THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Reportable

CASE NO: 222/06

In the matter between :

TAO YING METAL INDUSTRY (PTY) LTD	Appellant
and	
MAY POOE NO	First Respondent
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	Second Respondent
HOTELLICA	Third Respondent
CUSA	Fourth Respondent
THE METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL	Fifth Respondent

---

Before:	**FARLAM, NUGENT, LEWIS, JAFTA JJA & MUSI AJA**
Heard:	**8 MARCH 2007**
Delivered:	**18 MAY 2007**
Summary:	**Arbitration under the Labour Relations Act 1995 – duties of arbitrator – function of court on review – exemptions from industrial council and bargaining council agreements.** **The order appears at para 66 of the judgment of Nugent JA.**
Neutral citation:	**This judgment may be referred to as *Tao Ying Metal Industries v Pooe NO* [2007] SCA 54 (RSA)**

J U D G M E N T

NUGENT JA

NUGENT JA:

[1] This is an appeal against a decision of the Labour Appeal Court (LAC) (Zondo JP, Nkabinde and Pillay AJJA concurring) that is before us with the special leave of this court.[1] It concerns an application to review an arbitration award of a commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA). The application failed in both the Labour Court (Francis J) and in the LAC.[2]

[2] The case raises important questions concerning the role of arbitrators and that of the courts in overseeing the arbitration process. The Labour Relations Act 1995 is a carefully crafted statute. Applied in its terms it will generally result in the just and speedy resolution of labour disputes. In many such disputes conciliation and arbitration play a pivotal role. If care is taken at that stage of the process there ought to be little call for the intervention of the courts.

[3] In the case of disputes that are subject to compulsory arbitration the courts have a limited role. Their role is generally confined to overseeing the process by way of review to ensure that it was in accordance with law. In proceedings for review two separate questions arise. The first is whether the award was made in accordance with law. The focus in that enquiry, as reiterated most recently by this court in *Rustenburg Platinum Mines,*[3] is not on whether the decision of the arbitrator is right or wrong but rather on 'the process and on the way in which the decision-maker came to the challenged conclusion.' Describing the enquiry that this calls for Cameron JA said the following:[4]

[1] The test for special leave is contained in *Numsa v Fry's Metals (Pty) Ltd* 2005 (5) SA 433 (SCA).
[2] The judgment of the LAC is reported at (2006) 27 ILJ 137 (LAC).
[3] *Rustenburg Platinum Mines Ltd (Rustenburg Section) v Commission for Conciliation, Mediation and Arbitration* 2007 (1) SA 576 (SCA).
[4] Paras 30 and 31.

'The question on review is not whether the record reveals relevant considerations that are capable of justifying the outcome. That test applies when a court hears an appeal: then the inquiry is whether the record contains material showing that the decision – notwithstanding any errors of reasoning – was correct. This is because in an appeal the only determination is whether the decision is right or wrong … In a review the question is not whether the decision is capable of being justified … but whether the decision-maker properly exercised the powers entrusted to him or her.'

[4] It is only if the award is found not to be in accordance with law that the second enquiry arises. The second enquiry concerns the fate of the dispute that was the subject of the award once the award is set aside. Section 145(3) authorises the court to 'determine the dispute in the manner it considers appropriate' or to 'make an order it considers appropriate about the procedures to be followed to determine the dispute'. The course that a court will follow to achieve the resolution of the dispute will necessarily depend upon the particular circumstances. It is then that a court might consider whether the material before the arbitrator nonetheless justified the award.

[5] The task of an arbitrator is a demanding one. It is made more demanding by the absence of formality that characterises the resolution of labour disputes.[5] It is important that an arbitrator, notwithstanding the absence of formality, ensures at the outset that the ambit of the dispute has been properly circumscribed, even if the dispute has many facets, for that defines the authority that the arbitrator has to make an award. The authority of an arbitrator is confined to resolving the dispute that has been submitted for resolution and an award that falls outside that authority will be invalid. As pointed out by Mustill and Boyd[6] in the context of commercial arbitration (but the principle is equally applicable to labour arbitrations):

'If [an arbitrator] awards on issues which have not been left to him for decision, he commits misconduct and may also be acting in excess of jurisdiction.'

[5] Section 138(1).

[6] Sir Michael J Mustill and Stewart C Boyd *The Law and Practice of Commercial Arbitration in England* 2ed 317. See, too, 554-5.

The same point was made in *Produce Brokers*[7] (cited with approval in *McKenzie*[8]):

'The binding force of an award must depend in every case on the submission. If the question which the arbitrator takes upon himself to decide is not in fact within the submission, the award is a nullity. The arbitrator cannot make his award binding by holding contrary to the true facts that the question which he affects to determine is within the submission.'

[6] An award may also not be founded on matters that occur to the arbitrator but that the parties have had no opportunity to address.[9] That is simply an application of the principles of natural justice, and in particular the right to be heard, that are now formalised in the Promotion of Administrative Justice Act 2000.[10] As Lord Justice Morris said in relation to the duties of an umpire (equally applicable to the duty of an arbitrator) in *Société Franco-Tunisienne d'Armement-Tunis,*[11] which was applied in *Kannenberg*:[12]

'It seems to me that the point that occurred to the umpire was a point that would bring about a dramatic development of the case, and I am satisfied that the import of it was not communicated to the shipowners' arbitrator in such a way as enabled him to deal with it … The new point which appealed to the umpire … involved a complete departure from the course followed in the litigation up to that moment … Clearly there was a dramatic new turn to the case if this possible point had clearly emerged … Whether he was right in law is not for me to say in these proceedings. But, in my judgment, the owners ought to have had a real opportunity of dealing with the new point, and of putting forward reasons for submitting that it was wrong.'

[7] This matter has travelled a long journey to this court and it is as well to commence at the start so that there is clarity on what has occurred along the

[7] *Produce Brokers Company, Limited v Olympia Oil and Cake Company, Limited* [1916] 1 AC 314 (HL) at 327.

[8] *McKenzie NO v Basha* 1951 (3) SA 783 (N) at 787H-788A.

[9] *Steeledale Cladding (Pty) Ltd v Parsons NO* 2001 (2) SA 663 (D) at 672F-673C. See, too, *Russell on Arbitration* 22 ed by David St John Sutton and Judith Gill paras 5-060 and 6-085.

[10] Section 3(2).

[11] *Société Franco-Tunisienne d'Armement-Tunis v Government of Ceylon* 1959 (3) All ER 25 (CA) at 34-35.

[12] *Kannenberg v Gird* 1966 (4) SA 173 (C) at 186G-187E.

way. Before doing so it is convenient to clarify the legal context within which the dispute arose.

EXEMPTIONS FROM INDUSTRIAL COUNCIL AND BARGAINING COUNCIL AGREMENTS

[8] The principal institution for resolving labour disputes under the Labour Relations Act 1956 was a system of industrial councils. The parties to an industrial council (representatives of employers and employees in the particular industry) were authorised to conclude collective agreements[13] that could then be imposed upon all employers and employees in the industry by ministerial decree.[14] Typically, the parties to an industrial council would conclude an initial agreement, commonly referred to as 'the main agreement', that would deal comprehensively with conditions of employment. That agreement would be given legal effect in the industry by ministerial decree for a limited period in anticipation of at least some of its terms (particularly those relating to minimum wages) being re-negotiated (usually annually). Once the period of validity expired the main agreement, subject to amendments, would then be extended for another limited period, and so the process would be repeated. Thus at any time employers and employees in the industry would be bound by the terms of the main agreement, often concluded many years earlier, that had been periodically amended and extended.

[9] One such agreement was the industrial council agreement for the iron, steel, engineering and metallurgical industry. The main agreement that is now relevant was concluded and given legal effect in the industry by ministerial decree in 1980.[15] It was imposed upon the industry initially for a

[13] Section 23.
[14] Section 48.
[15] Government Notice R1329 of 27 June 1980 in Regulation Gazette 3026.

year and was thereafter extended annually, subject to numerous intervening amending agreements.[16] I will return to it later in this judgment.

[10] Section 51 of the 1956 Act authorised an industrial council to exempt an employer from 'all or any of the provisions of an agreement entered into by parties to an industrial council which is binding in terms of this Act'. The terms and conditions of an exemption were to be incorporated in a 'licence of exemption' issued under the hand of an official of the council.[17] Its effect was to 'exempt [the employer] from the relevant provisions of the agreement … to the extent specified in the licence of exemption' and the terms and conditions incorporated in the licence were binding upon the persons concerned.[18]

[11] The Labour Relations Act 1995, which replaced the 1956 Act with effect from 11 November 1996, creates a comparable regime to resolve labour disputes. The former industrial councils are replaced by bargaining councils, also comprising representatives of employers and employees in the particular industry, and they fulfil functions similar to those that were formerly fulfilled by industrial councils.[19] Collective agreements concluded by bargaining councils may similarly be imposed upon the industry by ministerial decree for specified periods and are subject to amendment and extension from time to time.[20]

[12] Employers may once more be exempted from the provisions of a bargaining council agreement but there is this distinction: while the authority to grant exemptions from an industrial council agreement was formerly conferred statutorily (by s 51 of the 1956 Act) the 1995 Act contemplates that

[16] See, for example, Government Notice R295 dated 20 February 1981 in Regulation Gazette 3137.
[17] Section 51(4).
[18] Section 51(7).
[19] Sections 27 and 28.
[20] Section 32.

the authority to grant exemptions from a bargaining council agreement made under that Act will emanate from the constitution of the bargaining council concerned.[21] A bargaining council agreement that is imposed upon the industry must make provision for an appeal to an independent body from a refusal by the bargaining council to grant an exemption to a person who is not a party to the bargaining council.[22]

[13] The transition from one regime to the other was provided for in Schedule 7 to the 1995 Act. An industrial council registered under the 1956 Act was deemed to be a bargaining council for purposes of the 1995 Act.[23] An industrial council agreement that was binding on the industry immediately before the commencement of the 1995 Act was to remain binding (subject to certain provisos that are not now relevant) 'for a period of 18 months after the commencement of this Act or until the expiry of that agreement … whichever is the shorter period, in all respects, as if the [1956 Act] had not been repealed.'[24] Any person who was bound by an industrial council agreement that continued to be binding after the 1995 Act commenced could still 'apply in accordance with the provisions of s 51 of the [1956 Act] for an exemption from all or any of the provisions of [the agreement]' and any such application had to be dealt with 'in terms of the provisions of section 51 … in all respects as if the provisions in question had not been repealed'.

[14] With that statutory background in mind I turn to the events that led to the arbitration that is now in issue.

THE EVENTS THAT GAVE RISE TO THE ARBITRATION

[21] Section 30(1)(k).
[22] Section 32(3)(e).
[23] Section 7(1) of Schedule 7.
[24] Section 12(1)(a) of the Schedule.

[15] Botshabelo in the Free State at one time fell within one of the so-called self-governing states that fell outside the authority of the Republic. Many such areas, including Botshabelo, were not attractive to industry. But one attraction was that industries located in those areas were not subject to the minimum conditions of employment that were applicable in the Republic under industrial council agreements.

[16] The appellant (the company), which has a manufacturing business that falls within the metal and engineering industry (formerly known as the iron, steel, engineering and metallurgical industry), was one of those that located itself in Botshabelo. In about 1993 the company concluded a recognition agreement with a trade union known as the Hotel, Liquor, Commercial and Allied Workers' Union of South Africa (the union). From time to time the company negotiated wages and other conditions of employment with the union but those wages and conditions were generally less favourable than the minimum wages and conditions provided for in the industrial council agreement.

[17] When Botshabelo was again brought under the authority of the Republic its industries automatically became subject to the provisions of the relevant industrial council agreements. Not surprisingly, some businesses were not economically viable on those terms. The bargaining council for the leather industry was the first to enforce the terms of its industrial council agreement with the result that the leather industry in Botshabelo immediately collapsed. The Department of Labour was concerned that the same might occur in the metal and engineering industry and it urged the bargaining council concerned (which replaced the former industrial council and which I will refer to simply as the bargaining council) to exercise caution and to explore ways of accommodating employers and employees so as not to precipitate the same result.

[18] In 1997 the company was told by the bargaining council that it was required by law to affiliate to it. After taking advice from a labour broker the company affiliated to the bargaining council in about February or March 1997 on the understanding that it would apply for exemptions from the provisions of the industrial council agreement. (The agreement that was then in force was the main agreement of 1980 as amended and extended from time to time.) According to a representative of the company who gave evidence during the course of the arbitration, the company told the union representatives on several occasions when they came to collect the monthly cheque for union dues, and told the shop stewards, that it had been required to affiliate to the bargaining council and that it was applying for exemptions. The union organizer who gave evidence denied that that the union was told of the company's intentions.

[19] The company applied for exemptions from the provisions of the agreement relating to annual leave (clause 12(3)), the provisions relating to the payment of holiday bonus (clause 14(1)(a)), and the minimum wage provisions (part 2). (It also applied for an exemption from the provisions of the pension and provident funds but that is not relevant for present purposes.)

[20] The members of the bargaining council could not reach agreement on what was to be done and it appointed a committee to investigate conditions in the companies concerned and then to make recommendations to the council concerning the applications for exemptions.[25]

[21] Three members of the committee (the representative of one of the unions failed to arrive), together with the secretary of the bargaining council,

[25] The committee comprised two employer representatives, a representative of the SA Electrical Workers' Union, and a representative of the National Union of Metalworkers of South Africa.

visited the premises of the company and made various enquiries. After lengthy deliberation the committee recommended to the council that the company should be excused from payment of the holiday bonus for the annual holiday period that had just passed (the annual holiday closure occurs annually from mid December to early January) but not in the future, and that it should be excused from the three-week leave requirement of the agreement during that closure (the company had allowed only two weeks) but the company should be required to increase it to three weeks from the next annual closure. With regard to wages it recommended that the company be exempted from the minimum wage provisions (contained in part 2 of the agreement) on two conditions: first, that it did not reduce its wages below the level at which they then were (that they ‘retain the status quo’), and secondly, that it increased its wages thereafter in accordance with the percentage increase negotiated by the bargaining council from time to time for the industry as a whole, commencing with the increase that was to be negotiated during the forthcoming bargaining session (which would be reflected in the bargaining council agreement that would supplant the industrial council agreement when its term expired).

[22] The bargaining council accepted the recommendations and granted exemptions on those terms. The exemptions, and the terms on which they were granted, were recorded in four standard-form ‘licences of exemption’, with appropriate additions, that were issued under the hand of the secretary of the bargaining council on 7 April 1997.

[23] It is not necessary to deal with the exemptions relating to annual leave and to the payment of holiday bonus (in both cases the exemptions were restricted to past events). The minimum wage exemption was recorded in two standard-form ‘licences of exemption’ (from the stock of the former industrial council). Each document recorded one of the conditions upon which the

exemption was granted. The exemption reflecting the condition relating to the payment of the annual increase was in the following terms (the printed words in the standard form are in ordinary script and the typewritten insertions are in bold):

'This is to certify that under the powers conferred upon it the Council has been pleased to grant exemption from the provisions of **PART 2** of the **MAIN** agreement published under Government Notice **R1329** Dated **27 June 1980** as amended and/or extended and/or replaced from time to time by any succeeding Agreement and/or any amendments and/or extensions thereof to [**TAO YING METAL INDUSTRIES (PTY) LTD]** to **That the national percentage increase negotiated annually be enforced on the company with the inception of the 1998/1999 Main Agreement.** Period from: **19 March 1997** to: **duration of Agreement.** NOTE: This exemption may be varied or withdrawn at any time at the discretion of the Council.'

The reference to the '1998/1999 Main Agreement' is a reference to the bargaining council agreement that was to replace the industrial council agreement when the latter expired (that occurred on 14 April 1998). The other 'licence of exemption' was in precisely the same terms except that the condition subject to which it was granted was recorded as 'status quo currently prevailing be retained'.

[24] For reasons that I will come to the proper meaning of these exemptions is of only secondary importance to this appeal but it is as well to deal with it at this stage. The meaning of the exemption that the bargaining council purported to grant as reflected in the two documents read together is clear. It purported to exempt the company from part 2 (the minimum wage provisions) of the industrial agreement that was then in force, and from the comparable provisions of the bargaining council agreement that was to supplant it when the industrial council agreement expired (and any extensions or replacements of that bargaining council agreement). Counsel for the union was not able to advance any other construction that would give effect to all the language of the exemption and there is none. No other interpretation

would be consistent with the condition upon which the exemption was granted (that the 'national percentage increase negotiated annually [would] be enforced on the company with the inception of the 1998/1999 Main Agreement'). But if there were to be any ambiguity in that regard (and in my view there is no ambiguity) recourse could be had to evidence to resolve the ambiguity, bearing in mind that this is not a legislative instrument but merely a recordal of the council's decision. The evidence before the arbitrator established unequivocally that the bargaining council intended the exemptions to have the effect I have described and that evidence was not even challenged. It is not surprising that the evidence was not challenged because the parties were agreed throughout the arbitration that that was the meaning of the exemption.

[25] It is true, as pointed out by the LAC, that the period for which the exemption was to endure was stated to be 'duration of Agreement', which, read in isolation, might mean the duration of the agreement that was then in force. But that would ignore the words 'as amended and/or extended and/or replaced from time to time by any succeeding Agreement and/or any amendments and/or extensions thereof', and the condition upon which the exemption was granted, and the unchallenged evidence.

[26] The LAC also found support for its construction in the presumption that the bargaining council intended to act lawfully. It held in that regard that s 51 of the 1956 Act[26] permitted a person to be exempted only from the provisions of an industrial council agreement that was in force when the exemption was granted.[27] I do not think that is the correct meaning of the section. It could not have been intended that fresh exemptions would need to be applied for and issued whenever the period of validity of an industrial council expired, which in the present case was annually. (According to the

[26] Read together with the transitional provisions of Schedule 7 of the 1995 Act.
[27] Paragraph 38 of the judgment.

evidence there are some 15 000 exemptions in existence in the industry at any time.) In my view the phrase 'an agreement … which is binding' as it is used in the section refers to an industrial council agreement that is binding on a person then or in the future. Any other construction would lead to an absurd result.

[27] But in any event that approach to the construction of s 51 seems to me to overlook something more fundamental. In acting as it did in April 1997 the bargaining council purported to do two things: First, it purported to exempt the company from the provisions of the existing industrial council agreement. Secondly, it purported to exempt the company from the provisions of the bargaining council agreement that was to replace the industrial council agreement. The validity of its acts depended upon whether the bargaining council indeed had authority to perform the particular act, irrespective of what it might have thought to be the source of its authority (it did not express itself on what it thought to be the source of its authority). With regard to its decision to exempt the company from the provisions of the industrial council agreement that was then in force clearly it was authorised to do so by s 51 of the 1956 Act read together with the transitional provisions. But whether it had authority to exempt the company from the provisions of the bargaining council agreement that superseded it depends not upon the construction of s 51 (which applied only to industrial council agreements contemplated by the 1956 Act) but rather upon whether that was authorised by the bargaining council's constitution.[28] The constitution of the bargaining council is not before us (it seems also not to have been before the LAC) and it is not possible in the circumstances to determine whether or not it had or lacked that authority. But that is in any event not material for present purposes. Where the language that is used in the document is clear, as it is in this case, there is no need to resort to presumptions. Apart from its use by the

[28] See paragraph 12 above.

LAC as an aid to interpretation, the validity or otherwise of the bargaining council's decision in April 1997 is immaterial to the arbitrator's award and to the issues that arise in this appeal.

[28] The industrial council agreement was replaced with effect from 14 April 1998[29] by a bargaining council agreement.[30] Not surprisingly the bargaining council agreement largely replicated the provisions of the former industrial council agreement (but with an additional significant provision that I will return to).

[29] Soon after the bargaining council agreement took effect the union (which was not a party to the bargaining council because it lacked the minimum membership required for admission) demanded that the company comply with its minimum wage provisions (again reflected in part 2). The company's standpoint, supported by the bargaining council, was that it was exempted from those provisions by the exemption that had been granted in April 1997. On 5 November 1998 the union lodged a dispute with the CCMA against both the company and the bargaining council.

[30] It is not ordinarily the function of the CCMA to enforce or resolve disputes concerning bargaining council agreements. That is generally the function of designated agents of the bargaining council[31] (enforcement) or the bargaining council itself.[32] The bargaining council agreement contained a procedure for the resolution of disputes 'concerning the interpretation, application or enforcement of the agreement', which envisaged conciliation, followed if necessary by arbitration by an arbitrator appointed by the

[29] The effect of the transitional provision in Schedule 7 of the 1995 Act was that all industrial council agreements would come to an end no later than 10 May 1998.

[30] Published under Government Notice R 404 in Regulation Gazette No 6127 dated 31 March 1998.

[31] Section 33.

[32] Section 33A.

bargaining council.[33] It seems that at the time the dispute in this matter arose the bargaining council had not yet been accredited to resolve disputes,[34] and the parties considered the CCMA to be the appropriate body to do so in the circumstances.[35] (Whether that was correct is not necessary to decide.)

[31] In the standard-form document that is completed when a dispute is referred to the CCMA the union recorded that the nature of the dispute was the company's 'failure to comply with minimum wages and conditions [in terms of] Metal and Engineering Industries Bargaining Council', and that the outcome it required was the company's 'compliance with minimum wages and conditions [in terms of] bargaining council agreement' and a 'prohibition of unilateral exemptions by bargaining council'.

[32] Those cryptic statements do not disclose precisely what was in dispute,[36] but that emerged later when the arbitration commenced, and I will deal with that more fully below. For the moment it is sufficient to say that the effect of the exemptions (that they exempted the company from the provisions of the bargaining council agreement that replaced the industrial council agreement) was never in dispute. On the contrary, it was agreed that that was the effect of the exemptions. What was in dispute was rather whether the exemptions had been validly granted. The union contended in that regard that the exemptions had been granted without prior consultation with the union and for that reason they were invalid. (That is why the bargaining council was cited as a party to the dispute, and why an order was sought prohibiting the bargaining council from issuing 'unilateral exemptions'.)

[33] Clause 36 of the bargaining council agreement read with the Metal and Engineering Industries Dispute Resolution Agreement published under Government notice R 406 dated 31 March 1998.
[34] Section 127.
[35] Section 24(2).
[36] *National Union of Metalworkers of SA v Driveline Technologies (Pty) Ltd* (2000) 21 ILJ 142 (LAC) para 36. See too *Telecall (Pty) Ltd v Logan* 2000 (2) SA 782 (SCA) paras 10-12.

[33] When conciliation failed the dispute was referred to arbitration under the auspices of a commissioner of the CCMA (who is cited as the first respondent in this appeal).[37] In the standard-form document requesting arbitration the union recorded that the issue in dispute was 'application of collective agreement', and the decision it sought from the arbitrator was 'agreement of bargaining council to be applied'.

[34] At the outset the arbitrator considered an objection by the company and the bargaining council to her jurisdiction. She rejected the objection but she also ruled that the bargaining council 'may not be a party to the dispute'. (Why that ruling was made is not now material.)

[35] The arbitration resumed on 18 January 2000. The union was represented by an attorney and the company was represented by counsel. I have pointed out that the cryptic statements in the standard-form documents did not reveal precisely what was in dispute. But the nature of the dispute emerged from the opening statements of the union's attorney, in which he formulated the dispute that the arbitrator was called upon to resolve as follows:

'In 1997 … an exemption was granted [from adherence to] all these minimum conditions or minimum requirements set by the council. *It is our case [that] this exemption was granted unilaterally by the council without negotiations with trade union or employees thus making these exemptions granted improperly granted.* It will be shown to you that the employees of Tao Ying are earning way under the minimum wages, they are not receiving the appropriate yearly increments, and they are not receiving other benefits as per the collective agreement of the Bargaining Council. Our request today to you will be to find in favour of the applicants and to order that the respondent comply with the collective agreement' (my emphasis).

What the union's attorney meant by his assertion that the exemptions were 'improperly' granted, as appears from the heads of argument that he later filed, was that they were invalid in law because they had been granted

[37] Relying upon ss 24(2)-(5) of the 1995 Act.

without consultation with the union. It was on those grounds that, at the conclusion of the arbitration, he sought an order from the arbitrator that the exemptions 'be declared null and void'.

[36] As if to avoid any uncertainty as to what was in dispute the union's attorney went on to say the following (after counsel for the company had said that he intended leading evidence to show that the union had ample opportunity to be heard before the exemptions were granted):

> '[I]t seems from what my learned friend has indicated the only issue basically in dispute might be today the granting of the exemption [as] such and the manner in which it was granted, that I perceive to be the only issue in dispute mainly, I don't know if my learned friend wishes to add anything else, because *we are in [agreement] that* there is a Bargaining Council agreement, that there are the minimum wages prescribed, and that *there was an exemption given to these minimum wages.* So in an effort not to prolong the arbitration proceedings with [unnecessaries] I do not wish to, you know, confine my learned friend in any way, but I'm just enquiring is that not perhaps the only issue that is in dispute and that is what needs be led evidence on from both the parties?'

That was confirmed by counsel for the company, subject to what he called another 'jurisdictional point' that was to be argued at the end of the arbitration but that is not now material. (Needless to say, the attitude of the company and its counsel throughout was that the exemptions applied to the bargaining council agreement, for otherwise it would have had no grounds to avoid submitting to its provisions.)

[37] Thus it is clear that it was accepted by both parties that the exemptions were still operative at the time of the arbitration. Indeed, as appears from the extract above, the parties were in agreement that 'there is a Bargaining Council agreement, that there are the minimum wages prescribed, and that there was an exemption given to these minimum wages'. The only dispute between them, which the arbitrator was called upon to resolve, was whether the exemptions were invalid for failure on the part of the bargaining council

to consult the union. Presumably that was also the dispute that was subjected to conciliation (there is no evidence to suggest that it was not) because otherwise the arbitrator would have lacked jurisdiction to conduct the arbitration at all.[38]

[38] That dispute was not capable of being resolved by arbitration and the proceedings were fruitless from the start. The arbitrator had no jurisdiction to declare the conduct of the bargaining council to be invalid, least of all in proceedings from which the bargaining council had been expressly excluded. The validity or otherwise of its conduct was capable of being determined only by a competent court in review proceedings to which the bargaining council was a party. The only proper outcome that was possible in the circumstances was thus a declaration that the arbitrator had no jurisdiction to resolve the dispute that had been submitted to arbitration.

[39] The arbitration proceeded nonetheless, and evidence was called on both sides on the question whether the union and its members had had an opportunity to express their views to the bargaining council before the exemptions were granted. With regard to the evidence that was led in the course of the arbitration (which was immaterial in view of the absence of jurisdiction to make the award that was sought) I need only observe that evidence that the exemptions were intended to endure for the life of the industrial council agreement and the bargaining council agreement that later replaced it went unchallenged. That is not surprising, bearing in mind that the parties were agreed that that was the effect of the exemptions.

[40] At the conclusion of the evidence the arbitration was adjourned and the representatives of both parties submitted written heads of argument. Apart from the 'jurisdictional point', the only matter addressed in the heads of

[38] Per Zondo AJP in *Driveline Technologies (Pty) Ltd*, above, para 62.

argument, by both parties, was whether the union had indeed had an opportunity to be heard before the exemptions were granted, and if not, what effect that had on the validity of the exemptions.

[41] The arbitrator delivered her award on 23 July 2000. Apart from disposing of the so-called 'additional jurisdictional point' that had been raised on behalf of the company (the nature of the point need not be considered) the arbitrator made no finding on the issue that had been canvassed before her. But she nevertheless made an award compelling the company to comply with the terms of the bargaining council agreement. Her award was in the following terms:

'[The company] is ordered to pay to its employees who are members of [the union] the wages negotiated in the Metal and Engineering Industries Bargaining Council since 14 April 1998 unless exemptions were granted to the [company] under the New Collective Agreement concluded in terms of the Labour Relations Act, 1995'.

[42] The reason that the arbitrator held that the company was obliged to comply with the provisions of the bargaining council agreement was that she believed, incorrectly, that it was common cause between the parties that the exemptions had come to an end when the industrial council agreement expired on 14 April 1998. That is apparent from her reasons for making the award. Dealing first with the so-called 'additional jurisdictional point' that had been raised on behalf of the company the arbitrator made the following observations:

'It is also common cause that by the time the dispute arose in August [1998] the exemptions under discussion were no longer valid having ceased to be so when the main Agreement in terms of which they were issued terminated and a period of eighteen months referred to in item 12(1) [of Schedule 7 to the 1995 Act] had also expired'.

After dismissing the 'jurisdictional point' the arbitrator turned to the merits of the matter and said the following:

'From [the] survey of the evidence above, it is clear that no exemptions were applied for by the [company] under the collective agreement in the Bargaining Council concluded

under section 28(a) of the [1995 Act]. [The company] continued to rely on the exemptions that had terminated on the 14 April 1998 which is the date of commencement of a New Agreement published in Government Notice R404 dated 31 March 1998 … In the absence of exemptions issued under the New Agreement, the [company] does not have a valid reason at law not to pay the minimum wages negotiated in the Bargaining Council after the Main Agreement was in operation'.

[43] It is clear from those passages that the arbitrator made her award in the belief that it was common cause between the parties that the exemptions expired on 14 April 1998, which was the date when the industrial council agreement was supplanted by the bargaining council agreement. Indeed, the assertion in the company's replying affidavit that the arbitrator 'wrongly assumed that the exemption endured only for so long as the original 1980 agreement remained in force' was not contested nor was it placed in issue before us by counsel.

[44] The arbitrator's belief that it was common cause that the exemption had expired was clearly incorrect: what was common cause was precisely the opposite. The first time that it was suggested that the exemptions had expired was when the arbitrator made her award and it has bedevilled the proceedings ever since.

[45] It is self-evident from the terms in which the award was made that the arbitrator failed to take account of the existence of the exemption when she made her award, which was the ground advanced in the founding affidavit for setting aside the award. In *Carephone (Pty) Ltd v Marcus NO*,[39] which was applied by this court in *Rustenburg Platinum*,[40] the LAC held that the award of an arbitrator constitutes administrative action as contemplated by s 33 of the Constitution, which requires there to be 'a rational objective basis justifying the connection made by the administrative decision-maker between

[39] 1999 (3) SA 304 (LAC) para 37 read with para 15.
[40] Above, esp paras 20 and 29.

the material properly available to him and the conclusion he or she eventually arrived at.' To leave out of account the exemption, when it was common cause that its effect was to relieve the company of the relevant provisions of the bargaining council agreement, clearly deprived the award of a rational connection between the award and the material that was before the arbitrator, and on that ground alone the award was liable to be set aside. Needless to say, if the arbitrator had applied the correct criterion for her decision on the material that was before her, which was that it was common cause that the exemptions were applicable, her award would necessarily have been different. To found the award upon a supposition that it was common cause that the exemption had ceased to operate when the opposite was true was also a gross irregularity,[41] which had the added effect that the arbitrator exceeded her powers by travelling outside the dispute that was before her.[42]

THE PROCEEDINGS IN THE LABOUR COURT AND THE LAC

[46] Bearing in mind that it had never been disputed that the exemptions from the provisions of the bargaining council agreement had indeed been granted the caveat in the award ('unless exemptions were granted to the [company] under the New Collective Agreement') initially caused some confusion and the company took the matter up with the bargaining council to confirm that the exemptions were indeed extant and had not been withdrawn. Ultimately, after the union applied to the Labour Court to have the award made an order of court, the company applied to review both awards of the arbitrator (the award on jurisdiction made on 23 July 1999 and the award made on 23 July 2000). The attack upon the former award (the award relating to jurisdiction) has since been abandoned.

[41] Section 145(2)(a)(i) of the 1995 Act.
[42] Section 145(2)(a)(iii). See *Amalgamated Clothing and Textile Workers Union v Veldspun Ltd* 1994 (1) SA 162 (A) at 169C; *Carephone*, above, para 25.

[47] By the time the application was brought the affected workers had resigned from the union and had joined the Commercial Workers' Union of South Africa (CUSA), which is a member of the bargaining council. The parties who were cited in the application were the arbitrator, the CCMA, the union, CUSA, and the bargaining council. Only CUSA opposed the application and it is the only party that opposes this appeal.

[48] The application was brought out of time and condonation was required. The labour court dismissed the application for condonation. In the course of doing so it made certain observations concerning the merits of the review but I need not deal with them.

[49] On appeal the LAC found, in my respectful view correctly, that there was good cause for the delay, and it set aside the decision of the Labour Court refusing condonation. But it went on to dismiss the application to review the award. The order that it made was as follows:

'1. The appeal is upheld in part and dismissed in part.

2. No order is made as to the costs of the appeal.

3. The appellant's appeal on the merits of the review application is dismissed.

4. The appellant's appeal against the order of the Labour Court relating to condonation is upheld and such order is set aside and replaced with the following one:

"(a) The applicant's application for condonation in regard to the launching of the review application is granted.

(b) the applicant's application for review is hereby dismissed.

(c) There is to be no order as to costs."'

[50] The order granting leave to appeal to this court provided that 'leave to appeal is limited to the dismissal of the appeal by the Labour Appeal Court on the merits of the review application'. That was a reference to the order in paragraph 3 of the orders made by the LAC (in contrast to its order in

paragraph 4 relating to condonation). The 'merits of the review application' are whether the review ought to have succeeded.

[51] Before the appeal was heard counsel were furnished by this court with a comprehensive set of questions concerning what was properly before the arbitrator, and the basis upon which she made her award, as I have outlined those matters above, which was not dealt with in the judgment of the LAC, and counsel were invited to address us on those issues as they then did.

[52] The LAC misconstrued the facts so far as they relate to the dispute that was before the arbitrator and the manner in which she arrived at her award, though I hasten to add that it seems to me to be quite probable that the appeal was presented to the LAC in a form that was conducive to the error.

[53] The LAC was under the impression that the dispute that the arbitrator had been called upon to resolve was whether the exemptions that had been granted to the company 'still applied to, and were operational under' the bargaining council agreement that supplanted it, and it was under the impression that the arbitrator had 'found that the exemptions … fell away when the new agreement came into operation on the 14th April 1998.' In both respects that impression was incorrect. The dispute before the arbitrator did not concern the duration of the exemptions at all. And the arbitrator made no finding as to the duration of the exemptions but relied instead upon what she incorrectly believed was common cause. That explains why, as observed by the LAC, the arbitrator 'did not in her award refer to the [company's] argument that such exemptions continued to apply during the life of the new agreement'.[43] She did not refer to the argument simply because it was never addressed to her, and that was because the duration of the exemptions was not in dispute.

Paras 3 and 30 of the judgment.

[43] Judgment para 30.

[54] The LAC went on to consider whether that 'finding' of the arbitrator was correct by construing the terms of the 'licences of exemption'. It held that the exemptions did not extend beyond the life of the industrial council agreement, for the reasons that I expressed in paragraphs 25 and 26 of this judgment, and accordingly it found that the award was correct.

[55] I have said that in my view the construction that the LAC placed upon the exemption was not correct, but the difficulty with its judgment is more fundamental. What was before the LAC was not an appeal against the arbitrator's award but rather a review of the proceedings that culminated in the award. In those circumstances the LAC was not called upon to decide whether the conclusion that was reached by the arbitrator was correct but rather whether the arbitrator properly exercised her powers in reaching that conclusion. By misconstruing the question that was before it the LAC inadvertently failed to address that question at all (perhaps for the reason that I alluded to earlier).

[56] I have already pointed out that the award that was made by the arbitrator is liable to be set aside. Accordingly the review ought to have succeeded and the order made by the LAC on the merits of the review application (paragraph 3 of its order) cannot stand.

[57] That gives rise to the second enquiry, which concerns the fate of the dispute once the award is set aside. It is in relation to that enquiry that the other defect in the proceedings, and the proper construction of the exemption, become relevant.

[58] Once an award is set aside on review a court is authorised to 'determine the dispute in the manner it considers appropriate' or to 'make an

order it considers appropriate about the procedures to be followed to determine the dispute.' No purpose would be served by remitting the dispute to the arbitrator. I have already pointed out that the dispute that was before the arbitrator was whether the exemptions were invalid for want of prior consultation with the union. There is only one appropriate award that she could have made in relation to that dispute, which was to declare that she had no jurisdiction to declare upon the validity of the exemptions. If we substitute a declaration to that effect that will bring to an end the dispute that was before the arbitrator.

[59] But it has become apparent in the course of these proceedings that CUSA has now resiled from the position that was taken by the union during the course of the arbitration, and it now contends that on a proper construction the exemption was intended to come to an end when the industrial council agreement lapsed on 14 April 1998. No purpose would be served by remitting the matter to the arbitrator for the dispute to be broadened so that an award may properly be made on that issue or to undertake that task ourselves. I have already held that that is not the correct meaning of the exemption and nothing would be served by doing so. To do so might in any event serve no purpose, for reasons that emerge below.

[60] For both counsel invited us to go even further and to substitute an award declaring the effect of the exemption upon the company's obligations (or absence of obligations) under the bargaining council agreement in the light of the construction that I have placed upon the exemption. I do not think we should do so.

[61] I am by no means certain that a court on review has the power to broaden the dispute that was before an arbitrator and then make an award in relation to the broadened dispute. That would seem to me to be a recipe for

undermining arbitration and encouraging parties to look to the courts instead to resolve their disputes, contrary to the intention of the 1995 Act. Counsel for CUSA submitted that because this was what he called a 'labour matter' the court was at large to do what it considered to be fair in any case that comes before it. That submission seems to me to bear the seed of a doctrine that would undermine the Act and the rule of law and I have no hesitation in rejecting it. A court does not have a general jurisdiction to do what it considers to be best, even in respect of labour disputes, but must confine itself to what it is authorised to do by law.

[62] But even if we had a general discretion to make an award that we considered would be best to bring the present saga to an end I would in any event not do so in the present case, at least without careful reflection and further enquiry, lest we inadvertently pronounce on matters that are not properly before us. I have already pointed out that we do not know whether the bargaining council had the authority to exempt the company from the bargaining council agreement that took effect on 14 April 1998 because we do not have its constitution before us. And even if the bargaining council was authorised to act as it did it is also not clear that the exemption had any effect in law in relation to the bargaining council agreement. The bargaining council agreement that took effect on 14 April 1998 provided for exemptions to be granted by 'an independent body [established by the agreement and] referred to as the Exemption and Arbitration Board' and not by the bargaining council itself. In those circumstances it might be that the exemption that was given by the bargaining council was always ineffective and that these proceedings have been misconceived from the start.

[63] I stress that these are not matters upon which I make any finding. Whether the bargaining council was authorised to grant exemptions, and what effect, if any, such exemptions might have had, was not addressed in

argument before us, or at any stage of the proceedings that have culminated in this appeal, but have only come to the fore in the course of preparing this judgment. I mention them only to illustrate why it would be undesirable to make orders falling outside the scope of the dispute that was before the arbitrator without fully appreciating the implications that those orders might have. Needless to say, there are also serious implications in introducing new matters into proceedings that have endured for nearly ten years. For this court to interpose its own notions of how matters might best be brought to finality without adequate insight into the implications carries a real risk of causing irreparable harm.

[64] In my view it is preferable that we confine ourselves to what is properly before us, which is a review of the arbitration proceedings in relation to the dispute that was before the arbitrator. In the course of this judgment it has been necessary to construe the exemption that was in issue and that might serve to guide the parties in their future relations. But I think that the parties are best placed to resolve any further disputes that might exist between them through the medium of the bargaining council, upon which the employees are now represented, which is the proper forum for the resolution of such disputes.

[65] As to the costs that have been incurred thus far I think it is appropriate that they be allowed to lie where they fall in all courts and I intend making no order in that regard.

[66] The appeal is upheld. The orders of the LAC are set aside and the following orders are substituted:

‘1. The appeal is upheld. The order of the Labour Appeal Court is set aside and substituted with the following:

“(a) The application for condonation is granted.

(b) The award of the arbitrator made on 23 April 2000 (incorrectly dated 23 July 1999) is set aside and substituted with an award in the following terms:

"It is declared that the arbitrator has no jurisdiction to make an award in respect of the dispute that is the subject of this arbitration."

(a) No order is made in relation to the costs of the application.'

2. No order is made in relation to the costs of this appeal.'

R.W. NUGENT
JUDGE OF APPEAL

CONCUR:

FARLAM JA)
LEWIS JA)

JAFTA JA

[67] I have had the benefit of reading the judgment prepared by my Brother Nugent. Regrettably I am constrained to disagree with the findings and the conclusion reached therein. In particular I find myself in respectful disagreement with him on the issue of the real dispute that served before the arbitrator; the validity of the process she followed in arbitrating it, the issue that arose before the Labour Appeal Court and the cogency of reasons given by it in support of its decision.

[68] The appellant operates a manufacturing business in the metal industry at a factory in Botshabelo in the Free State Province. Among its employees, were members of a trade union called The Hotel Liquor Commercial and Allied Workers' Union of South Africa (the union) who

later resigned and joined Commercial Workers Union of South Africa (CUSA).

[69] In 1993 the union and the appellant concluded a recognition agreement. Clause 4 of this agreement established a committee consisting of an equal number of members representing each party. The committee was charged with the task of conducting collective bargaining. Collective bargaining on wage increases took place in May of each year. The committee was bound to convene within 21 days of receipt of a written request from either party. The union represented 250 employees out of a workforce of approximately 300 workers.

[70] Towards the end of 1996 the appellant became a member of the Bargaining Council in the Metal and Engineering Industries. When it was first approached to join by the council, it raised concerns about the effect the collective agreement would have on it, as at that stage it was paying its employees wages lower than the minimum wages prescribed in the council's collective agreement. The council proposed that it apply for an exemption from paying minimum wages and other benefits which it claimed it could not afford to pay. Following this advice the employer indeed applied for an exemption. At the outset members of the council could not agree on whether to grant the exemption or not. As a result a committee was appointed to investigate the matter. Messrs Viljoen, Stander, Van Vuuren (all members of the committee) visited the employer's factory together with Mr Coetzee, the council's regional manager. Pursuant to its visit, the committee made a recommendation to the council which issued four licences of exemption, each licence dealing with a separate and different issue.

[71] Meanwhile the union, which was not a member of the council and

was not represented in the council's committee, wrote a letter to the employer requesting that the bargaining committee be convened for the purpose of negotiating wage increases for 1997. The employer responded by saying that having joined the council, it was subject to its collective agreement which superseded the parties' recognition agreement. When the union demanded that the employer pay the minimum wages prescribed by the council's collective agreement, it refused, claiming that it had been exempted from doing so. It must be mentioned that, although the union was a representative union at the employer's factory and this was known to the council, it was nonetheless not consulted during the council's visit to the factory. A few workers, none of whom were members of the union, were randomly consulted. The union's capacity to advance and promote the interests of its members was severely emasculated. It was not only denied the rights it enjoyed in terms of the recognition agreement but also its constitutional right to engage in collective bargaining on behalf of its members. Its members' right to join a trade union of their choice and their right to fair labour practices were, as a result, impaired.

[72] The union applied for membership of the bargaining council with a view to advancing the interests of its members there. But its application was turned down on the basis that it did not meet the threshold set by the council for membership. In terms of that threshold requirement any union seeking membership had to have a minimum of 5000 members in the industry falling within the jurisdiction of the council, regardless of whether it was a majority union at the workplace of any of the employer members.

[73] In 1998, the union once again demanded that the employer pay the minimum wages in compliance with the new collective agreement which was promulgated in terms of the current Labour Relations Act 66 of 1995 (the current Act). Once again the employer refused to pay, contending that

the exemption issued to it the previous year continued to apply to the new agreement. Reliance was placed on the clause quoted in para 23 of Nugent JA's judgment.

[74] Finding itself in an untenable situation once more, the union declared a dispute. At that stage its members were earning R125 per week instead of the R388 minimum wage prescribed in the new collective agreement. As appears from the background, the dispute was about the employer's failure to pay the minimum wages in compliance with the new collective agreement. It was then referred to the Commission for Conciliation, Mediation and Arbitration (the CCMA) for conciliation. The CCMA requires that referrals of this nature be contained in a standard pro forma form supplied by it. The form is meant to guide parties making referrals. In column 3 of the form, the applicant for conciliation is required to state the nature of the dispute. In this case the union described it in the following terms:

'The dispute is about Tao Ying Metal Industries's failure to comply with minimum wages and conditions i.t.o. Metal and Engineering Industries's Bargaining Council.'

[75] Resolution of the dispute eluded the parties at conciliation and the matter was referred to arbitration. After hearing evidence, the arbitrator issued an award in the following terms:

'Respondent TAO YING INDUSTRIES, is ordered to pay to its employees who are members of the Applicant, HOTEL, LIQUOR, COMMERCIAL and CATERING ALLIED WORKERS UNION OF SOUTH AFRICA (HOTELLICA) the wages negotiated in the Metal and Engineering Industries Bargaining Council since 14 April 1998 unless exemptions were granted to the Respondent under the New Collective Agreement concluded in terms of the Labour Relations Act, 1995.'

[76] The appellant instituted an application in the Labour Court for the review of the award on, inter alia, the ground that the arbitrator had failed

to apply her mind to the provisions of the exemptions granted to it in March 1997. It contended that those exemptions 'still enured to its benefit since they were granted in respect of the wage provisions of the Main Agreement published on 27 June 1980 as amended and/or extended and/or replaced from time to time by any succeeding agreement'. The Labour Court found it unnecessary to consider the merits and dismissed the application on the basis that the appellant had failed to make a proper case for condonation for instituting the application late.

[77] Dissatisfied with the outcome the appellant appealed to the Labour Appeal Court. The latter court reversed the Labour Court's finding on condonation but dismissed the appeal on the merits. The present appeal comes before us with special leave of this court. In the order granting leave this court said:

'The leave to appeal is limited to the dismissal of the appeal by the Labour Appeal Court on the merits of the review application.'

The merits considered by the Labour Appeal Court relates only to the question whether the clause on which the appellant relied had the effect of extending the currency of the exemption to the new collective agreement.

[78] The issue before the Labour Appeal Court was essentially one of interpretation of the exemption as reflected on the licences. The Labour Appeal Court held that on the issue of currency the exemption contained two conflicting terms. One in the middle (the first clause) and the other at the bottom of the licence document (the second clause). The second clause limited, so it found, the currency of the exemption to the duration of the old collective agreement whereas the first clause suggests that the exemption was intended to survive the termination of the main agreement and continue to be in force.

[79] The Labour Appeal Court reasoned that since the exemption was applied for and granted in terms of s 51 of the old Act, the bargaining council's power was limited to granting an exemption from an agreement already in existence and which was binding in terms of this Act. To the extent that the first clause purports to extend the currency of the exemption beyond the duration of the collective agreement then in existence, Zondo JP held, it was *ultra vires* because the bargaining council had no power to grant an exemption beyond the lifespan of such agreement. The learned Judge President concluded that the correct interpretation is that the currency of the exemption terminated simultaneously with the main agreement in May 1998.

[80] Although the arbitrator did not, understandably so I may add, engage in the detailed interpretative process which Zondo JP undertook, she also found that the exemption expired when the new agreement came into operation on 14 April 1998. In her award the arbitrator expressed herself as follows:

'It is common cause that the period during which the exemptions were valid is well within the eighteen months referred to in item 12(1) of the Act. It is also common cause that the exemptions were granted in terms of an agreement that was concluded in the industrial council. The said agreement (Main Agreement) was promulgated in terms of section 48 of the 1956 Act and published in the Government Notice R1329 dated 27 June 1980. These exemptions were not, with due respect to Adv Beaton, valid for a period of eighteen months. *They remained valid for the duration of the Main Agreement*. The agreement terminated with the coming into operation of the collective agreement concluded in the Metal and Engineering Industries Bargaining Council. The said collective agreement was published in the Government Notice R404 dated 31 March 1998 and came into effect on 14 April 1998' (my emphasis).

[81] Before us it was argued on behalf of the employer that the arbitrator

had failed to apply her mind to the issue before her, namely, the invalidity of the exemption on the basis that it was improperly granted. The fact that she failed to apply her mind was, it was argued, demonstrated by her making the finding that it was common cause between the parties that the exemptions were valid for eighteen months. I do not agree for three reasons. First, the finding falls short of supporting the inference of failure to apply her mind. In my view such finding suggests, if anything, that she did apply her mind. The use of the word "valid" may, in this regard, have been erroneous. However, it must be read in the context of the entire award. The arbitrator's statement refers to the period during which the exemption was in force as envisaged in item 12(1). This item extends the currency of agreements beyond the repeal of the old Act, albeit for a period of 18 months. Secondly, it is a well-known rule of interpretation that the whole document must be considered and that words in it must be read in their context. It is therefore impermissible to take a word, in isolation, and give it a particular meaning. Thirdly, it appears from the quotation in para 80 above that the appellant's counsel had argued before the arbitrator that the exemption was valid for a period of 18 months from the commencement of the current Act.

[82] In argument before us a considerable amount of time was devoted to the enquiry as to what were the real issues before the arbitrator. While it is true that during the opening addresses before the arbitrator the issues may have been expanded upon, sight must not be lost of the fact that she had to arbitrate the same dispute that had earlier been unsuccessfully conciliated. I have serious reservations about whether parties appearing before an arbitrator, in matters such as the present, can raise issues not covered in the dispute which was submitted for conciliation. In terms of s 135 of the current Labour Relations Act, certain jurisdictional facts must be in existence before such a dispute can be arbitrated. These are: (a) the same

dispute must have been unsuccessfully conciliated; and (b) a period of 30 days from the date of referral must have elapsed or a certificate to the effect that conciliation has failed must be issued by the mediator.

[83] In *National Union of Metalworkers of SA & Others v Driveline Technologies (Pty) Ltd* (2000) 21 ILJ 142 (LAC) Zondo AJP (Mogoeng AJA concurring) rejected the proposition that a party could pursue a dispute, in arbitration or in the Labour Court, which has not been referred to conciliation. The learned Judge President said at para 62:

'At 1214J-1215A in[*Numsa & Others v Cementation Africa Contracts (Pty) Ltd* (1998) 19 ILJ 1208 (LC)] the Labour Court made statements to the effect that, after conciliation, a party which wants to take a dismissal further is bound by the conciliating commissioner's description of the dispute in the certificate of outcome. I do not agree with this. The position is, as the Labour Court correctly pointed out in that case, that a party cannot change the nature of the dispute. I would add that the conciliating commissioner is also bound not to change the nature of the real dispute between the parties. If he did, the party that seeks to take the matter further would not be bound by a wrong description of the dispute but would have a right to take further the true dispute that was referred to conciliation and give a correct description of the dispute. What the parties are bound by is the correct description of the real dispute that was referred to conciliation.'

[84] In the light of the provisions of s 135 the dispute that was before the arbitrator was the employer's failure to pay minimum wages in compliance with the new collective agreement. Its nature could not be altered by the parties. While the legal representatives on both sides alluded to the real dispute during their opening statements, they also referred to issues pertaining to the defence raised by the employer. These remarks were aimed at defining the issues relating to the exemption and its application to the new collective agreement. In his opening statement counsel for the employer said:

'Madam Commissioner the complaint against my client, Tao Ying, is its failure to apply

a collective agreement, it was formulated in the referral to the CCMA, and the relief sought is compliance with a collective agreement, that is what my learned friend has articulated to you, that what he wants from you is an order that we shall comply with the Bargaining Council agreements.'

[85] Consistently with the dispute referred to above, counsel for the appellant put the following question to its employee at the arbitration:

'Right, now you are aware that the union in this case is asking for an order that you comply with the minimum wages prescribed by the Bargaining Council?... Ja.'

The employer's defence was that the exemption granted to it in April 1997, when properly construed, continued to relieve it of its obligation. As stated above, the employer relied on the clause that said it was exempted from 'Part 2 of the Main Agreement as replaced from time to time by any succeeding agreement'. The answer to the question raised lies in the interpretation of this clause.

[86] In construing the exemption it must be read as a whole. If it is read in this way, I agree with Zondo JP that there appears to be a conflict between the first and second clauses, particularly that portion of the first clause which refers to the main agreement as replaced by succeeding agreements. However, to the extent that this clause refers to the main agreement as amended or extended, it is consistent with the second clause. What it means is that the exemption would continue to apply to the agreement in its amended or extended form. The important issue here being that it is still the same agreement against which the exemption was originally granted. To this extent the currency of the exemption corresponds with that of the main agreement. This much was conceded by the appellant's counsel in their written argument before us. They stated in para 37:

'37.1 The proper construction of a legal instrument requires a consideration of the document taken as a whole. Effect must be given to every clause in the instrument and,

if two clauses appear to be contradictory, an effort must be made to reconcile them in order to do justice to the intention of the framer of the document.

37.2 In the present case the textual reconciliation of the two clauses is no complex matter. The two provisions are fully compatible and, read together, signify that the exemption, subject to it not been withdrawn at an earlier date, is to continue throughout the life of the agreement. If the agreement is not extended the exemption lapses; if it is, the exemption continues for the extended period.'

[87] The difficulty arises though when effect is given to that part of the exemption which says it would apply to the main agreement as replaced from time to time by succeeding agreements. What becomes immediately clear, in this instance, is that the focus of the exemption is no longer the main agreement but the agreement that replaces it. The phrase 'exempted from Part 2 of the Main Agreement as replaced from time to time by succeeding agreements' is, in my view, meaningless. This is so because the entire agreement has, by now, fallen away. To maintain that an employer is, in these circumstances, exempted from an agreement which is no longer binding ineluctably leads to an absurdity. This part of the clause is so vague that no effect can be given to it (*Commissioner for Inland Revenue v Golden Dumps (Pty) Ltd* 1993 (4) SA 110 (A) at 116E and the authorities there cited).

[88] Furthermore the phrase 'any succeeding agreement' would have to be interpreted in the context of the exemption. It certainly cannot bear its wide literal meaning simply because the bargaining council's authority to grant an exemption in terms of s 51 of the old Act was limited to agreements binding in terms of that Act only. Therefore, reference to any succeeding agreement in the clause must have been intended to mean agreements which were binding in terms of the old Act. That much is clear

from Item 12(8) which provides:

'After the commencement of this Act and despite the repeal of the Labour Relations Act any person or class of persons bound by an agreement or award remaining in force in terms of sub-item (1), may apply in accordance with the provisions of section 51 of the Labour Relations Act for an exemption from all or any of the provisions of that agreement or award (as the case may be). Any application so made, must be dealt with in terms of the provisions of section 51 and, wherever applicable, any other relevant provisions of the labour Relations Act, in all respects as if the provisions in question had not been repealed.'

[89] Item 12(8) taken together with s 51 reveals that there are jurisdictional facts which had to be in existence prior to the granting of exemptions by the bargaining council. These were: an application made in the prescribed form and manner; an agreement entered into by the parties to a bargaining council; and that such agreement be a binding agreement in terms of the old Act. In truncated form s 51 reads:

'(1) Whenever application is made in the prescribed form and manner for the exemption of any person or class of persons from all or any of the provisions of an agreement entered into by the parties to a conciliation board, which is binding in terms of this Act, or from all or any of the provisions of an award and the Minister is of the opinion that –

(a) the terms and conditions of employment of such person or class of persons are substantially not less favourable to him or them than the terms and conditions of employment prescribed by that agreement or award….

he may, if he deems it expedient to do so, grant exemption from all or any of the provisions of the agreement or award concerned to or in respect of that person or class of persons, for such period and subject to such terms and conditions as he may determine. The period for which exemption is granted may commence on a date prior to that on which the exemption is granted but not earlier than the date on which the application was made in terms of this sub-section….

(3) Application for exemption from all or any of the provisions of an agreement

entered into by parties to an industrial council which is binding in terms of this Act may be made to the industrial council concerned, or to any committee to which the powers of the council under this section have been delegated in terms of section twenty-five, and the powers conferred on the Minister by sub-section (1) may *mutatis mutandis* be exercised by such council or committee.

(4) The terms and conditions of an exemption granted under sub-section (1) or (3) shall be incorporated in a licence of exemption, signed by an officer or secretary of the council or committee concerned, as the case may be, and a copy thereof shall be transmitted to such person or persons as the officer or the secretary, as the case may be, considers necessary….'

[90] In my view, it was permissible for the arbitrator to consider the ambit and scope of the exemption and form an opinion on whether it indeed exempted the employer from paying the minimum wages as contemplated in the new agreement. Following her assessment of the exemption, she was entitled to say its application did not extend to the new agreement and therefore the employer was not excused from paying the minimum wages. That was the effect of her finding, namely that the currency of the exemption lapsed when the old agreement terminated.

[91] But even if one were to accept as correct the interpretation contended for by the appellant, it would still bear the duty of proving that the new agreement has indeed replaced the old one because without that factual basis the exemption cannot be construed to apply to the new agreement. In this regard the appellant led the evidence of only Mr Willem Coetzee, the bargaining council's regional manager. At the arbitration he testified that he did not know whether or not the old agreement had been terminated at the time the new one came into operation. He said, however, that such an agreement could co-exist with non-cancellation. His evidence continued as follows:

'Now on 10 November 1996 was there an industrial council agreement, as it was then

known, in force in the metal industry? ---This, I have a list of the instructions if you will bear with me a second. Can I give it to you?

Yes ---That was for ease of reference because there were many, many agreements published from 1980 to current and I have given you the Government Gazette numbers and the pages.

Here we are ---Yes sir. I've given you an account of what transpired from 27 June 1980, how many times the agreement was amended, extended, re-enacted, and the last one was done on 6 August 1999 in Government Gazette 20330 on page 17….

So the agreement that, so there was an agreement in place on 10 November 1999, sorry 1996, am I right Mr Coetzee? ---Yes sir, it was in force for two days.

Commissioner: Agreement in place on?

Mr Beaton [for the appellant]: 10 November 1996.

Commissioner: And it was in place for two days?

Mr Beaton: Yes, on 10 November it had been in place for two days. Now Mr Coetzee are you aware of any cancellation of that main agreement prior to 31 March 1998? ---The agreements are normally cancelled by the minister before he re-enacts a new one otherwise there would be two in operation.

Yes, so I assume that would take place *pari passu*? --- That's right.

Other than that are you aware of any cancellation? --- Not off the top of my head sir.'

[92] The appellant relied solely on Coetzee's advice for the contention that the exemption still enured as at the time the present dispute arose. This is quite clear from the correspondence between it and him. In a letter dated 14 December 1999 Coetzee responded as follows to an enquiry about the duration of the exemptions:

'Your correspondence dated 20th September 1999 which was received by this office [on] 1st December 1999 in the above regard has reference.

Scrutiny of the confirmed minutes of the Regional Council Meeting where these exemptions were granted, revealed no specific expiry date. I would therefore assume that the exemptions would be in force until such time as the council, in writing withdraws the exemption, or the expiry date, whichever is the soonest.'

This letter reveals Coetzee's thinking which was the basis of his opinion that the exemption in question still applied. He held the view that since the

exemption itself had not been withdrawn and it had no specific expiry date, it continued to apply for the duration of the old agreement which in his view, had not been cancelled even at the time he testified before the arbitrator in January 2000. The same views were repeated by him in the letters addressed to the appellant dated 11 April 2000 and 5 July 2000.

[93] When asked about the duration of the exemptions by the union's attorney (at the arbitration) Coetzee said:

'Again I refer to page 10 and to page 14, sorry, 13, these agreements are also exempted from 19 March 1997 for the duration of the agreement? --- Yes sir.

How long is that? --- Can I just refer you to the previous one to make myself clear please? We were referring in the previous one to paragraph 2, Engineering Industries Pension Fund agreement which was published under government notice R627 of 19 April 1996, which is a completely different agreement to the one that we referring to in the exemption … (intervenes)

I'm quite aware of that. --- If you look at the list that we distributed a little while ago you will find that the council's main agreement started off in 1980 and it was not rescinded in the sense that there is no such agreement in force any more therefore *the agreement which was in force in 1980 is currently today still in force so*, to answer your question, *if the exemption was issued on 19 March 1997 then while the agreement is in force that exemption will be in force*' (my emphasis).

[94] It is quite clear that Coetzee linked the currency of the exemption in question to the duration of the main agreement. In my view, his reading of the exemption was, in this regard, correct and is consistent with the interpretation preferred above. However, his view that the old agreement was still in force in January 2000 was clearly wrong because in terms of the transitional provisions it terminated in May 1998, a month after the new agreement came into operation. As indicated above, the question of the latter agreement replacing the former did not arise in this matter. It follows that there is no basis for extending the exemption in question to the new agreement. That exemption lapsed when the old agreement was terminated.

[95] Before us the Labour Appeal Court was criticised for holding that by purporting to extend the exemption beyond the duration of the main agreement, the bargaining council acted *ultra vires*. Counsel for the appellant argued that the Labour Appeal Court failed to appreciate that the exemption granted by the bargaining council had two components which must not be conflated. The first, so he argued, concerns the main agreement which continued to be of force for 18 months; and, the second, concerns the new agreement which constitutes a replacing agreement as contemplated in the survival clause dealt with above. He contended that the constitution of the bargaining council empowers it to grant exemptions. While it may be true that the bargaining council's constitution gives such power to it, the argument loses sight of a fundamental issue which is that the appellant's application for exemption was made in terms of Item 12(8) and consequently it had to be determined in terms of the relevant provisions of the old Act only. The bargaining council had no authority whatsoever to deal with that application in terms of its constitution. Moreover, the bargaining council could not, acting in terms of s 51 of the old Act, validly grant an exemption from an agreement which was binding in terms of the current Act in circumstances where there was no application before it for exemption from such agreement.

[96] There is simply no factual basis for the contention, made by the appellant, that the bargaining council acted in terms of its constitution in granting the exemption. Coetzee's testimony on this issue was that the bargaining council acted in terms of the old Act. His evidence was as follows:

'But at the time that this exemption was granted, the date on the documents to which you have referred is 7 April 1997, at that time which exemption procedure applied?---The same one that applied in 1980 sir.

And that is the one on page 4? ---That is the one referred to on page 4, top left-hand

corner.'

[97] Nowhere in his testimony did Coetzee say that the exemption was granted in terms of the bargaining council's constitution, following the procedure provided for in the current Act. Nor did the other witness called by the appellant, at the arbitration hearing, testify on this issue. The facts established at that hearing do not support the inference that the council acted on authority derived from its constitution. Indeed counsel for the appellant submitted to the arbitrator that the exemption was valid for a period of 18 months from the coming into operation of the current Act. In these circumstances the criticism levelled at the Labour Appeal Court was unwarranted.

[98] My Brother Musi assumes, without deciding, that the irregularities brought up for the first time at the hearing of this appeal were permissibly raised. I am not willing to do so. I agree with the submission made by counsel for the union that the appellant's case, as set out in its founding affidavit, does not cover the issue of the arbitrator having exceeded her powers by reason of considering the duration of the exemption. Nor does it cover the other irregularities dealt with in Musi AJA's judgment. Our courts do not allow applicants in review proceedings to raise new grounds of review in replying affidavits or from the bar during argument (*Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636B).

[99] But apart from the timing and manner in which those irregularities were raised, in the present case they do not justify interference with the award because the arbitrator has taken into consideration other factors, properly placed before her, which support her conclusion. If we accept that the award we are concerned with here constitutes an administrative action, then the existence of irregularities by itself alone does not warrant

interference unless there was no other material before the arbitrator which justified the conclusion she reached. At the time the award was issued our Constitution guaranteed, inter alia, the right to administrative action which was justifiable in relation to the reasons given for it and the right to a procedurally fair administrative action as two separate and distinct rights. The Constitution did not, however, guarantee an entitlement to a perfect or much less administrative action that was free of procedural errors. Instead what was guaranteed was procedural fairness (*Bel Porto School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) para 104 and the authorities there cited). A complaint that is based on irregularities is ordinarily aimed at showing that the right to procedural fairness has been infringed. Over the years our courts have developed a test for determining whether an irregularity complained of has resulted into procedural unfairness. The test is whether the irregularity vitiates the entire administrative action. If the answer to this question is in the affirmative, then the administrative action in question must be set aside. However, if there was material before the administrative functionary, justifying the action taken, the court would not be entitled to interfere even if an irregularity had been committed.

[100] Recently this court has, in the *South African Veterinary Council and another v Veterinary Defence Association* 2003 (4) SA 546 (SCA), considered the issue of irregularities in the context of the right to a procedurally fair administrative action as was contemplated in the interim Constitution. Writing for the court Farlam JA said (para 35):

‘I turn to consider whether a reviewable irregularity took place. It is clear from the authorities that if a disciplinary tribunal has applied the wrong criterion in making a finding of guilt the application of such criterion constitutes a reviewable irregularity, which can only be ignored if it is clear that if the correct criterion had been applied the finding would have been the same: see, for example, *Hira and Another v Booysen and Another* 1992 (4) SA 69 (A) at 95C-F.’

The learned Judge continued (para 40):

'In view of the fact that it is clear that the tribunal adopted an erroneous approach to the matter the proceedings can be saved only if it is clear that despite the irregularity Dr Krawitz was not prejudiced because the finding would have been the same if the correct approach had been applied: cf *Le Roux and Another v Grigg-Spall* 1946 AD 244 at 254.'

[101] The doctrine of judicial precedent obliges us to follow this decision unless we are convinced that it is wrong (*Contract Forwarding (Pty) Ltd v Chesterfin (Pty) Ltd* 2003 (2) SA 253 (SCA) para 9). I am not so convinced despite what was stated in *Rustenburg Platinum Mines (Rustenburg Section) v Commission for Conciliations, Mediation and Arbitration* 2007 (1) SA 576 (SCA) paras 30 and 31. The decision in the *South African Veterinary Council* was not considered in *Rustenburg Platinum Mines*.

[102] A similar test was adopted by the Constitutional Court in *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 36 and *Pharmaceutical Manufacturers Association of SA*: *In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC). In the latter case the Constitutional Court said (para 90):

'Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. *As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision,* viewed objectively, *is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately*' (my emphasis).

[103] In this case the parties raised before the arbitrator the question of the

duration of the exemption as one of the issues to be considered in arbitrating the dispute. In fact, as stated above, the only basis on which the award was challenged was that the arbitrator failed to apply her mind to the duration of the exemption. She considered the material before her and came to the conclusion referred to in para 80 above. The evidential material presented at the arbitration supported the finding that the exemption lapsed when the old agreement terminated and that when the present dispute arose in August 1998, the exemption was no longer in force. Consequently her award cannot, in my view, be set aside.

[104] For these reasons I would dismiss the appeal.

C N JAFTA
JUDGE OF APPEAL

MUSI AJA:

[105] I have had the benefit of reading the judgments prepared by my Brothers Nugent and Jafta. I agree with Jafta JA that the appeal must be dismissed for reasons he so lucidly articulates. However I have adopted a different approach which leads to the same conclusion. I propose to deal with three issues, namely, the grounds of review on which the arbitrator’s award was challenged; the nature of the dispute before her; and the irregularities allegedly committed by her during the arbitration proceedings.

[106] Initially the award was challenged on three bases. The appellant contended in its founding papers that the bargaining council ought to have been joined because the exemptions granted by it were being challenged. It also claimed that the arbitrator had exceeded her powers in entertaining the dispute because she had no jurisdiction to do so in terms of the Labour

Relations Act 66 of 1995 (the LRA). However these two grounds of attack were not pursued in the court below and in this court. Nothing more need be said about them.

[107] The sole ground of review in which the appellant persisted is that the arbitrator failed to apply her mind to the terms of the exemptions granted to it in 1997. In its founding affidavit the complaint is set out in the following terms:

'9.23 It is also submitted that the First Respondent failed to apply her mind to the provisions of the exemptions previously granted to the Applicant during March 1997. It is the Applicant's position that the exemptions previously granted still enure to its benefit since they were granted in respect of the wage provisions of the Main Agreement published on 27 June 1980:

"as amended and/or extended and/or replaced from time to time by any succeeding agreement. . . ." (The deponent's underlining)

9.24 Should she have considered them properly she would not have given the award she did.

9.25 It is submitted that the conduct of the First Respondent as outlined above amounts to:

i) a defect as contemplated in subsection 145(1) of the Labour Relations Act, No 66 of 1995; alternatively

ii) a permissible ground in law as provided for in section 158(1)(g) of the Act, to review and set aside the function and/or act performed by the Respondent, wherefore it is prayed that the Honourable Court will grant an order in terms of which the First Respondent's award is reviewed and set aside as prayed for in the Notice of Motion.'

[108] For its cause of action the appellant relied solely on the provisions of the LRA and in order to succeed it had to prove that its challenge was based on one or more of the grounds of review contained the sections of the LRA it had relied upon, Section 145 provides:

'(1) Any party to a dispute who alleges a defect in arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award –

(a) . . .

(2) a defect referred to in subsection (1), means –

(a) that the commissioner –

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(b) that an award has been improperly obtained.'

[109] The word 'defect' in s 145 bears four meanings. It means a misconduct committed by an arbitrator or a gross irregularity which she or he has committed during the arbitration proceedings or an act performed by an arbitrator falling beyond his or her powers or that the award was improperly obtained. Any complaint which does not fall within the ambit of any of the four defined meanings of the word does not constitute a defect as contemplated in s 145.

[110] Clearly the only ground possibly covered by the appellant's complaint is that relating to commission of a gross irregularity in the conduct of arbitration proceedings.

[111] In argument in this Court the grounds of review were somewhat expanded to include a contention that the arbitrator exceeded her powers by inquiring into and basing her award on an issue that was not properly before her, namely, the currency of the exemptions. Related to this is a contention that no notice had been given that such issue would be considered and that the parties had not been given the opportunity to address it. It was also contended that the sole issue that was properly before the arbitrator was the validity of the exemptions on the basis averred by the union and that she had no authority to enquire into such issue. Finally it was contended that the award was not rationally justifiable in that it had been based on an erroneous

finding that it had been common cause that the exemptions had expired. The latter contention introduces the requirement enunciated in *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC) to the effect that an arbitration award must be rationally justifiable. See also *Shoprite Checkers (Pty) Ltd v Ramdaw NO* (2001) 22 ILJ 1603 (LAC). I proceed to deal with these grounds and issues incidental thereto. In doing so I leave aside the question of whether it was permissible to raise and canvas new grounds that were not included in the appellant's review application and not even canvased in the court *a quo*.

[112] I deal first with the question of whether the validity of the exemptions on the basis alleged by the third respondent (the union) was the sole issue before the arbitrator. It is so that the opening statement made by the union representative at the start of the arbitration does give the impression that the dispute was about the validity of the exemptions, it being alleged that they were irregularly granted, in that the union or its members, had not been consulted before they were granted. However, such statement must be read in the context of the documentation filed of record as a whole and other material, including statements made by the appellant's then legal representative.

[113] It is noteworthy that the union's representative concludes that statement with a prayer that 'the respondent company comply with the collective agreement'. The complaint that the union had taken to the CCMA was that the appellant was not paying its employees (the union's members) the minimum wages that had been determined by the collective agreement concluded in the bargaining council and which came into operation on 14 April 1998. This much is clear from paragraph 3 of the referral form 7.11 which reads:

'3 The nature of the dispute:

(a) The dispute is about: Tao Ying Metal Industry's failure to comply with the minimum wages and conditions in terms of Metal and Engineering Industries Bargaining Council'

What the union wanted was for the CCMA to conciliate this dispute about the applicant's failure to pay, with a view to enforcing payment of the minimum wages. The certificate of non-resolution issued by the CCMA reflects the dispute as: "collective bargaining provisions – interpretation or application" (read enforcement for application). Likewise the Request for Arbitration form reflects the dispute as: 'application of collective agreement.'

[114] That the dispute before the arbitrator was about the interpretation or application of the collective agreement was confirmed by the appellant's representative when he stated the following:

'Madam Commissioner the complaint against my client, Tao Ying, is its failure to pay a collective agreement, it was so formulated in the referral to the CCMA, and the relief sought is compliance with a collective agreement, that is what my learned friend has articulated to you, that what he wants from you is an order that we shall comply with the Bargaining Council agreement.'

The appellant's representative then went on to submit, by way of a point *in limine*, that the agreement in terms of which the exemptions had been granted was not a collective agreement within the meaning of item 12 of schedule 7 to the LRA. The point he was making, if I understand it correctly, was that the CCMA had no jurisdiction to interpret or apply an agreement promulgated under s 48 of the 1956 Labour Relations Act and, by implication, the exemptions granted thereunder, because such an agreement is not a collective agreement as contemplated in the LRA.

[115] The issue of the exemptions was raised by the appellant in the form of a defence to the union's claim for payment of the minimum wages. Such defence was that the appellant was not obliged to pay such wages because it had been exempted from doing so and referred to the relevant licences of

exemption, in particular, the exemption from part 2 of the 1980 agreement (the main agreement). It is in response to that defence that the union raised the issue of validity when it alleged that the exemptions were irregularly granted and therefore invalid. But this does not detract from the fact that the real dispute before the arbitrator was enforcement of the terms of the collective agreement relating to minimum wages. In fact the appellant clearly accepted this to be the position when it stated the following in its founding affidavit in the review application:

'9.2 In terms of the dispute referral the dispute is about the applicant's failure to comply with minimum wages and conditions in terms of Metal and Engineering Industries Bargaining Council.'

[116] Now it is so that the arbitrator had no authority to enquire into the validity of the exemptions on the basis that they had been improperly granted, and bearing in mind that the bargaining council had been excluded from the proceedings. However, as mentioned above, that was not the sole issue before her. At any rate, this issue became water under the bridge as it appears that the union had, during the course of the proceedings, accepted the validity of the exemptions.

[117] I now turn to consider the allegation that the expiry of the exemptions was not properly before the arbitrator and was not canvassed. During argument in this court, reference was made to a passage in the questioning of Mr Coetzee, the appellant's chief witness, by the arbitrator and from this counsel who appeared for the appellant in this court suggested that the issue of the duration of the exemption was generated by the arbitrator herself. He further contended that not only had the parties been given no notice that the issue would be raised, but also that they were not given an opportunity to address it.

[118] A closer perusal of the record of the arbitration proceedings reveals that the issue was first raised by the appellant's legal representative in his address at the start of the arbitration proceedings. In outlining the further point *in limine* that he had raised, the appellant's counsel quoted item 12(1)(a) of schedule 7 to the Labour Relations Act to the effect that an agreement promulgated under s 48 of the 1956 Labour Relations Act that was in force immediately before the coming into operation of the new Labour Relations Act (on 11 November 1996) would remain in force and enforceable for a period of 18 months from the date of coming into operation of the latter Act. He then stated the following:

'Now the 18 month period takes you to March 1998 the exemptions which are challenged in this arbitration were granted in April 1997, in fact if I am not mistaken on 7 April 1997 so that they were granted in terms of the Industrial Council Agreement promulgated in terms of s 48 of the old act and *were in force until March 1998*' (my emphasis).

Clearly this statement means that he was of the view that the exemptions expired in about March 1998 (he probably confused March with May). This statement is significant in another respect to which I shall turn in due course.

[119] In his heads of argument the appellant's legal representative argued the point *in limine* that he had earlier outlined. In doing so he did not retract the statement to the effect that the exemptions had expired. In response to the point *in limine* aforesaid, the union representative complained vaguely that not enough information had been provided but nonetheless proceeded to make a statement the effect of which was that the exemptions had expired with the expiry of the 18 months from the inception of the LRA as provided for in item 12(1) of schedule 7.

[120] The duration of the exemptions was also canvassed with Coetzee in his evidence. He was asked how long the exemptions lasted and his response was as follows:

‘If you look at the list that we distributed a little while ago you will find that the council’s main agreement started off in 1980 and it was not rescinded in the sense that there is no such agreement in force any more therefore that agreement which was in force in 1980 is currently today still in force so, to answer your question, if the exemption was issued on 19 March 1997 then while the agreement is in force the exemption will be in force.’

Further on he says:

‘So it is not only my opinion and my council’s opinion, it was also the opinion of the Exemptions and Arbitrations Board that while this agreement is running the exemption is issued to the company for the duration of that agreement until such time as the exemption is drawn . . .’

Coetzee’s view was that the exemptions were linked to the duration of the main agreement and that for so long as it remained in force so would they, unless withdrawn by the bargaining council or the Minister. Of course the tenor of his evidence was also that the exemptions were still in force at the time of arbitration but he seemed to have assumed that the main agreement was still in force. The question of the effect of the 1998 collective agreement on the exemptions was not canvassed with him.

[121] In my view, the above evidence shows that the issue of the expiry of exemptions was indeed canvassed by the parties and it is not as if the arbitrator went on a frolic of her own in dealing with it. The contention that the issue was not part of the issues before the arbitrator, runs counter to what the appellant stated in its founding affidavit:

‘8.16 Eventually the first respondent saw it fit to declare a dispute against the applicant for underpayment of wages alleging that the exemptions held by the applicant in fact *expired* or were invalid exemptions’ (my emphasis).

Moreover the expiry of the exemptions was not only relevant for a determination of the issues in dispute but was also an integral element of the defence based on the exemptions, which, once it arose, could not be ignored. I would say that the arbitrator would have misconducted herself had she ignored it.

[122] In my view, the finding that it had been common cause that the exemptions had expired emanates directly from, and is supported by, the statements made by the representatives of the parties, as indicated above. The difficulty that confronts this court is that nowhere in the founding affidavit filed on behalf of the appellant in the review application was such finding challenged nor was it even mentioned. The application was served on the arbitrator and she surely would have responded and cleared the matter had the allegation been made that she would have so grossly misdirected herself. Besides, the award shows that the arbitrator's own conclusion was that the exemptions expired with the expiry of the main agreement when the new collective agreement came into operation on 14 April 1998.

[123] The arbitrator differed with the legal representatives of the parties only in respect of the exact date of the expiry of the main agreement and the exemptions. She expressed the difference as follows:

'These exemptions were not, with due respect to Advocate Beaton, valid for a period of 18 months. They remained valid for the duration of the main agreement. The agreement terminated with the coming into operation of a collective agreement concluded in the Metal and Engineering Industry Bargaining Council.'

Whether the arbitrator was correct in this regard is an issue I discuss hereunder.

[124] It was also argued on behalf of the appellant that the phrase in the founding affidavit 'that the arbitrator had failed to apply her mind to the provisions on the exemptions' encompasses a gross irregularity that rendered the award susceptible to review under s 6 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA). PAJA does not have retrospective effect and therefore it does not apply to the present case. When the challenged award was issued in July 2000, PAJA was not in existence, it having come into operation on 13 November 2000.

[125] In my view, the only notable error committed by the arbitrator was her finding referred to above that the exemptions lapsed when the new collective agreement came into operation on 14 April 1998. The difficulty with this finding is that it assumed that the coming into operation of the new agreement had the effect of terminating the main agreement. However there was no evidence to this effect. The only evidence that has a bearing on this aspect is that of Coetzee. The tenor of his testimony was that the agreement would be terminated by the occurrence of two events: a ministerial notice or withdrawal by the bargaining council. None of these had occurred and Coetzee suggested that the two agreements would have existed side by side. In my view, the correct position is that adopted by the legal representatives during the arbitration to the effect that the exemptions expired when the main agreement lapsed at the end of the 18 months transitional period in May 1998. In any event, this error by the arbitrator does not detract from her core finding that when the dispute arose in August 1998 the exemptions had expired. If anything, this shows that the arbitrator did indeed apply her mind to the terms of the exemptions.

[126] It has to be borne in mind that an irregularity has to be gross to render an award susceptible to review. As to what constitutes a gross irregularity the following dictum of Schreiner J in *Goldfields Investment Ltd v City Council of Johannesburg* 1938 TPD 551 at 560 is instructive:

'It seems to me that gross irregularities fall broadly into two classes, those that take place openly, as part of the conduct of the trial – they might be called patent irregularities – and those that take place inside the mind of the judicial officer, which are only ascertainable from the reasons given by him and which might be called latent. . . . Neither in the case of latent nor in the case of patent irregularities need there be any intentional arbitrariness of conduct or any conscious denial of justice. . . . *The crucial question is whether it prevented a fair trial of the issue. If it did prevent a fair trial of the issues then it will amount to a gross irregularity*. (my emphasis) In matters relating to the merits the magistrate may err by taking a wrong one of several possible views or he may err by mistaking or

misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the court not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the enquiry, or of its duties in connection therewith then it is in accordance with the ordinary use of the language to say that the losing party has not had a fair trial.'

[127] The above dictum has been followed and applied in a long line of cases including cases involving administrative decisions decided in this court and the LAC. See *Local Road Transportation Board v Durban City Council* 1965 (1) SA 586 (A) at 598; *Paper, Printing, Wood & Allied Worker's Union v Pienaar NO* 1993 (4) SA 621 (A) at 638; *Toyota SA Motors (Pty) Ltd v Radebe* (2000) 21 ILJ 340 (LAC) at 351; *Stocks Civil Engineering (Pty) Ltd v Rip NO* (2002) 23 ILJ 358 (LAC) and *Bramford v Metrorail Services (Durban)* (2003) 24 ILJ 2269 (LAC) at 2282. The same approach applies in the review of irregularities in constitutional matters. See *S v Shikunga* 1997 (2) SACR 470 (NmSc) at 484 and *S v Jaipal* 2005 (1) SACR 215 (CC) at 234a-235i.

[128] I should conclude by pointing out that when viewed in its proper perspective the complaint that the arbitrator failed to apply her mind to the provisions of the exemptions in fact relates to interpretation. It was contended in particular that she misconstrued the survival clause, the import of which was that the exemptions applied to the new agreement and therefore continued to enure to the appellant's benefit. That was in fact the sole issue that was pursued in the Labour Appeal Court and that was the issue addressed in the original heads of argument filed on behalf of the appellant in this court. In the premises I cannot, with respect, share the view of Nugent JA that the Labour Appeal Court misconstrued the issues before it. I need also emphasize

that the contention that the validity of the exemptions was the sole issue before the arbitrator and that she had no authority to arbitrate it was certainly not raised in the appellant's review papers, it emerging for the first time in this court.

[129] I conclude that the challenged award is not vitiated by any irregularity and is rationally connected to the material that was before the arbitrator. I would dismiss the appeal.

HM MUSI
ACTING JUDGE OF APPEAL