



SOUTH AFRICAN LOCAL GOVERNMENT BARGAINING COUNCIL

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11 September 2023

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Dear Sir / Madam

OUTCOME OF EXEMPTION APPLICATION HEARING: CITY OF TSHWANE METROPOLITAN MUNICIPALITY vs IMATU / SAMWU - Case Number: EX/HQ082301

Nature of Exemption Application: Salary and Wage Collective Agreement 2021

Kindly find attached the Outcome from Senior Panelist, E Hambidge.

Yours faithfully

SS GOVENDER
GENERAL SECRETARY

Address correspondence to the General Secretary

SOUTH AFRICAN
LOCAL GOVERNMENT
BARGAINING COUNCIL



Case Number: EX/HQ 082301
Senior Commissioner: Eleanor Hambidge
Date of Award: 10 September 2023

In the **EXEMPTION APPLICATION** between

CITY of TSHWANE METROPOLITAN MUNICIPALITY

(Applicant)

And

IMATU and SAMWU

(Respondents)

DETAILS HEARING and REPRESENTATION:

The Application for Exemption as brought by the City of Tshwane (Applicant) is opposed by SAMWU and IMATU. Whereas I dismissed the points *in limine* launched by SAMWU on 23 August 2023, this application and the opposition thereto were argued on 30 August 2023, via an online platform. The proceedings of both 23 and 30 August 2023 were recorded.

On both days, Adv. Bruinders SC, with the assistance of Advocate Lewis, represented the Applicant, whereas Advocate Harvey represented IMATU and Mr. Ndou, an attorney, represented SAMWU.

ISSUE in DISPUTE:

The issue in dispute is whether to grant exemption from the relevant clauses of the Salary and Wage Collective Agreement to the Applicant. The Applicant sought exemption from clauses 6.6 - 6.7, 7.3, 8.1, 9.1.3 and 10.1.3 of the *2021 Salary and Wage Collective Agreement* in relation to 29 000 employees who are employed by the City and who fall within the bargaining unit, and to whom this Collective Agreement applies. This Salary and Wage Collective Agreement was entered into for a period of 3 years (the period of operation of such is from 1 July 2021 until 30 June 2024).

ANALYSIS of ARGUMENT:

I have carefully applied my mind to the application for exemption, as opposed by both SAWU and IMATU.

As a point of departure, the Applicant which is a member of SALGA (the employers' organisation) brought this Application for Exemption, which it is entitled to do. Such right to apply for exemption is provided for in the Salary and Wage Collective Agreement, which Collective Agreement was entered into for a period of three years, as previously stated.

In passing, a Collective Agreement entered into under the auspices of a bargaining council may only be extended by the Minister of Employment and Labour to non-parties if the bargaining council has an effective exemption procedure in place (see section 32(dA) of the LRA, as amended). However, as previously stated, in this Exemption Application before me, the Application for Exemption was brought by a party to the South African Local Government Bargaining Council (SALGBC) and not brought by a non-party, in circumstances where the Applicant had advised SALGA at the time of conclusion of the Salary

and Wage Collective Agreement that the Applicant cannot afford the increase. The Collective Agreement was nevertheless entered into between SALGA, IMATU and SAMWU and as argued by Ms. Harvey for IMATU, and correctly so in my opinion, majoritarianism underpins the process of collective bargaining. Whereas the Applicant had applied for exemption for the first year of operation of this Collective Agreement, that application was briskly dismissed and is currently the subject of a review application before the Labour Court. Whereas the Applicant did comply with the Salary and Wage Collective Agreement in the second year of its operation and had paid the increase for 2022/2023 in an amount of R 489 million for all its employees and councilors, it has launched this Application for Exemption for the financial year 2023/2024 (i.e. the third year of operation of such Collective Agreement).

The Applicant launched a substantive Application for Exemption and contrary to the argument advanced and point *in limine* raised in this regard by SAMWU, I find the application for exemption was not defective and complied with providing adequate information (substantial compliance), as identified in this Collective Agreement.

1. PROPER APPROACH TO AN EXEMPTION APPLICATION:

As succinctly held by the Labour Appeal Court in the exemption matter of *Golden Arrow Bus Services (Pty) Ltd v SARPBAC and others* (CA 4/2020) (handed down on 14 May 2021), in deciding an exemption application, I am duty-bound to consider the broad range of considerations (i.e the factors for exemption, as listed in this Collective Agreement) in determining the merits of this application. Thus, to quote the LAC: "The decision to exempt a party from the terms of a collective agreement must be evaluated through the prism of the principle of voluntarism. But any decision by an exemption panel, as was required by the second respondent, cannot invoke the principle of voluntarism to eschew a careful examination of the list of criteria..."

Notwithstanding the above and I hasten to add that I am bound by the dicta of the Labour Appeal Court in *Golden Arrow (supra)*, I also align myself with the dicta of Honourable Judge van Niekerk in another exemption matter, also involving SARPBAC - that *PUTCO (Pty) Ltd v SARPBAC and others* (JR 1969/18); (2019) 40 ILJ 2389 (LC), a judgment handed down on 11 April 2019, well before the impact of Covid was

being experienced in this country, wherein the Court held that decision-makers, such as myself, are required to make decisions on the basis of the evidence before them, with affordability as the primary criterion where such is the basis for such application. In this Exemption Application before me, affordability was certainly one of the main arguments being advanced.

In clause 15 of the Salary and Wage Collective Agreement, it is provided as follows:

“15.1 Exemption Process

15.1.1 Any Party or person bound by this collective agreement concluded under the auspices of the SALGBC or which binds the Parties to the SALGBC, shall be entitled to apply for exemption from any provision of the said collective agreement”.

Then, in clause 15.1.2 until clause 15.1.2.10 of the same Exemption Process, it deals with the manner in which to launch the application and the information to be provided in this regard.

Clause 15.1.3 requires the application to be in writing, as has happened herein and clause 15.1.4 affords an opportunity for such to be opposed within 10 days, as has happened herein. Clause 15.1.8 emphasizes that the exemption process is a financial enquiry, based on the criteria set out in 15.1.15.

Then, for ease of reference, I also decided to quote clause 15.1.2 onwards:

“15.1.2 All applications for exemption shall be made in writing on the appropriate application form, obtained from the SALGBC, setting out relevant information, including:

15.1.2.1 The provisions of the agreement in respect of which exemption is sought;

15.1.2.2 The number of persons in respect of whom the exemption is sought;

15.1.2.3 The reasons why the exemption is sought;

- 15.1.2.4 The nature and size of the municipality in respect of which the exemption is sought;*
- 15.1.2.5 The duration and timeframe for which the exemption sought;*
- 15.1.2.6 The business strategy and/or the financial recovery plan of the applicant seeking the exemption;*
- 15.1.2.7 The applicant's past record (if applicable) of compliance with the provisions of the Collective Agreement, its amendments and Exemptions Outcome;*
- 15.1.2.8 Confirmation that the trade unions or workforce itself were advised of the exemption application at local level;*
- 15.1.2.9 The relevant financial information which shall include, but not limited to the last audited financial statements together with Section 72 of Municipal Finance Management Act (MFMA) reports, combined with Section 71 reports for the current and preceding two financial years; and*
- 15.1.2.10 Any other relevant evidence / documents for consideration by the Senior Panellist. However, the Senior Panellist shall determine the relevance and weight to be attached to such evidence.*
- 15.1. 3 An application for exemption from any provision of the collective agreement shall be lodged in writing on the prescribed form with the General Secretary of the SALGBC and the applicant shall serve a copy of the application as follows:*

15.1.3.1 In the case of a Trade Union or employee applying for exemption from a collective agreement, submit a copy of the exemption application to SALGA and the relevant municipality affected by the application; and

15.1.3.2 In the case of SALGA and/or a Municipality applying for exemption from a collective agreement, forward the exemption application to the national and local offices of IMATU and SAMWU.

15.1.4 The Parties referred to in clause 15.1.3, as the case may be, shall be afforded ten (10) days to submit a response to the application for exemption to the General Secretary of the SALGBC. The party shall also be obliged to submit the response to the applicant for exemption.

15.1.5 The application for exemption shall be considered by the Senior Panellist.

15.1.6 All applications considered by the Senior Panelist shall only be based on the written exemption application and written submissions and arguments in respect of the application, if any, by the applicant and any party or person opposing the application, unless determined otherwise by a Senior Panellist. The Senior Panellist shall consider and determine exemption applications in a manner that is fair and transparent. The applications shall be determined as expeditiously as possible and may, in exceptional cases and subject to the decision of the Senior Panellist, include the hearing of evidence, where the matter cannot be decided solely on the documentation.

15.1.7 Notwithstanding clause 15.1.2.9 any party to this Agreement shall be free to submit any relevant evidence / documents for consideration by the Senior Panellist. However, the Senior Panellist shall determine the relevance and weight to be attached to such evidence.

15.1 .8 The Exemptions Process shall be a financial inquiry based on the Exemptions Criteria set out in clause 15.1.15 below, along with the criteria of fairness to the employer and the employees.

15.1 9 In the event of applications being made that are frivolous and vexatious, such applications may be dismissed with costs.

15.1.10 Where a municipality submits an application for exemption, the municipality's obligation to implement the salary increase is suspended pending the outcome of the exemption application.

15.1. 11 The Senior Panellist must consider and make a decision and issue an Exemption Outcome within 30 days of the SALGBC having received the exemption application.

15.1.12 The onus to prove the case for the granting of an exemption lies with the applicant.

15.1.13 Parties undertake to make every reasonable effort to assist their members to discharge such onus in a full and proper manner."

In this Collective Agreement, the criteria for deciding an exemption application are set out as follows:

"15.1.15 Criteria and Other Factors to be considered by the Senior Panellist:

15.1.15.1 When considering an application for exemption, including an application for the withdrawal of an Outcome of Exemption by the SALGBC, the following criteria shall be taken into account (the order not indicating any form of priority):

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."

2. APPLYING the CRITERIA to the APPLICATION for EXEMPTION:

Having applied my mind to the Application for Exemption, which is opposed, I am inclined to deny such. Herewith brief reasons, as required.

In terms of clause 15.1.8 of this Collective Agreement, the decision to grant exemption is primarily a financial enquiry, based on the Exemptions Criteria set out in clause 15.1.15, as quoted above, along with the criteria of fairness to both the Applicant/Employer and the Employees of the City of Tshwane Metropolitan Municipality. In declining this Application for Exemption, I was assisted by the financial expert, Mr. Krish Kumar, in assessing the financial information. As provided for in clause 15.1.14.4 of the Salary and Wage Collective Agreement, the financial expert is required to provide assistance and advice, and also make recommendations, which has happened *in casu*.

The Applicant for Exemption submitted that should it implement the *2021 Salary and Wage Collective Agreement* for the 2023/2024 financial year, such conduct would be unlawful because it will *inter alia* be in breach of the requirements of section 15(1) of the Municipal Finance Management Act 56 of 2003 (MFMA) as there is no budgeting funding for the increase. According to the Applicant for Exemption, it was unable to budget for the 2023/2024 increase because there is no funding to pay for it and consequently, the Applicant cannot afford it.

Having applied my mind to the detailed application, it is abundantly clear that the Applicant is in financial distress with major liquidity problems, as borne out by National Treasury mid-term recommendations; the Auditor-General report on the 2021/2022 annual financial statements; and the Moody's report which all clearly indicate that there are solvency issues with creditors not being paid. The 2022/2023 annual financial statements do, however, indicate a slight improvement, but there are still challenges in relation to liquidity and being in a position to pay creditors. However, the budget for 2023/2024 and I hasten to add that a budget is a projection, indicates an overall increase in expenditure and income of 6% and thus it is anticipated that these measures (highlighted in par. 57 of Application) will go a long way to ameliorate the Applicant's financial predicament. SAMWU raised in their submissions that the Applicant has made provision for the salary increase in the 2023/2024 financial year, based on the actual expenditure in the 2022/2023 financial year, compared to the budget provision in the 2023/2024 Medium-Term Revenue and Expenditure Framework Report (MTREF). Although I was referred by Adv. Bruinders SC to paragraphs 85 to 88 of the Application, no reference was made to the actual budget provision which is R 12 640 889 388 (page 762, MTREF 23/24), and when compared to the actual expenditure for 2022/2023 in an amount of R 11 494 593 387, after the leave adjustment, there is a difference of R 1 146 296 001, and accordingly it is fair to both the Applicant/Employer and the Employees to conclude that sufficient provision has been made in the 2023/2024 budget to cover the increase in an amount of R 602 million.

Since I dealt with the financial position, there is no need to deal with the principle of legality, relied upon by the Applicant. Suffice to say, once the Applicant elected not to budget for salary increases, whether such decision was *mala fide* or not is not for me to rule upon herein, except to conclude that the Applicant for Exemption can no longer rely on the principle of legality when it is my finding that adequate provision has been made for the increase in the 2023/2024 budget. I am further persuaded to decline this Exemption Application, as granting such has the potential to undermine centralized collective bargaining in this sector. As previously stated, the Applicant is a party to the SALGBC and this Collective Agreement was entered into between the parties to council, premised on the principle of majoritarianism, a principle which is the cornerstone of our labour dispensation and the Applicant's Application for Exemption, which constitutes a dispute of right, was arbitrated upon, and ultimately dismissed, after careful consideration thereof.

Although there was an application for costs sought against the Applicant, as advanced by SAMWU, I decline to order such. The Applicant by bringing this application, which it is entitled to do, did not act in a frivolous and/or vexatious manner. As previously stated, the Applicant was entitled to launch this application. The fact that I decided to decline such is not indicative of frivolous and vexatious behaviour.

AWARD:

1. For the reasons set out above, this Exemption Application is dismissed.
2. The Applicant for Exemption is hereby directed to comply with the relevant clauses of the *2021 Salary and Wage Collective Agreement*, it has sought exemption from and accordingly, it must comply with clauses 6.6 - 6.7, 7.3, 8.1, 9.1.3 and 10.1.3 of the *2021 Salary and Wage Collective Agreement* with immediate effect.
3. Although this award is final and binding, the Applicant is nevertheless advised of its right of review this arbitration award (see clause 15.1.14.8 of the Salary and Wage Collective Agreement).
4. No order as to costs.

DATED AND SIGNED AT JOHANNESBURG ON THIS THE 10th day of September 2023.

Signature:

A handwritten signature in black ink, appearing to read 'Eleanor Hambidge', written over a horizontal line.

Senior Commissioner: ***Eleanor Hambidge***

Industry: ***Local Government***
