective Agreement (the Collective Agreement) was refused. In this Court, the Municipality sought an order setting aside the Ruling and substituting it with a Ruling that the Municipality be granted an exemption from clauses 6.6 and 6.7 of the Collective Agreement until the pay levels, associated with the Municipality's grading as a Category 4 Municipality, are "*regularised*", or for such period and on such terms as the Court may deem appropriate. In the alternative, the Municipality sought the remission of the matter to the Bargaining Council, to be heard afresh by a different panellist.

[3] The exemption application was brought in terms of clause 15.1.15 of the Collective Agreement, concluded on 15 September 2021 for the period 1 July 2021 to 30 June 2024. Having complied with the Collective Agreement for the first two years, the Municipality sought a "*partial exemption*" for the third year. Under the Collective Agreement, employees of all municipalities were entitled to an across-the-board increase of 5.4%, based on the projected average CPI for 2023.

LABOUR COURT

[4] SAMWU raised whether the review application was brought in terms of the correct section of the Labour Relations Act No 66 of 1995 (the LRA). The point so raised is worthy of consideration. However, in light of the conclusion to which the Court comes, it is unnecessary to say anything further about it, and the Court will assume, without deciding, that no procedural hurdles preclude entertaining the merits of the application.

The factual matrix

[5] The salient facts are, for the most part, not seriously in dispute. In this context, the Municipality indicated in its heads of argument that it accepted the facts as captured by the Panellist in the Ruling, for the purposes of adjudicating the review application. It, however, contended that the Panellist's legal conclusions, drawn from the facts, were erroneous to the extent that they vitiated her decision.

[6] By way of overview, the Applicant in this matter, like many municipalities in this country, found itself in financial dire straits. It seems that, broadly speaking, the Municipality accepted that, for the most part, the reason for its predicament was that those who had managed and governed the Municipality historically had fallen way short of the mark. Maladministration and poor governance, including a decision to pay municipal employees on an inflated scale, so the Municipality said, had resulted in the Municipality being, in its words, "*technically bankrupt*".[1] In response, the national government intervened as contemplated by Section 139 of the Constitution and instituted a so-called financial recovery plan. The Municipality pursued other avenues in search of financial respite. There was potentially light at the end of the tunnel. However, the situation was serious and it was acknowledged that the emergence from the tunnel, if there was going to be an emergence at all, would be somewhere in the distant future.

[1] In short, monies owed exceeded revenue

LABOUR COURT

[7] The Panellist described the factual background to the matter as follows:

> *"15. The Applicant municipality was the culmination after the merger of three municipalities, the erstwhile Tsolwane, Inkwanca and Lukhanji municipalities. During the merger, in 2016, the employees of the former two municipalities demanded by way of strike action to be paid at the same level as the latter municipality's employees. That took them from municipal category 1 pay levels to category 4 levels. Much the same happened in 2018/2019 when, through industrial action, the employees managed to receive pay at municipal category 6 levels (and task grades were improved). The new municipality, the Applicant, had to carry the burden of the excessive payroll it had inherited.*
>
> .....
>
> *17. Job grades had to be normalised and other anomalies had to be resolved. Once resolved, the Applicant would be able to pay increases on the correct grades. Paying increases on the incorrect grades would not solve the problem, but would compound the wrong decisions of the past.*
>
> *18. In April 2022 and in terms of section 139(7) of the Constitution the national executive intervened and the Applicant remained subject to such intervention to date.*
>
> *19. The CFO of the Applicant, Mr Mahlalela, presented figures from the 2021 and 2022 audited financial statements and sections 71 and 72 reports reflecting the Applicant's financial position. There was, for example, an increase in creditor liabilities from R670+m to R990+m; the total revenue came to R846m, whereas the total expenditure was well in excess of R1b; instead of the supposed 8% to be used for maintenance, only some 0,3% and 0,03% was so used because of a lack of funds (the actual figures are 0,31% and 1,03%); debt collection, supposed to be at a rate of 95%, stood at 64% and 74%; instead of paying creditors within one to three months, some creditors were not paid at all because of a cash flow problem – it was a matter of robbing Peter to pay Paul; an amount of R1,1b was owed to*

LABOUR COURT

Eskom alone; infrastructure and service delivery grants were reduced by National Treasury.

20. *A financial recovery plan by National Treasury to assist the Applicant was adopted by its Council and was in the process of being implemented, although it was still in the early stages of implementation."*

Overview

[8] If the Court understood the thrust of the Municipality's position correctly, it was that it had turned over a new leaf, that there were new brooms who were of the mind to set things right, and that the sins of the fathers should not be passed down to the next generation when a successful exemption could contribute to restoring the finances of the Municipality. Rather, because a new administration had replaced the erstwhile administration, this was, so it was contended, a proper case where the Panellist should have had sympathy with the Municipality and should have afforded it relief in terms of the powers vested in her.

[9] The supplementary affidavit recorded as follows:

*"[8] Although the Municipality accepted that the grading issue fell outside the remit of the exemption tribunal, its argument was and remains that the costs caused by the higher grading were relevant to its financial distress and thus to the exemption application. The point made by the union, and accepted by the tribunal, that the Municipality could "*afford*" an increase in the third year of the agreement because it had managed to do so in the previous two years is tautologous - this is precisely why the Municipality was constrained to seek exemption in the third year.*

[9] The unions and the presiding panellist also ignored the fact that managers who had succumbed to the unions' demand that the Municipality be upgraded have been replaced by a new management team, headed by myself, and a new Council, which are legally obliged to take measures to ensure that the Municipality fulfils its constitutional and statutory mandate to provide the

LABOUR COURT

sustainable delivery of services to the community falling within its impoverished jurisdiction.

....

*[13] The only "*solution*" offered by the unions (and accepted by the panellist) to resolve these intractable problems was to improve management, implement more efficient debt collection and cut down on alleged unnecessary expenditure, which is precisely the objective of the current Council and management, but which clearly cannot be achieved overnight. The unions did not contradict the Municipality's explanation for each item of expenditure they claimed was unnecessary - including the hiring of additional security personnel to safeguard municipal property which had been torched by unidentified individuals."* (own emphasis)

[10] In his oral submissions before the Panellist, in support of the application for the exemption, Mr Jali, on behalf of the Municipality, explained as follows:

> "*The reasons why we are at this quagmire or the mess that we find ourselves in, it is because of the decisions that were taken earlier and the new Council that is now in .... they are saying we want to rectify all the ills and all the things that were done incorrectly by the employees of the Municipality and those that have left the Municipality. So that is our resolve.*" (own emphasis)

[11] At the level of principle, the Court has two difficulties with the Municipality's submissions under this heading, i.e. that the Panellist should have, so to speak, come to the rescue of the Municipality, given the historical maladministration perpetrated under the remit of the erstwhile Municipal Council.

[12] The first difficulty is that, at conceptual level, insofar as it is so suggested, it is not permissible for an organ of state to avoid accountability by drawing a line between different eras of governance. In *Altech Radio Holdings (Pty) Ltd and Others v Tshwane City*,[2] the Supreme Court of Appeal rejected a similar

[2] 2021 (3) SA 25 (SCA)

LABOUR COURT

argument, albeit that it was raised in a different context – as a justification for an allegedly unacceptable explanation for an unreasonable delay. The Court commented as follows:

> *"[24] The core contention advanced by the City is that the delay is justified because the DA only won control of the City in August 2016 and thereafter required time to investigate the alleged irregularities perpetrated under the previous ANC controlled administration. That contention appears to have found favour with Baqwa J, who held:*
>
> > '(O)fficials of the previous administration who vacated their positions with the [City] were no longer there to account for their omissions and the new officials had to find their way virtually in the dark to establish the correctness or otherwise of the decisions of their predecessors.'.
>
> *[25] I cannot agree with the learned judge. At the level of law, a change in political control of an organ of state, such as the City, is irrelevant. The City is a single juristic entity. It accepts that the change in political administration did not make it a different juristic entity. ...."* (own emphasis)

[13] The second difficulty, in the Court's view, is, as was submitted by Mr Qhali, who appeared on behalf of SAMWU, that it would generally not be fair or proper for an organ of state, such as a Municipality, to rely on its own substandard administration to justify the granting of an indulgence of the nature sought in this application. The natural question is why the hapless employees should effectively be held responsible, or in part responsible, for the consequences of the prior bad governance of the powers that be.

[14] Although not strictly analogous, in my view, a comparison may be drawn with the scenario where a deviation is sought, from compulsory procurement procedures in the public sector, based on a dilemma which is either self-created or self-inflicted. It has been held, in that context, that recourse may only be had to a deviation in exceptional circumstances. In *Joubert Galpin Searle Inc and Others v Road Accident Fund and Others,*[3] the Supreme Court of Appeal explained that *"poor planning"* on the part of the organ of state cannot serve as

[3] [2014] 2 All SA 604 (ECP); 2014 (4) SA 148 (ECP)

LABOUR COURT

a basis for justifying a failure to comply with procurement procedures[4]. A similar approach was taken in *Martin Noel Pietersen v the State*[5] where the Court found that when the dilemma an organ of state finds itself in is *"self-imposed"*, there can be little scope for deviations.[6] Expressed differently, if an organ of state seeks relief of this nature, reliance on its own poor performance will generally not be acceptable.

[15] As mentioned above, the stark fact is that the Municipality itself is responsible for the perilous financial situation it finds itself in. Yet it seeks, at least to some degree, to hold its employees responsible for its own maladministration by effectively penalising them when it comes to their entitlement to remuneration increases. Whilst there can be no absolutes when it comes to the exercise of a discretion of the nature in question, it offends one's sense of justice and fairness if the Municipality were to escape the natural consequences, albeit to a degree, of its poor governance and maladministration by transferring those consequences onto its employees. This would particularly be so in circumstances where the members of the Municipal Council receive increases when they are not entitled, as of right, to same.[7]

[16] If the sentiments expressed above may validly be applied to the current situation, as the Court believes they can be, then much of the wind is taken out of the sails of the Municipality's case. Nonetheless, a detailed analysis of the exemption application is desirable, if not required.

Reasoning of the Panellist

[17] The Collective Agreement lists the applicable criteria as follows:

---

[4] [79]

[5] (A309/2017) [2019] ZAWCHC 93 (6 February 2019)

[6] para [52]

[7] The Court accepts the point made by Mr Grogan, who appeared on behalf of the Municipality, that the amount paid to the Municipal Council members would not have come close to the footing the bill for the increase payable to the employees. It should accordingly not be blown out of proportion. That said, increasing the remuneration of Councilors, who are not employees and where there is no obligation to do so whilst, in the same breath, requesting that employees forfeit, in their entirety, the increases to which they are entitled, as of right, must, at some level, impact adversely on the integrity of the exemption application.

LABOUR COURT

"*15.1.15.1.1 Any written and/or verbal substantiation provided by the applicant or a Party to the SALGBC;*

15.1.15.1.2 Fairness to the employer, its employees and other employers and the employees in the local government sector;

15.1.15.1.3 Whether an exemption, if granted would undermine this agreement or the collective bargaining process;

15.1.15.1.4 The employer is unable to afford the costs of the whole or part of this agreement;

15.1.15.1.5 The employer has short-term cash flow problems necessitating a limited exemption;

15.1.15.1.6 Unexpected economic hardship occurring during the currency of this agreement and job creation and/or loss thereof;

15.1.15.1.7 whether a budgetary provision, approved by National Treasury, was made for implementation of the obligation arising out of the collective agreement;

15.1.15.1.8 Any process or directives as may be agreed to by the Executive Committee from time to time; or

15.1.15.1.9 Any other factor(s) which is considered appropriate."

[18] The Panellist considered each criterion. In refusing the application for an exemption, she reasoned as follows:

"47. The primacy and binding nature of a collective agreement is a well-known fact and need not be dwelled upon. Therefore, a deviation or exemption from a collective agreement should be treated with prudence and in a judicious

LABOUR COURT

manner. I was referred to authority [8] in this regard. The principle that stands out is that exemptions, adopting a narrow approach and not to be readily granted, may be granted in a case of a party to a collective agreement experiencing undue hardship.

48. *Exemptions ought to be considered in light of the overall interests of the sector with fairness to both sides in mind, while maintaining confidence in the collective bargaining process. Exemptions too easily granted may undermine that confidence.*

49. *The application is based on the issue of affordability. The Respondents acknowledged the financial challenges faced by the Applicant, but are of the view that increases could be paid were finances managed and controlled properly.*

50. *The Applicant referred to the categorisation of the Applicant municipality and the fact that employees were accordingly paid on incorrect grades, a fact that contributed to the financial distress experienced by the Applicant. This forms part of the historical debts inherited by the Applicant and conceivably contributes to its financial situation. The Applicant contends that two wrongs cannot make a right, i.e. paying increases on the incorrect grades.*

51. *The categorisation is not a matter to be determined by this forum. The Applicant should have endeavoured to rectify the categorisation, if it is indeed incorrect, long ago. Seven years have lapsed since one of the erstwhile municipalities applied for a re-categorisation and nothing has been placed before me to the effect that the Applicant has submitted a similar application since.*

52. *More glaring though is the fact that the Applicant paid increases in the past two years, covered by the same collective agreement, based on what it calls the incorrect grades. If the grades played such a prominent role they should have been corrected before or soon after the current collective agreement took effect. I agree with the Applicant that two wrongs do not make a right,*

---

[8] *Kem-Lin Fashions CC v Brunton & Another* [2001] 1 BLLR 25 (LAC); (2001) 22 ILJ 109 (LAC); Du Toit *et al*, Labour Relations Law: A Comprehensive Guide, 6 ed, LexisNexis.

LABOUR COURT

but the grades could hardly be used as a factor when they evidently were not much of a concern in the past two years.

53. *A fairly new administration is also not a reason for not having turned around the financial issues and not resolving factors that contribute to the financial issues. Given the fact that many of the senior officials in the new administration have been there for a year or more, much could have been done to alleviate some of the problems. It is a matter of putting shoulder to the wheel. And, the Applicant has been subject to a section 139 (of the Constitution) national intervention to assist the new administration since early part of last year.*

54. *According to the Applicant, its total revenue was R846m, whereas the total expenditure was well in excess of R1b, with R1,1b owed to Eskom alone. Creditor liabilities increased by some R300m, debt collection decreased and was well below the benchmarked 95% and grants have been reduced. The section 71 report of 2023 reflects R624m received in revenue, whereas the operational costs are in excess of R950m, a deficit of more than R300m. As a result, creditors cannot be paid in time or not at all and less is spent on maintenance.*

55. *According to the First Respondent, the Applicants* [sic] *shows a surplus of R28,6m and a positive cash-flow of R5,2m, although the cash-flow is decreasing. According to the Second Respondent, the Applicant shows a year-on-year increase in revenue and in cash-flow and there was a positive balance in cash at the end of 2022. Both Respondents pointed out that expenditure increased, including unexplained expenditure, and blamed it on mismanagement and a lack of control over financial issues. In addition, an increase for councillors had been budgeted for, whereas no increases or a decrease in salaries were budgeted for in respect of employees. Not all the figures referred to by the Respondents could be verified.*

56. *The Respondents are of the view that the financial recovery plan and the municipal debt relief programme will assist and make it possible for the Applicant to afford the increases. The Applicant agreed that the debt relief programme would assist, but did not see it as the ultimate solution; other*

LABOUR COURT

measures had to be implemented. In the latter regard, it is probable that the recovery plan will go some way in turning the Applicant's financial situation around, especially with the assistance of national intervention. The Applicant has now applied for debt relief in respect of the Eskom debt. An outcome has not been received as yet and, considering Circular 124, an approval of the application is not guaranteed – which is a point of concern. If approved, the Applicant will have to realise that conditions under the programme will have to be met at all cost.

57. *The Applicant submitted that the total payroll made up some 50% of its total revenue. The financial expert, Mr Kumar, indicated that the payroll came to between 30% - 40% over the past two years, well within the benchmark.*

58. *Turning to the factors contained in clause 15.1.15 of the Salary and Wage Collective Agreement which have to be considered when determining an exemption application: the first factor is the written and/or oral submissions by the parties. These are being considered in this ruling. The second last factor in the list of nine, that of any process or directive agreed to by the Executive Committee, finds no application in casu.*

59. *The second factor is fairness to the Applicant and its employees, as well as other employers and employees in the local government sector. The Applicant maintains that its employees are being paid on the incorrect grades. Both Respondents are of the view that withholding an agreed increase would have a negative effect on the morale and motivation of the employees, especially when considering the fact that their counterparts in other municipalities have received increases and those municipalities paid despite their financial positions. Moreover, it is unfair to pay an increase to councillors, but no increase to the employees.*

60. *Any incorrect grades must be resolved without delay. In the meantime, as observed above, the grades cannot be used as a justification not to pay increases. I agree with the Respondents that withholding an increase would probably have a negative impact on employees. However, this argument considers fairness to the employees only and fairness to the employer is overlooked. The circumstances of the two sides need to be balanced. On*

LABOUR COURT

the other hand, the Applicant provides for increases of councillors, but not for employees. This cannot be correct as councillors are not employees and employees should enjoy priority. The first obligation must be towards employees, not the councillors.

61. *The third factor is whether an exemption would undermine the collective agreement in question or the bargaining process. The Applicant's position is that an exemption would not undermine the agreement as its commitment to the agreement can be seen from its compliance over the past two years (last year as a result of a compliance order and subsequent arbitration award). The Respondents' view is that the increase to be paid is well below the official inflation rate, agreed to by the Applicant via its representative in negotiations. Furthermore, a collective agreement is intended to create stability, security and industrial peace. Withholding an increase would cause unjustifiable hardship to employees.*

62. *With the correct approach an exemption would generally not undermine a collective agreement or the bargaining process as both employers and employees are well aware that circumstances may arise which necessitate an exemption, the very reason why exemption is provided for in collective agreements. The emphasis must be on a prudent and cautious approach to exemption. The Respondents repeatedly referred to a modest or below inflation rate increase of 4,5% or 4,9%. This is misleading. In terms of clause 6.7 the increase would be based on the projections of the Reserve Bank – which was done, hence the circular that was issued by the General Secretary of the SALGBC. The circular was issued after a meeting in which all parties participated and agreed to the rate as 5,4% (as the projected CPI rate). The increase to be paid by the Applicant is, therefore, slightly more than what the Respondents led us to believe. Different amounts were mentioned by the parties, ranging between R16m and R23m for salary increases alone, increases in benefits to be included.*

63. *The fourth factor is whether the employer is unable to afford the costs of the whole or part of the agreement. The Applicant contends that it cannot afford the costs in respect of the entire agreement because of its financial distress. Not having to pay increases would mean a saving of almost R23m.*

LABOUR COURT

According to the Respondents, the increases can be afforded although it may be difficult to do so. Financial controls and the curbing of irregular spending are required.

64. *The figures presented by the Applicant show financial difficulties. The Respondents acknowledged the financial challenges more than once, but were of the view that better financial controls were called for. In a perfect world the Applicant should be able to turn its finances around overnight. However, we do not live in a perfect world. If the Applicant was unable to stabilise things over a number of years (since its inception, after the merger), one cannot help to wonder about is ability to do so now. In this regard the Applicant needs to rely on the recovery plan and debt relief programme and call on the assistance of the national intervention. It must be added that the First Respondent's suggestion of a loan to pay increases is not a good suggestion. The last thing a person or entity in financial distress needs is to incur more debt.*

65. *The fifth factor is whether the employer has a short-term cash-flow problem necessitating a limited exemption. According to the Applicant, it has a cash-flow problem. The Respondents disagree. The First Respondent acknowledges a decrease in cash-flow and the challenges faced by the Applicant in this regard but, if well managed by implementing the recovery plan and debt relief, increases can be afforded.*

66. *The cash-flow presents a problem although the figures may reflect some positive cash-flow. There is clearly not enough money to pay all creditors on time or at all and Eskom has not been aid* [sic] *for a considerable time.*

67. *The sixth factor is an unexpected economic hardship during the currency of the agreement and job creation or losses and the seventh factor is whether the budget makes provision to comply with the agreement. According to the Applicant, job losses are a possibility should its current financial situation continue. Its budget, providing for increases, is unfunded. The Second Respondent's opinion is that no increases have been budgeted for. The First Respondent holds the position that a reduction in salaries has been budgeted for whilst councillors stand to receive an increase.*

LABOUR COURT

68. *A possible loss of jobs is a very relevant factor to be considered. It could very well be argued that, if both sides could agree on a smaller than agreed increase or no increase at all, jobs could be saved, which means better job security.*

69. *The Applicant added that employees' rights would not be infringed by an exemption, that National Treasury is assisting in the recovery of its financial situation and that it is in compliance with the statutory requirements in terms of other applicable legislation.*

70. *It is a positive sign that National Treasury will assist and that the debt relief programme may, if conditions are complied with, bring a degree of relief to the Applicant's financial distress. It is a further positive sign that the Applicant is able to comply with the costs occasioned by the legislation other than the LRA, under which collective agreements are concluded. However, the Applicant is incorrect in holding that employees' rights would not be infringed if an exemption is granted. The employees are, in terms of the Salary and Wage Collective Agreement, entitled to an increase. If that increase is not paid, their rights are not respected.*

71. *The First Respondent added under "*other factors*" (the ninth factor) public interest. The citizens of the country, funding the fiscus, are entitled to proper services. Employees are unlikely to be able to render such services where their personal circumstances are imperilled and their standard of living eroded by irresponsible governance.*

72. *Once again, the First Respondent is concentrating on employees only without regard to the employer's situation. That can be expected; that is what unions do. But, if fairness to both employer and employees are to be considered, the employer's circumstances should not be overlooked. A municipality has the obligation to provide services to the public. It needs funds to do so. Employees are unions must also realise that it is not about their subjective feelings and reactions only but, in the bigger scheme of things, about the broader public and every citizen in the country – which includes them.*

LABOUR COURT

73. *In summary of what has been said: it is clear that the Applicant is in a precarious financial situation. It has a deficit that cannot be ignored. On the other hand though, it is clear that the Applicant needs to re-prioritise. We have not had the benefit of viewing and studying the budget, but from what has been submitted, it appears that some aspects are provided for, others not. One or two examples will suffice: it cannot be said that increases for councillors are more of a priority than increases to employees, not if an increase for employees has been negotiated and included in a collective agreement. Nor can it be justifiable that expenditure on contracted services has been increased considerably, such as more than R1m per month more on security (despite the fact that more security guards were needed).*"

Analysis

Introduction

[19] The Collective Agreement enjoins the Exemption Committee to consider the range of factors identified above. As mentioned, in substance, the Municipality contends that the Panellist failed to apply her mind properly to the exemption criteria.

[20] As a point of departure, exemption applications are, by definition, granted only in exceptional circumstances and where a proper case has been made out. The purpose of the discretionary power to exempt an employer from a term of a collective agreement, forged through the sacrosanct process of collective bargaining, is to cater for special or unforeseen circumstances.[9] A good example would be a natural disaster such as a flood which wreaked havoc with the infrastructure of a Municipality, resulting in catastrophic financial losses.

[21] Exemption applications are to be considered in light of the overall interests of the sector in question, which is self-evidently invested in ensuring consistency and fairness to all parties, as well as preserving confidence in the institution of

[9] *Kem-Lin* para [24]

LABOUR COURT

centralised collective bargaining. Significantly, the power to grant an exemption is taken out of the hands of municipalities and is given to skilled panellists, who are independent third parties. This fosters accountability, ensures transparency and fairness, and curbs abuse. It ensures that an exemption is granted only where it is reasonable and justifiable. On the other hand, it must be borne in mind that the exemption procedure is itself a product of collective bargaining and is contained in the collective agreement. It follows that it is nonsensical to say that the granting of the application, without more, or *simpliciter*, somehow undermines the institution of collective bargaining.

[22] Importantly, a Review Court is not at large to substitute the Panellist's finding on the basis that it would have made a different finding. Its power to interfere is limited to circumstances where a proper case has been made out on review. Although it is unnecessary for me to decide (I take the view that the application would fail even if the Court had to apply a so-called *"loose"* discretion), it seems to me that in granting an exemption of this nature, a panellist exercises a narrow or true discretion, an exemption being in the nature of an indulgence, akin to that of condonation. Scope for interference is, accordingly limited.[10]

Overview of the approach taken by the Panellist

[23] I do not think that it can be said, with any conviction, that the Panellist did not take the time and trouble to consider the various factors and to apply her mind to them. It is clear that she dealt, methodically, with each of the criteria, and although there may be one or two questions about the weight which she attached to some of the factors, in the Court's view this is not a case where it can be said that the Panellist made errors which were of such a nature that they served to vitiate her Ruling. After having applied her mind and having considered norms of fairness, she ultimately concluded, in the Court's view, in a rational manner that what was required was an exercise of re-prioritisation

[10] *Cf. Government Printing Works v Public Service Association and Another* [2025] 2 BLLR 112 (LAC); (2025) 46 ILJ 915 (LAC) para [19]; *Zwane and Others v Orange Grove Dairy (Pty) Ltd and Others* (A2025/165189) [2026] ZALAC 42 (28 September 2026) para [17]

LABOUR COURT

when it came to expenditure and not, to put it colloquially, a bailout in the form of a reprieve from having to pay remuneration which was due to the employees concerned. I agree with the contention by Ms Harvey, who appeared on behalf of IMATU, that the panellist did not treat the collective bargaining as an absolute trumping all other factors. She weighed it against affordability, fairness and the public interest. She also took into account the financial distress of the Municipality and weighed it against other factors, including the question of fairness.

[24] Thus, the Court is of the view that there is no basis to contend that the Panellist did not properly exercise her discretion. Indeed, the majority of the Panellist's inferences and conclusions were justified and, even if one or two were accompanied by a degree of over- or under-emphasis, or even speculation, either these instances were not material to the outcome or, whilst all of the inferences may not have been the ones which the Court would have drawn, they do not fall outside the bounds of reasonableness. As IMATU pointed out, the case of the Municipality (which bore the onus) was itself, to a large extent, based on speculation. Without wishing to be overly critical, the impression gleaned is that the Municipality had adopted what is called in the common vernacular a shotgun approach, exploring all conceivable avenues to save money, inclusive of the exemption application. There is nothing objectionable about such a strategy in principle but, by the same token, the Municipality should not be surprised if every avenue followed did not yield fruit. I now turn to the individual factors insofar as this may be necessary.

Maladministration by the Municipality in general

[25] This factor has, to a degree, already been dealt with. The Panellist, having stated the obvious, that exemptions are the exception rather than the rule because of the importance of collective bargaining in the labour law landscape, effectively found that the Municipality only had itself to blame for the financial distress which it was experiencing, and from which it sought to break free. She emphasised the circumstance that, when it came to the Municipality, next to

LABOUR COURT

little had been done as the years slipped by and that, on the contrary, the Municipality had been content to accept, if not the correctness, then the reality of the fact that the Municipality had been categorised at grade 6, given that, for the last two years, it had paid increases on this premise.

[26] In the Court's view, the appropriate way to remedy maladministration and poor governance is intervention as provided for by the Constitution and legislation, turnaround strategies as well as the securing of debt relief and other similar measures, and not, in effect, by requiring, at least as a default measure, that employees be penalised for the way that the Municipality had been running itself in the past. Ultimately, if a municipal council is not able to properly administer and govern within its jurisdiction, its Council risks being voted out of office. That is how democracy works.

The categorisation issue

[27] Although not expressly stated, the impression which the Court gained was that the incorrect grading of the Municipality was the mainstay of the exemption application. In the context of debating the test that the Court should apply and in particular the limits when it came to interference with an exemption ruling, the following exchange took place:

> *"COURT: You said something earlier about whether the right amount of weight, is that not a bit of a grey area? If there is a material fact which could have altered the outcome and that is completely disregarded, then I can say the discretion was not exercised properly. But if it is just a question of how much weight was attached, is it not very difficult for me to interfere to a particular factor?*
> *MR GROGAN: I would readily concede to that. And the one material factor that the municipality alleges was given no weight at all was the incorrect grading.*
>
> *COURT: So, I mean, I think it is common cause that that was disregarded. So, the only question is whether it should have been disregarded. If it was disregarded, then it certainly was material.*
> *If it was wrongly disregarded, and that is a decision which I will have to ponder on.*

LABOUR COURT

MR GROGAN: Yes.

COURT: Is that, would you say that that is the primary point? Do you have a, again not wanting to put it crudely, a number 2 and a number 3 when it comes to ...[intervenes]

MR GROGAN: They are all listed in the supplementary affidavit and largely replicated in my heads of argument. And I suppose they go down, well, they do not go down in order of priority, but they all relate to the holistic assessment of the ultimate finding that is made." (own emphasis)

[28] Indeed, as mentioned above, the relief sought on behalf of the Municipality, as contained in the notice of motion, is inextricably linked to the alleged erroneous categorisation of the Municipality. It is appropriate, at this point, to note that the relief sought in the notice of motion was, to an extent, incompetent. It was formulated in a manner resembling an interim interdict in that it contained a prayer that the Ruling be substituted with a finding that the exemption be granted until the event of the regularisation of the alleged incorrect pay levels. The Panellist was self-evidently only entitled to grant an exemption for the period of the final year of the increase, as was prayed for in front of the Panellist.

[29] The complaint of the Municipality under this heading is summarised in the supplementary affidavit provided as follows:

"*8. Although the Municipality accepted that the grading issue fell outside the remit of the exemption tribunal, its argument was and remains that the costs caused by the higher grading were relevant to its financial distress and thus to the exemption application. The point made by the union, and accepted by the tribunal, that the Municipality could "afford" an increase in the third year of the agreement because it had managed to do so in the previous two years is tautologous - this is precisely why the Municipality was constrained to seek exemption in the third year.*

9. The unions and the presiding panellist also ignored the fact that managers who had succumbed to the unions' demand that the Municipality be upgraded have been replaced by a new management team, headed by myself, and a new Council, which are legally obliged to take measures to ensure that the

LABOUR COURT

Municipality fulfils its constitutional and statutory mandate to provide the sustainable delivery of services to the community falling within its impoverished jurisdiction."

[30] As mentioned, the alleged incorrect categorisation was one of the main pillars, if not the main pillar, on the strength of which the exemption application was brought. At the same time, the Municipality, correctly so, acknowledged that the merits or otherwise of a challenge to the alleged wrong categorisation was not a matter for the Panellist. [11] The Court agrees that the lawfulness of the Municipality's categorisation is a matter for a Superior Court. An arbitrator has no powers of review,[12] nor are any such powers contained in the provisions of the collective agreement, which is the source of the Panellist's powers when it comes to pronouncing on exemption applications. This, notwithstanding, the Municipality sought to rely on the alleged unlawful grading of the Municipality to justify the application for the exemption, even though, at the risk of repetition, it acknowledged that this alleged unlawful categorisation was not a matter for consideration by the Panellist.

[31] By way of background, the facts suggest that the recategorisation took place some seven years ago and the Municipality is, as the Court understands it, yet to launch any legal proceedings to rectify this alleged sorry state of affairs. All that has happened is that the new Council has taken a resolution authorising litigation. As to how the Municipality came to find itself in what he contends is an unjust and inequitable situation, although the details were not discussed at length in the arbitration or in the Court papers, it appears that the Municipality allowed a wrong categorisation and wrong task levels arising from the amalgamation of various municipalities (which then formed the Municipality) to become entrenched before the legal status of the categorisation, the proper grading of posts and the financial implications of the remuneration

[11] Through its actions (acknowledging that legal proceedings must be instituted to challenge the categorisation), the Municipality accepted that a court of law can adjudicate Council's decision. Mr Grogan did state that although Council had approved a resolution in 2023 for the institution of legal proceedings, he had no instruction as to the status of any such proceedings.

[12] *Department of Justice v CCMA and Others* [2004] 4 BLLR 297 (LAC) para [73]

LABOUR COURT

arrangements had been satisfactorily resolved. That at least is the version of the Municipality.

[32] On the face of it, one would have thought that if the Municipality was going to make out a case for its recategorisation then, on its version, it could and should have timeously adopted a resolution to follow the necessary steps to regularise the erroneous categorisation, including approaching the High or Labour Courts. Depending on the facts, the Municipality could have sought relief in a superior Court for a declarator on the correct categorisation, as well as appropriate consequential relief, including relief relating to the correct and/or recovery of the contentious remuneration arrangements. None of this happened, and more than half a decade slipped by whilst, at least according to the Municipality, public funds were dissipated on inflated salaries and, to use a proverbial expression, the Municipality fiddled while Rome burned.

[33] If I understand the submissions made by Mr Grogan, the challenges facing the Municipality, on this issue, were caused by the circumstance that the employees, at the time, through the vehicle of unprotected industrial action, improperly or unlawfully attempted to exert, and indeed did exert, pressure on the Municipality. It is most unfortunate if it is true, as alleged, that the Municipal Council kowtowed to a group of mutinous striking workers, taking public funds earmarked for service delivery and funnelling them to pay inflated salaries. That would be a betrayal of their mandate to serve the populace. But, the Court cannot accept that the circumstances, so described by the Municipality, could ever serve as a legitimate basis to excuse an organ of state, such as the Municipality, from having been acquiescent, or even a party, to the unlawful categorisation. There comes a time when an organ of state, in the position of the Municipality, needs, so to speak, to stand its ground and to uphold the rule of law, to demonstrate what the Supreme Court of Appeal[13] and the

[13] *Cf. MEC for Health, Province of Eastern Cape NO and Another v Kirland Investments (Pty) Ltd t/a Eye & Laser Institute* 2014 (3) SA 219 (SCA) paras [1], [7], [10] and [11]

LABOUR COURT

Constitutional Court have referred to as "*moral courage*".[14] The buck stops with the Municipality. The Municipal Council made decisions relevant to the categorisation of the Municipality (not the trade unions or the employees), and the Council was not entitled to abdicate its constitutional responsibilities in the face of unlawful pressure from employees.

[34] But the Court must immediately record that the views it expresses on this issue are not binding because the lawfulness or otherwise of the allegedly erroneous categorisation was not before the Panellist, and the Panellist was not apprised of all the relevant facts. Furthermore, the Municipality's alleged erroneous re-grading was hotly disputed. In particular, it was disputed, on behalf of IMATU, by Ms Harvey that unprocedural industrial action was the genesis or the cause of the alleged incorrect grading.

[35] Returning to the contention that the Panellist should take into account the allegedly inflated salaries, the Court views such a submission as problematic at two further levels.

[36] Firstly, there is the insurmountable hurdle which arises from the well-known *Oudekraal* principle which holds that an administrative act, until reviewed and set aside, exists as a matter of fact and has legal consequences. It must surely follow from this principle that it is not permissible for the Municipality, in effect, to ask the Panellist to ignore an administrative decision which is binding until set aside and which, indeed, may never be set aside and, on the back of this approach, to ask for relief on the basis that the decision is wrong in law. That is the one thing which the Court has held is impermissible.[15] Until the administrative decision, and only if, is set aside, the rule of law requires that the beneficiaries of that decision not be prejudiced.

LABOUR COURT

---

[14] *Cf. Member of the Executive Council for Health, Province of the Eastern Cape NO and another v Kirland Investments (Pty) Limited t/a Eye and Laser Institute* 2014 (3) SA 481 (CC) paras [31] and [38]

[15] *Kirland* (Supreme Court of Appeal and Constitutional Court decisions)

[37] In this context, the impression may be gleaned that the Municipality, in effect, sought, at the hearing of the exemption application, to persuade the Panellist, so to speak, to look into the future, as if she were an oracle, and to accept that the Municipality will be successful in the setting aside of the alleged erroneous categorisation and, on that basis, to come to the assistance of the Municipality. If that were the thinking, then granting such relief would have been patently premature. It needs only to be stated that there can be no guarantee as to the outcome of any Court case.[16] The Review Court may disagree with the contention that there was an erroneous categorisation. The Review Court may find that an unreasonable delay has created an insurmountable hurdle to considering the merits of any challenge. The Review Court may be prepared to declare the grading unlawful but not to award any consequential relief or to set it aside. The list of contingencies is not a closed one.

[38] Secondly, what the Municipality's submissions overlook, under this heading, is that a Superior Court, when considering a *lis*, will have jurisdiction over both the cause of action and the nature and extent of the relief to be granted. The Bargaining Council is prohibited from usurping the powers of the review court in respect of both the cause of action and the relief which may be granted should the litigation instituted in that forum be successful. Any Superior Court that considers the merits of the review application will not only be immersed in the matter, but will be seized with it, and accordingly must decide the appropriate relief to be granted. Because the merits cannot be divorced from the quantum, it is not permissible for the Municipality to seek, in an exemption application, to smuggle in a request for relief, dressing it up as a request for an exemption, where that request should have been made to the Review Court tasked with pronouncing on the alleged wrong categorization, such relief presumably taking the form of a request for a retrospective order.

[39] The Municipality may or may not have a claim of unjustified enrichment against the employees who received allegedly inflated salaries if such are proved. That,

---

[16] *Cf. Benteler South Africa (Pty) Ltd v Busakwe and Others (Application for Leave to Appeal)* (PR177/22) [2026] ZALCPE 27 (20 October 2026) paras [66] and [67]

LABOUR COURT

however, without wishing to belabour the point, was not a matter for the Panellist. Such a claim must be pursued in the appropriate forum and utilising the appropriate legal remedy. In all probability it would be a delictual claim. It is also not permissible to introduce surreptitiously a delictual claim, as it were, through the back door and under the guise of an application for exemption.

Undermining of collective bargaining

Shorn of all elaboration, the Municipality criticised the Panellist for effectively ruling that a partial exemption would negatively affect collective bargaining and would undermine collective agreements concluded by the Bargaining Council. The Municipality alleged further that the Panellist gave undue weight to the doctrine of collective bargaining, which in turn tainted her evaluation of the factors she was enjoined to consider under the Collective Agreement. It was contended that this thinking has no place in exemption applications, because an exemption procedure would serve no purpose if that were the overriding and determinate consideration in each case. Reference was made to *City Tshwane Metropolitan Municipality v Kleinot N.O. and Others*,[17] a judgment concerning an application for leave to appeal as delivered on 15 July 2025.

[40] In my view, it is clear that the Panellist applied her mind to how much weight to attach to the primacy of collective bargaining and sought, as best she could, to strike a balance in this regard. She certainly did not take the approach of unthinkingly saying that an exemption should never be allowed because the right to one is always trumped by collective bargaining.

[41] As to the contention by the Municipality that the Panellist attached undue weight to the importance of collective bargaining in her analysis, the Court quotes, with approval, from IMATU's heads of argument wherein the following observations, are made:

[17] JR1946/23 [2025] ZALCJHB 314 (15 July 2025)

LABOUR COURT

"*19. The Municipality complaints* (sic) *that the decision-maker erred by giving undue weight to the integrity of collective bargaining and the collective agreement: This contention is incorrect in law: Clause 15 of the exemption procedure expressly requires consideration of whether exemption would undermine the agreement or collective bargaining.*

20. The decision-maker did not treat collective bargaining integrity as an absolute bar. She treated it as a weighty factor to be balance against affordability, fairness and public interest. That approach accords with the purpose of the exemption regime. If collective bargaining integrity carried no real weight, exemptions would become routine and the negotiated agreement would be rendered unstable. The Municipality's submission would hollow out the exemption framework entirely and is inconsistent with the agreement the parties concluded.

21. Even if it were assumed, in the Municipality's favour, that different weight could reasonably have been attached to some of the factors, that does not establish a reviewable irregularity. The Municipality does not demonstrate that the weight attached by the decision-maker produced an unreasonable outcome. Absent such a showing, disagreement about emphasis or prioritisation does not meet the review threshold and the enquiry in Herholdt *(whether incorrect weight caused an unreasonable result) is not even triggered."*

Possible job losses

[42] In the Court's view, it should not ordinarily, save possibly in an indirect sense, be the case that a municipality can say it needs an exemption; otherwise, job losses may occur. The LRA provides finely tuned processes for dealing with retrenchments, and those avenues should be utilised to address the question of potential job losses.

[43] Should dismissals be contemplated for genuine operational reasons, then the implementation of cost-saving measures and the like to avoid or minimise such contemplated dismissals are to be the subject of retrenchment consultations in

LABOUR COURT

the retrenchment process itself. In the Court's view, it is not proper for the Municipality, under the guise of an exemption application, to focus on potential job losses and secure cost-saving measures that way without following the peremptory retrenchment procedures as contained in the LRA. If the Municipality has a bloated staff establishment and wishes to achieve greater profitability, then the Section 189 consultations provide both the procedure as well as the mechanisms which need to be followed and implemented where the potential loss of jobs is the central issue.

The morale of the workforce

[44] In my view, the Panellist correctly accepted that refusing increases would negatively impact workforce morale. I think any tribunal can take judicial notice that this would generally be the case, particularly where the increases are negotiated through collective bargaining and other employees nationwide are enjoying their right to such increases. As mentioned above, circumstances are aggravated by the fact that the members of the Municipal Council received annual increases. Whether a nexus can be drawn between the increases and service delivery is, as submitted by Mr Grogan, more speculative.

Institutional bias

[45] The immediate difficulty with the allegation of institutional bias, raised for the first time in the heads of argument, is that the founding papers makes no case under this heading. The word bias is not mentioned.[18]

[46] If this was going to be the case of the Municipality, one would have expected it to have been alleged that bias is, by way of illustration, embedded within the structures, rules, and environment that dictate how decisions are made within the Bargaining Council. No evidence showed that the system was designed to produce a specific output. Insofar as it may be relevant, the Panellist

[18] Had this point of bias been properly raised, the Panellist may well have entered the fray.

LABOUR COURT

acknowledged that previous rulings did not bind her and the mere fact that the majority of rulings share a similar outcome does not, *per se*, mean that there is institutional bias.

[47] To succeed with a claim of institutional bias, a party must prove the system or structure prevented a fair, independent hearing. It must be demonstrated that the entire set-up makes it inherently tilted towards one side, that the bias is built into the system itself, regardless of who is sitting in the room. There is nothing to suggest to the Court that the Panellist was not genuinely independent.

[48] In summary, the highwater mark of the argument, under this heading, was a contention that because the vast majority of exemption applications have failed, this in turn meant that there was institutional bias and, presumably, on the back of this conclusion, the Ruling fell to be set aside. This reasoning is unpersuasive. As mentioned it is, in truth, a *non sequitur.* I would add only that, ironically, the Municipality is represented by SALGA, which part of the very institution which is alleged to be biased.

Did the Panellist exceed her powers granting the relief which she did?

[49] A feature of the relief contained in the Ruling is that, despite the fact that the Municipality sought an exemption from paying an increase to its employees; it returned from the forensic fray saddled with a far-reaching ruling against it, i.e. a *mandamus* compelling its Municipal Council to develop its budget in a particular manner. The result is that IMATU and SAMWU, and one must assume the employees as well, now have a ruling in their favour which they may enforce, if necessary, by way of contempt of court proceedings when they, as respondents, sought no such relief (in fact sought no relief at all), from the Panellist. I elaborate below.

[50] The executive part of the Ruling reads as follows:

"Ruling

LABOUR COURT

77. The application for exemption is dismissed.

78. <u>The Applicant is ordered to review and adjust its budget and to prioritise salary, wage and benefits increases to employees in accordance with the Salary and Wage Collective Agreement and, further, to have the adjustments budget approved.</u>

79. The Applicant is ordered to pay said increases in respect of July 2023 – February 2024 on the normal pay day towards the end of February 2024 and thereafter monthly for the remainder of the financial year." (own emphasis)

[51] The Municipality contends that the Panellist exceeded her powers in granting the relief set out in paragraph 78 of the Ruling[19]. The approach taken by IMATU was, as I understood it, that, correctly so, paragraph 78 was, in any event, superfluous and the outcome of the exemption application did not depend on its inclusion in the Ruling. Accordingly, there was no point in dwelling on it. SAMWU, through Mr Qhali, made it clear that it had no issue with the Court setting aside paragraph 78.

[52] I agree with the Municipality's submissions on this point. The *"order"* (the words of the Panellist) so made is far-reaching in the extreme. Its effect is to dictate to members of the Council that they must not exercise their respective discretions freely and voluntarily when it comes to any resolution about the budget. Rather, they must act at the behest of a third party (the Panellist) who has ordained the contents of the budget, irrespective of the councillors' views. Not only does such a decision violate the principles of common law,[20] but it is unconstitutional. In terms of Section 160 (2)(b) of the Constitution, the approval of a municipal budget is a function which may not be delegated by a Municipal Council. Decisions regarding the approval of a budget may only be taken where they are supported by a majority.[21]

[19] Insofar as the point was not properly raised in the papers, in my view, given its jurisdictional nature, it was the type of point which the Court was not only entitled, but obliged, to raise *mero motu*.
[20] *Cf. Hofmeyr v Minister of Justice and Another* 1992 (3) SA 108 (C) at 117 F-G
[21] Section 160(3)(b)

LABOUR COURT

[53] The circumstance that a third party, including a judicial officer, may not usurp the powers of a municipal council does of course not mean that a panellist may not make a decision that has financial consequences for a Municipality, such as the refusal of an exemption. A municipality cannot escape its financial obligations by adopting a budget which does not cater for those obligations. But it is not for a third party to command how a municipal budget should be structured.

[54] There are other reasons why this submission made on behalf of the Municipality is correct. Firstly, in terms of the Collective Agreement, a panellist may either refuse or grant an exemption. A panellist, however, has no power to grant a *mandamus* against a municipality of the nature contained in the Ruling. Such relief does not fall within the ambit of ancillary or consequential relief. A panellist may not prescribe to a municipal council how it should govern the Municipality. By way of amplification, other than the making of a costs order, and the granting of condonation for non-compliance with time limits, a panellist's powers are, in terms of the Collective Agreement, limited to granting or refusing that application. The Collective Agreement provides that a panellist may:

> *"15.1.14.5.1 Grant a full or partial exemption or reject an application for exemption;"*

[55] Furthermore, it is trite that a court or a judicial officer has no competence to pronounce on issues not before it and to grant relief not sought.[22] In *PL v YL*[23], the Full Bench explained as follows

> *"[24] .... the court's mandate or jurisdiction is determined by the* lis *between the parties. The court's authority in other words does not extend beyond*

[22] *MEC of the Department of Education, Eastern Cape Province v Gqebe* [2009] 9 BLLR 896 (LAC); (2009) 30 ILJ 2388 (LAC).
[23] (2013 (6) SA 28 (ECG)

LABOUR COURT

the issues which the action is capable of raising, and which the parties themselves have raised in their pleadings. ..."[24] (own emphasis)

[56] It has been held by the Supreme Court of Appeal[25] as well as the Labour Appeal Court[26] that it is impermissible for a judicial officer to grant relief not sought. The reason for this prohibition is not difficult to fathom. Granting relief not sought breaches the *audi* Rule and deprives the party against whom the relief is granted of a hearing. In *Knoop*, Wallis JA characterised it as being unconstitutional to issue an order without hearing a party. In *Jowell v Bramwell-Jones and Others*,[27] Heher J (as he then was before his elevation to the Supreme Court of Appeal) elaborated on this trite principle as follows:

> "... *Indeed, the court would be acting contrary to its own character and nature if it were to pronounce upon any claim or defence not made by the parties. ...Moreover, in such an event, the parties themselves, or at any rate one of them, might well feel aggrieved; for a decision given on a claim or defence not made, or raised by or against a party is equivalent to not hearing him at all and may thus be a denial of justice. The Court does not provide its own terms of reference or conduct its own enquiry into the merits of the case but accepts and acts upon the terms of reference which the parties have chosen and specified in their pleadings. In the adversary system of litigation, therefore, it is the parties themselves who set the agenda for the trial ...* " (own emphasis)

[57] For the sake of completeness, I would add that, not only was the relief not sought, but it was granted without it having been canvassed with the parties. Thus, it would have come as a surprise to the Municipality when the Ruling was issued. In *MEC of the Department of Education, Eastern Cape Province v Gqebe,*

---

[24] See also *Kirland* (SCA) para [27], wherein the Court explained that judicial proceedings are mandatory, before relief may be granted; i.e. there must be a claim instituted in accordance with proper procedure.

[25] *Knoop and Another NNO v Gupta (Tayob Intervening)* [2021] 1 All SA 17 (SCA); 2021 (3) SA 135 (SCA) paras [27](a) and [28]

[26] *Industrial Development Corporation of South Africa v Modika and Others* (Labour Appeal Court of South Africa, Johannesburg) Case No. A2026-037072 delivered on 16 March 2026 in terms of which Moshoana JA carefully explained that the Labour Court had erred "... *in issuing an order not sought* ..." para [24]. See also *Parliament of the Republic of South Africa v Albertyn and Others* (C436/2020) [2023] ZALCCT 30 (20 June 2023)

[27] 1998 (1) SA 836 (W) at 898G-J

JUDGMENT

Khampepe ADJP, as she then was, dealing with a similar situation where the Labour Court, per Cele J, had granted relief not sought, elaborated further as follows:

> *"[25] In Kauesa v Minister of Home Affairs and Others 1996 (4) SA 965, referred with approval in Groenewald NO and Another v Swanepoel 2002 (6) SA 724 (ECD), the court took a dim view on the practice which is often adopted by judicial officers of relying for their decisions, on matters not canvassed in papers or in argument for their decisions. In Kauesa at 973I-974A the court said:*
>
> > 'It would be wrong for judicial officers to rely for their decision on matters not put before them by litigants either in evidence or in oral or written submissions. Now and again a Judge comes across a point not argued before him by counsel but which he thinks material to the resolution of the case. It is his duty in such a circumstance to inform counsel on both sides and to invite them to submit arguments either for or against the Judge's point. It is undesirable for a Court to deliver a judgment with a substantial portion containing issues never canvassed or relied on by counsel.'" (own emphasis)

[58] In this context, I quote from the tail end of the hearing before the Panellist:

> *"COMMISSIONER: Will the budget be available at this time of the year, just as a matter of interest not because it matters.*
> *MR JALI: Yes, Commissioner, you would note that the municipalities how they are structured, between, between May and June, May – June up to towards June the municipalities always work on the draft budget and then July up to now the municipalities will work on the revised budget up until it is then approved by counsel* [sic]. *So, but if, the current budget, if it is not yet been approved, we cannot submit a budget that is not yet approved by counsel* [sic].
> *COMMISSIONER: That is just a question for matter of interest.*
> *MR JALI: Yes.*
> [There was then a brief interjection by Mr Kumar (the financial expert) querying as to whether it is correct that the budget had not been approved.]
> ...

LABOUR COURT

> COMMISSIONER: All right. Let us not open that can of worms because we do not want to, to have another problem about budget being approved or not approved. The fact is we do not have that budget in front of us. It is not part of our documents.
> MR JALI: Yes, Commissioner.
> ..." (own emphasis)

[59] Thus, not only was the relief not sought, but the Commissioner conveyed to the parties that the issue of the budget would not be relevant to her decision and that she had only raised it as a matter of "*interest*"; yet, extraordinarily so, she proceeded to do the opposite of what she had conveyed to the parties, i.e. to make a ruling about should be contained in the budget.

[60] A ruling by a panellist exercising a quasi-judicial function that exceeds her jurisdictional authority must be set aside.[28] If an arbitrator proceeds to exceed her powers, this is sometimes referred to, in unflattering language, as judicial overreach[29]. Because the Panellist had no jurisdiction to grant the order which she did, that portion of the Ruling falls to be deleted.[30]

Conclusion

[61] Having rejected the central argument based on the alleged erroneous categorization of the Municipality as well as the contention that the introduction of a new municipal council and administration should have counted in favour of the Municipality, the remainder of the argument presented on behalf of the

---

[28] *Cf. Public Protector v South African Reserve Bank* 2019 (9) BCLR 1113 (CC); 2019 (6) SA 253 (CC) in terms of which the erstwhile Public Protector, astoundingly so, directed Parliament to change the Constitution as well as *Public Protector and Others v President of the Republic of South Africa and* 2021 (9) BCLR 929 (CC); 2021 (6) SA 37 (CC) in terms of which the Public Protector directed the National Directorate of Public Prosecutions to "*conduct an investigation into prima facie evidence of money laundering as uncovered during* [her] *investigation*".

[29] The Court does not suggest that, in this matter, the Panellist was guilty of anything more than a material error of law when it comes to this aspect. She no doubt had the best intentions when formulating the Ruling in the manner in which she did, and the Municipality may do well to heed the sentiments contained in paragraph 78. The point however is that, if anything, her views in this regard could have been part of her reasoning but should not have found their way into an enforceable order, particularly in circumstances where, as mentioned, this issue was not canvassed with the parties.

[30] *Cone Textile (Pvt) Ltd v Ayres and Another* 1980 (4) SA 728 (ZA) at 735G-H

LABOUR COURT

Municipality may be summarised as follows. Mr Grogan contended, for want of a better expression, that, in attempting to balance the various factors, the Panellist had done so in a jarring fashion. The colourful term "*yo-yoing*" was used in the founding papers. There may be a degree of substance to this submission. On the other hand, in a polycentric enquiry, given that the factors coexist uneasily, it is all but inevitable that there will be tension when it comes to the weighing of those factors, particularly where some of the factors defy precise definition, are elastic and relative in nature. Take for example the concept of "*affordability*" which, at the end of the day, is to be determined by a value judgment. As has often been said, a polycentric enquiry does not lend itself to judicial intervention. But that does not mean that a party's right to challenge an exemption ruling should be emasculated to the extent that it is rendered nugatory. If a proper case is made out that a discretion was not exercise judicially, there will always be room for a reviewing court to intervene. However, all things considered, in this matter, despite the eloquent submissions made, and valiant case mounted, by Mr Grogan on behalf of the Municipality, in the Court's view, the threshold for the reviewing and setting aside of the Ruling has clearly not been reached.

Costs

[62] Given the ongoing relationship between the parties and the issues at stake, in my view, applying the principles of law and fairness, this is not a case where a costs order should be made.

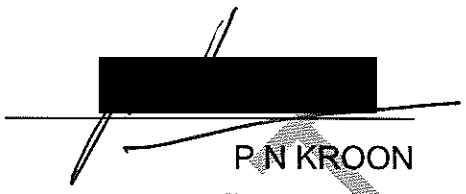
Order

1. The application is dismissed save to the extent set out in paragraph 2 of this order.

2. Paragraph 78 of the Ruling issued under case number EX/HQ 072301 dated 28 September 2023 is deleted.

LABOUR COURT

3. There is no order as to costs.



P N KROON

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv J Grogan
Instructed by:	Matiwane Attorneys
For the Third Respondent:	Adv S Harvey
Instructed by:	Francois du Plessis Attorneys
For the Fourth Respondent:	Adv T Qhali
Instructed by:	Andrew Meldrum Attorneys

LABOUR COURT