REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2068/2010

In the matter between:

SUBARU PRETORIA (PTY) LTD **Applicant**

and

MOTOR INDUSTRY BARGAINING COUNCIL

(MIBCO) **First Respondent**

MEYER, CC *N.O* **Second Respondent**

MIBCO EXEPTIONS BOARD/APEALS BOARD **Third Respondent**

Heard : 02 August 2013

Judgment : 16 August 2013

Summary: Review of an administrative decision by MIBCO refusing exemption from membership from the motor industry administered retirement fund. Decision was reasonable. Review dismissed.

JUDGMENT

AC BASSON, J

[1] The applicant is SUBARU Pretoria (Pty) Ltd (hereinafter referred to as "the applicant"). The first respondent is the Motor Industry Bargaining Council (hereinafter referred to as "MIBCO") a bargaining council established in terms of the Labour Relations Act.[1] MIBCO has as its members, two majority unions (NUMSA and MISA), and two majority employers' organisation. The second respondent is Mr Meyer NO cited in his official capacity as the Administrative Officer employed by MIBCO. The third respondent is MIBCO's Exemptions Board and MIBCO's Appeals Board.

[2] This is a review in terms of section 158(1)(g) of the LRA in terms of which the applicant seeks an order declaring that the first respondent (MIBCO) acted in a manner which constitutes a reviewable irregularity when it cancelled the exemption granted to the applicant's employees from membership of the motor industry administered retirement fund. The initial exemption was granted on 18 August 2009 but was subsequently withdrawn. The applicant seeks a further order declaring that the decision taken by the third respondent dismissing the subsequent appeal in respect of the cancellation of the exemption constituted a reviewable irregularity.

[3] In essence, the applicant seeks to review these two decisions on the grounds that they were irregular and unreasonable.

Broad framework

[4] MIBCO has the power to regulate employment conditions in the Motor Industry which includes prescribing to employees to take up membership with certain retirement funds: The Auto Workers' Provident Fund or the Motor Industry Provident Fund. The relevant fund to which the applicant was obliged to belong to is the Motor Industry Auto Workers' Provident Fund (hereinafter referred to as the "MIBCO Provident Fund"). By requiring employees to belong to one of these funds (depending on the grade at which they are employed in the motor industry), retirement benefits are secured industry-wide for employees.

[1] 66 of 1995.

[5] The following collective agreements are important in deciding this application: The MIBCO Main Agreement, the Administrative Agreement, the Auto Workers' Provident Fund Collective Agreement and the Motor Industry Provident Fund Agreement. It is apparent from clause 5[2] of the latter two agreements that membership to those funds is compulsory for certain employees at certain grades in the motor industry. It is further clear from clause 10[3] of both the latter two agreements that MIBCO may grant exemption from any of the provisions to any party on application in terms of clause 40 of the Main Agreement.[4] It appears from the Main Agreement that

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[2] 'CLAUSE 5 : MEMBERSHIP

(1) Subject to the provisions of clause 2 of this agreement and of subclause (3) of this clause, membership of the fund shall be compulsory for every employee employed in the Motor Industry in grades 1 to 6 who has not reached retirement age. 8.

(2) Employees who are not compulsory members in terms of subclause (1) and Directors of companies, members of Close Corporations, Sole Proprietors and Partners in business directly engaged in, or in connection with the Motor Industry, may be admitted to voluntary membership of the Fund at the sole discretion of the Regional Council concerned, and the provisions of the Agreement shall *mutatis mutandis* apply to persons admitted to voluntary membership and their employers.

(3) Every employee for whom membership is compulsory in terms of subclause (1) of this clause, and every person admitted to voluntary membership in terms of subclause (2) of this clause, shall -

(a) complete the form specified in Annexure A to this Agreement and lodge such completed form with the Secretary of the Regional Council for the Region in which he is employed, within one month after the date on which he enters, re-enters or becomes employed in the Motor Industry; and for purposes of this paragraph an employee shall be deemed to have re-entered the Motor Industry when he has changed employment from one Region to another;

(b) when required to do so by the Council, a Regional Council or the Fund, furnish such evidence and information, documentary or otherwise, as may be necessary for purposes of his identity, his membership of the Fund and/or payment or determining of any benefit arising out of such membership.'

[3] 'CLAUSE 10 : EXEMPTIONS

The Council or any Regional Council may grant exemption from any of the provisions of this Agreement to any party on application in terms of Clause 40 of Division A of the Main Agreement.
CLAUSE'

[4] 'Clause 40 of the Main Agreement reads as follows:

'(1) When applications for exemption are received from employers or a group of employees, requiring exemption from the Motor Industry's retirement funds in order to join an alternative approved fund, the following shall be observed:

a) The alternative fund must be a properly structured pension/provident retirement fund registered in terms of the Pension Act.

b) Applications for exemption submitted by an employer on behalf of its employees to be exempted from the industry's retirement funds shall be made on an official company letterhead and shall be signed by the employer or its duly authorised representative.

c) Applications for exemption submitted by a group of employees to be exempted from the industry's retirement funds, shall be made on an official company letterhead from the company that they are employed at, and shall be signed by each employee or his/her duly authorised representative.

MIBCO will only grant exemption if it is satisfied that adequate and suitable alternative retirement benefits are secured for the employees of the applicant who applies for exemption.

[6] Applications for an exemption serve before a committee called the Committee of Party Officials ("CPO"). MIBCO also has the power in terms of clause 4(3) of the Administrative Agreement to withdraw any exemption on one week's notice. If an exception is refused, a party may appeal the decision of the CPO in terms of clause 22 of the Administrative Agreement.

[7] On 3 March 2008, at a meeting of the CPO, the following were recommended to MIBCO's National Administrative Committee:

(i) That the CPO delegates the authority that those applications that, according to the comparison done by MIFA, appear to be inferior, can be rejected without any consideration. In other words, the CPO need not even consider the application for an exemption and the application can be rejected administratively.

(ii) That the CPO delegates the authority that an application for Retirement Annuities in the place of a Provident Fund could be rejected administratively. The respondent contends in its papers that the underlying rationale why an application for membership to a Retirement

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d) The contributions to the alternative fund by both employer and employee shall be at least the equivalent to that required by the industry's funds respectively.
e) The waiting period for membership to the alternative fund(s) may not be longer than 6 months.
f) All new alternative fund's benefits shall be collectively better than those of the industry's funds and the benefits of all existing funds which at present enjoy exemption shall be equal or better than those of the industry's funds.
g) Membership of an alternative fund that complies with these criteria shall be compulsory when exemption is granted from membership of the industry funds.
h) In the event that a dispute arises as a result of the rejection of such application, the dispute shall be referred to an agreed neutral third party or parties, qualified in the matters of retirement funds, who shall observe the provisions of this clause and who shall make a final and binding ruling.

2) The Secretary of the Regional Council or the General Secretary, as the case may be, shall issue to every person granted a licence, a letter of authority signed by him setting out, read with the changes required by the context, the information referred to in sub-clause (1) of this clause.'

Annuity in the place of a Provident Fund could be rejected administratively is “the fundamental negativity of retirement annuities vs. structured industry retirement funds”. In other words, because of the fundamental nature of retirement annuities they do not present benefits that are better than those provided for by the industry funds and as such do not meet the requirements of clause 40 of the Main Agreement.

The following constitute some of the reasons why MIBCO considers that retirement annuities do not constitute an appropriate retirement fund in respect of which it will be appropriate to grant an exemption from membership to the bargaining council industry funds:

(i) Retirement annuities generally provide for a 10 to 15% contribution increase per annum which may not be in line with salary increases (and in fact not have been), thus eventually rendering them unaffordable;

(ii) There is no legal obligation on an employer to contribute – as is the case with the industry funds;

(iii) Proceeds of retirement annuities are only available at minimum age 55;

(iv) Retirement annuities coupled to equities will have values determined by current market values, which could fluctuate wildly (and have in fact fluctuated wildly);

(v) Retirement annuities are taken with an insurer who invests the monies in-house whereas the motor industry retirement funds use multiple managers for diversification of risk;

(vi) Retirement annuities, even if co-funded by employers, are not necessary transferrable on the same basis when employees change jobs in the industry; and

(vii) In the event of a member changing employer, the new employer may refuse to contribute towards the retirement annuity for a variety of reasons.

[8] On 22 May 2008, MIBCO's National Administrative Committee[5] adopted the stance that:

(i) There is a "fundamental negativity of retirement annuities vs structured industry retirement funds". 13 points are identified as the underlying rationale for this view. (The document referred to in these proceedings as "Annexure AA8" contains the rationale for this view.)

(ii) Due to this fundamental inferior nature of retirement annuities, they do not present benefits that are better than those provided for by the industry funds, and

(iii) As such, therefore, retirement annuities do not meet the requirements set out in clause 40 of the Main Agreement for purposes of seeking an exemption in relation thereto (in the place of industry funds).

[9] As a result of this policy decision, so it was argued on behalf of the respondent, the respondent was therefore entitled to reject an application for an exemption where the exemption related to retirement annuities.

[10] In respect of this policy decision, the respondent was at great pains to point out to the Court that it was not about Rand and Cents – it was about the overall inferiority of retirement annuities versus the structured industry retirement fund.

Application for exemption

[11] The applicant made an application for exemption on 19 February 2009. The application was rejected on the basis that it did not contain sufficient information. On 27 March 2009, the applicant again submitted the application for exemption from contributing to the MIBCO Provident fund. This application

[5] Contained in Annexure "AA8" to the papers.

was made after consultation with Finlogic (a retirement benefits consultancy). In this application – which was made on the pro forma application form provided for by MIBCO – the applicant set out the details in respect of the proposed alternative in-house retirement scheme. Attached to the application is also a list of signatures of employees of the applicant consenting to their participation in the in-house fund. In addition to this information, the applicant also attached information regarding the death benefits, funeral, child education and disability benefits. It is clear from the papers that no mention is made that the application for the exemption applied for was in relation to a retirement annuity – it only refers to the in-house fund of "Subaru Pretoria". On 18 May 2009, MIFA reported to MIBCO in a memo that there were no negative points to the in-house fund but that the registration of the in-house fund was still pending with the Registrar of Pension Fund. Again, there was no mention in the memo that the applicant's in-house fund was a retirement annuity.

[12] On 28 May 2009, Meyer advised the applicant as follows:

> 'At the recent meeting of the Council, your application was considered and rejected for the following reasons:
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> "1. The proposed in-house fund is not registered in terms of the Pension Fund Act.
>
> 2. There is no certificate signed by the in-house funds' actuary confirming the costs as set out in Item 3.3 of the application form."'

[13] Upon receipt, the applicant furnished proof of the certificate of registration of a pension fund for the Discovery Investment Retirement Annuity Fund. Attached to this letter were two documents from Discovery. The second document refers for the first time to the fact that the applicant's in-house fund was a retirement annuity.

[14] The application served before the CPO on 14 August 2009. The application was rejected on the basis that the fund was not registered with the FSB

(Financial Services Board). It was, however, resolved that if proof of registration was received, Meyer could approve the exemption without the matter being referred back to the CPO. According to the respondent's papers, Meyer failed to appreciate that the fund was a retirement annuity. I will return to this issue hereinbelow.

[15] On 18 August 2009, the exemption was granted. According to the certificate of exemption, the applicant will contribute to the Discovery Retirement Fund which "provides benefits for employees which are considered to be not less favourable than the benefits provided by the Motor Industry Retirement Fund". The applicant thereafter withdrew from the MIBCO Provident Fund.

[16] According to the respondent, Meyer did not have the authority to grant an exemption where the in-house fund constituted a retirement annuity. The CPO only delegated its authority to grant exemptions to Meyer provided that he was satisfied that there was proof of registration of the in-house fund with the FSB. This delegation did not, as already indicated, include the authority to grant exemption to an application in respect of a retirement annuity. Furthermore, it was according to the respondent, the policy of MIBCO to refuse exemptions in the case of retirement annuities on the basis that retirement annuities have certain fundamentally negative attributes that do not render the benefits thereof better than those of the industry fund. According to the respondent, Meyer acted outside the authority delegated to him when he granted the exemption in relation to an in-house fund that is a retirement annuity. Furthermore, as already indicated, Meyer was unaware (according to him) of the fact that he was exercising his delegated authority to grant an exemption in relation to a retirement annuity. Consequently, according to the respondent, Meyer, therefore, acted outside of his delegated authority.

[17] Subsequent to the granting of the exemption, it came to the attention of Meyer that the applicant's in-house fund was a retirement annuity. It was then decided at a meeting of the CPO to investigate all exemptions granted during the preceding six months. It was further decided that where the exemption was in respect of a retirement annuity, the exemption ought to be withdrawn.

[18] Two months after the exception was granted MIBCO, on 22 October 2009, did a turn-around and in a letter written to the applicant, the applicant was informed that certain information was required in respect of the fund to which the applicant contributed.

[19] On 20 November 2009, the applicant responded. It is important to note that the applicant did not inform the respondent that it is contributing to a retirement annuity. The letter only refers to the "Discovery Retirement Fund". However, in the affidavit deposed to on behalf of the applicant, a certain Mr Grobler indicated that the registered in-house fund is a retirement annuity.

[20] On 8 December 2009, MIBCO wrote a letter stating that the "in-house fund is indeed a retirement annuity scheme. The Council adopted a resolution some time ago that it is not acceptable to replace a provident fund provision in the Motor Industry with a retirement annuity policy". According to the respondent, the applicant had therefore obtained the earlier exemption in relation to a retirement annuity that did not meet the requirements stipulated in clause 40 of the Main Agreement as indicated by the CPO decision of 3 March 2008 and MIBCO's decision of 22 May 2008.

[21] The applicant lodged an appeal against the withdrawal of the exemption. The appeal was dismissed.

[22] Clause 22 of the Administration Agreement provides for the establishment of an Exemption Board. If regard is had to clause 22(7), it appears that the appeal board must have regard to certain criteria in considering the appeal. The applicant submitted that if regard is had to the terse letter informing the applicant that the appeal board had rejected the appeal, it is clear that the appeal was not considered properly or reasonably in light of the criteria listed in clause 22(7) of the Administration Agreement.

[23] The applicant further submitted that the decision to cancel the exemption was unreasonable because the purported rationale was itself irrational and the existence of a policy decision upon which that policy decision was supposedly based did not exist. The applicant further submitted that the dismissal of the

appeal was wholly unreasonable: No hearing was afforded to the applicant and no reasons for the dismissal of the appeal were given. MIBCO - as already pointed out - contended that Meyer failed to appreciate the fact that the fund was a retirement annuity and that he did not have the delegated authority in the first place to grant the exemption in light of the policy decision taken by the CPO in respect of retirement annuities.

Brief exposition of the law

[24] Notwithstanding the voluminous papers, the question before the Court is crisp: Was the decision to cancel the exemption previously granted unreasonable and was the decision to dismiss the appeal lodged pursuant to the cancellation of the exemption unreasonable?

[25] It appears that at common law the judicial review of administrative discretionary powers has been somewhat narrow in that a court will not generally substitute its opinion for that of the administrative body. See in this regard *Shidiack v Union Government (Minister of the Interior)*:[6]

> 'The decision of the Minister being essential, it becomes necessary to consider the circumstances under which the Courts can properly question his decision. Now it is settled law that where a matter is left to the discretion or the determination of a public officer, and where his discretion has been bona fide exercised or his judgment bona fide expressed, the Court will not interfere with the result. Not being a judicial functionary no appeal or review in the ordinary sense would lie; and if he has duly and honestly applied himself to the question which has been left to his discretion, it is impossible for a Court of Law either to make him change his mind or to substitute its conclusion for his own. This doctrine was recognised in *Moll v Civil Commissioner, Paarl* (14 S.C., at p. 468); it was acted upon in *Judes v Registrar of Mining Rights* (1907, T.S., p. 1046); and it was expressly affirmed by this Court in *Nathalia v Immigration Officer* (1912 AD 23). There are circumstances in which interference would be possible and right. If for instance such an officer had acted *mala fide* or from ulterior and improper motives, if he had not applied his mind to the matter or exercised his

[6] 1912 AD 642 at 651.

discretion at all, or if he had disregarded the express provisions of a statute - in such cases the Court might grant relief. But it would be unable to interfere with a due and honest exercise of discretion, even if it considered the decision inequitable or wrong.'

[26] In a more recent decision *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another,*[7] Corbett, JA explained the ambit of the Court's discretion as follows:

> 'Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice' (see *National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd* 1972 (3) SA 726 (A) at 735F - G; *Johannesburg Local Road Transportation Board and Others v David Morton Transport (Pty) Ltd* 1976 (1) SA 887 (A) at 895B - C; *Theron en Andere v Ring van Wellington van die NG Sendingkerk in Suid-Afrika en Andere* 1976 (2) SA 1 (A) at 14F - G). Such failure may be shown by proof, *inter alia*, that the decision was arrived at arbitrarily or capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated. (See cases cited above; and *Northwest Townships (Pty) Ltd v Administrator, Transvaal, and Another* 1975 (4) SA 1 (T) at 8D - G*; Goldberg and Others v Minister of Prisons and Others (supra* at 48D - H*); Suliman and Others v Minister of Community Development* 1981 (1) SA 1108 (A) at 1123A.*)* Some of these grounds tend to overlap.'

Constitutional framework

[27] Section 33(1) of the Constitution[8] gives the right to administrative action that is "lawful, reasonable and procedurally fair". Of relevance to this application is the fact that section 33(1) of the Constitution provides that administrative

[7] 1988 (3) SA 132 (A) at 152A – D.
[8] Act 108 0f 1996.

action must be reasonable.[9] It falls outside of the ambit of this judgment to summarise the case law in respect of what is encompassed by reasonableness. It is, however, also accepted that it is often difficult to define "reasonableness". I will therefore suffice with a brief reference to three prominent cases in which the question of what constitutes "reasonable" administrative action was considered. In *Minister of Health and Another NO v New Clicks South Africa (Pty) Ltd and Others (Treatment Action Campaign and Another as Amici Curiae*[10] the Court confirmed that reasonableness" is now the standard of scrutiny of administrative action in terms of section 33 of the Constitution:

> '[108] The provisions of s 33 of the Constitution are similar to those contained in s 24 of the interim Constitution. There is, however, a material difference. Under the interim Constitution a requirement for just administrative action was that a decision must be justifiable in relation to the reasons given. That in substance set rationality as the review standard. Under s 33 administrative decisions can now be reviewed for reasonableness. That is a variable but higher standard, which in many cases will call for a more intensive scrutiny of administrative decisions than would have been competent under the interim Constitution.'

[28] O' Regan, J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others*[11] in listing various factors that are relevant in deciding whether a decision is reasonable or not, points out that the reviewing Court should caution not to usurp the functions of administrative agencies:

> '[45] What will constitute a reasonable decision will depend on the circumstances of each case, much as what will constitute a fair

[9] Cora Hoexter in Administrative Law in South Africa at 281 – 292 lists, with reference to a host of case law, the grounds for review as follows:

(i) Failure to decide or consider an issue.
(ii) Failure to act within a reasonable time.
(iii) Failure to take into account relevant and taking irrelevant considerations into account.
(iv) Fettering the discretion or unduly limiting the discretion.
(v) Arbitrary and capricious decision-making.

See for a detailed discussion of reasonableness: Hoexter at at 293 *et seq*.

[10] 2006 (2) SA 311 (CC) at para 108.

[11] 2004 (4) SA 490 (CC) at para 45.

procedure will depend on the circumstances of each case. Factors relevant to determining whether a decision is reasonable or not will include the nature of the decision, the identity and expertise of the decision-maker, the range of factors relevant to the decision, the reasons given for the decision, the nature of the competing interests involved and the impact of the decision on the lives and well-being of those affected.(footnote omitted) Although the review functions of the Court now have a substantive as well as a procedural ingredient, the distinction between appeals and reviews continues to be significant. The Court should take care not to usurp the functions of administrative agencies. Its task is to ensure that the decisions taken by administrative agencies fall within the bounds of reasonableness as required by the Constitution.'

[29] Lastly, the Supreme Court of Appeal in *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management, and Others*[12] set out the test for a review based on reasonableness as follows:

'[12] … The right to just administrative action is derived from the Constitution and the different review grounds have been codified in PAJA, much of which is derived from the common law. Pre-constitutional case law must now be read in the light of the Constitution and PAJA. The distinction between appeals and reviews must be maintained since in a review a court is not entitled to reconsider the matter and impose its view on the administrative functionary. In exercising its review jurisdiction a court must treat administrative decisions with 'deference' by taking into account and respecting the division of powers inherent in the Constitution. This does not 'imply judicial timidity or an unreadiness to perform the judicial function'. The quoted provision, s 6(2)(h) of PAJA, requires a simple test, namely whether the decision was one that a reasonable decision-maker could not have reached or, put slightly differently, a decision-maker could not reasonably have reached. (See the authorities quoted by the Court below in paras [60] - [64] to which

[12] 2006 (2) SA 191 (SCA) at para 12.

must be added *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) (2004 (7) BCLR 687) at paras [42] - [50], *Associated Institutions Pension Fund and Others v Van Zyl* [2004] 4 All SA 133 (SCA) at para [36] and the unreported *Zondi v Member of the Executive Council for Traditional and Local Government Affairs and Others (CC)* (case No CCT 73/03 delivered on 15 October 2004) at paras [99] - [103].)"

[30] In light of the above, I will now briefly consider whether the two decisions by MIBCO are reviewable. On behalf of the respondent it was submitted that the first decision – which refused exemption – is academic in light of the fact that the applicant has pursued its internal remedies- namely an appeal in terms of clause 22 of the Administrative Agreement. This argument certainly has merit. However, I have, in order to bring finality to this matter, decided to revisit the decision made by MIBCO to withdraw the exemption after discovering that the exemption had in fact related to a retirement annuity. In considering this application I had regard to the following facts:

(i) The applicant's in-house fund was a retirement fund.

(ii) The respondent considered that retirement annuities by their very nature were inferior when compared with industry funds (for the reasons set out in "Annexure AA8").

(iii) MIBCO exercised its discretion to cancel the exemption on the basis that the applicant's in-house fund was a retirement annuity and as such it provided inherently inferior benefits when compared with the industry funds. MIBCO's appeals board was of the same view. Put differently, MIBCO is of the view that retirement annuities do not comply with clause 40 of the Main Agreement. The discretion to reject applications for exemption was accordingly delegated to Meyer (in this instance) to reject applications for exemption where it related to retirement annuities administratively.

(iv) MIBCO (through Meyer) exercised its discretion erroneously when he granted the exemption. Consequently the exemption was cancelled.

[31] Can it be said that MIBCO and/or MIBCO's exemption board and appeal board arrived at an unreasonable decision in cancelling the exemption and dismissing the appeal against the cancellation of the exemption? In light of what the Constitutional Court stated in *Bato Star namely that* "an administrative decision will be reviewable if, in Lord Cooke's words, it is one that a reasonable decision-maker could not reach"[13] can it be said that the two decisions were unreasonable?

[32] Although the report of MIFA states that the benefits provided for by the in-house fund (the retirement annuity) of the applicant is not inferior to that of the Motor Industry/Auto Workers Provident Fund, I am in agreement with the respondent that this does not take into account the considerations inherent to a retirement annuity fund as outlined in the document referred to in this judgment and the papers as "Annexure AA8". In essence, when MIBCO adopted a policy decision to reject applications for exemptions in respect of retirement annuities it did so on the basis of the considerations set out in this document. On behalf of the respondent, it was submitted that it was not about rand and cent but about the inherent negativity of retirement annuities versus structured industry retirement fund. The upshot of this policy decision is that retirement annuities are not regarded as meeting the requirements for exemption as set out in clause 40 of the Main Agreement because of the fundamental negativity associated with retirement annuities.

[33] This brings me to the next question of whether it was unreasonable for MIBCO to refuse administratively the application for an exemption on the basis of this policy decision as contained in "Annexure AA8"? Firstly, can it be said that the discretion of Meyer was fettered by the policy decision/guidelines as contained in "Annexure AA8" when he cancelled the exemption? Although it is accepted that public decision-makers are expected to apply policies and guidelines, it is also accepted that these guidelines should not be such to preclude a person exercising a discretion from independently applying his mind in arriving at a decision.[14] The fact that a guideline exists against which

[13] *Bato Star*, *supra*, at para 44.
[14] See in general Hoexter at 285 *et seq*.

a person must exercise his or her discretion does not therefore imply as a matter of course that the decision maker's discretion has been fettered. The Appellate Division (as it then was) in *Britten v Pope*[15] recognised the value of guidelines but cautioned that there should nonetheless be an intelligent exercise of an administrative discretion:

> 'It must be used in good faith, and after fair enquiry, not arbitrarily or capriciously, but bearing in mind the interests both of the public and of the applicant, and within the limits of the Statute. There should no doubt be an exercise of discretion in respect of each application, but that need not necessarily exclude all reference to general principles. Indeed some such reference would seem to be necessary to the intelligent exercise of this administrative discretion. The law affords no guide; and if the decisions of the Committee are not to be arrived at by haphazard, the adoption of some general lines of policy or some uniform basis of treatment becomes in certain cases inevitable.'[16]

[34] In the more recent case of *Kemp NO v Van Wyk*,[17] the Supreme Court of Appeal held that these principles as set out in *Britten* remain equally applicable today. The Court emphasised the fact that the official is entitled to refer to the existing policy provided that he or she is independently satisfied that it is appropriate to apply the policy in the particular circumstances:

> '[1] A public official who is vested with a discretion must exercise it with an open mind but not necessarily a mind that is untrammelled by existing principles or policy. In some cases, the enabling statute may require that to be done, either expressly or by implication from the nature of the particular discretion, but, generally, there can be no objection to an official exercising a discretion in accordance with an existing policy if he or she is independently satisfied that the policy is appropriate to the circumstances of the particular case. What is required is only that he or she does not elevate principles or policies into rules that are considered to be binding with the result that no discretion is exercised

[15] 1916 AD 150.
[16] Ibid at 158.
[17] 2005 (6) SA 519 (SCA) at para 1.

at all. Those principles emerge from the decision of this Court in *Britten and Others v Pope* 1916 AD 150 and remain applicable today.'

[35] The principle therefore appears to be that an official may take an administrative decision with reference to or with consideration of an applicable policy/guideline provided that there is no ridged application of the policy or guideline. In other words, where an official applies a policy or guideline as a hard-and-fast rule without consideration of whether the policy or guideline should be applied, the Court would generally be entitled to interfere with the exercise of the administrative discretion.[18] In this regard, the Court in *Kemp*[19] considered whether to interfere with an official's discretion to refuse to grant permission to import some sable antelope from Zimbabwe in circumstances where the official had relied on a policy that imposed an embargo on such imports. The Court held as follows:

'[10] The various further submissions that were made on behalf of the appellants need not be traversed in any detail because they really all came down to this: It was submitted that the first respondent's reliance upon the existence of the embargo in making his decision excluded the proper exercise of his discretion and for that reason he acted unlawfully. What he was required to do, so it was submitted, was to consider the proposals that were put forward by the appellants, in isolation of the existing embargo, and to refuse the application only if those proposals were demonstrably inadequate to obviate the risk of the disease being introduced. I do not think that is correct. That would suggest that the first respondent's function was limited to adjudicating

[18] *Johannesburg Town Council v Norman Anstey and CO* 1928 AD 335 at 339 - 340: 'And the only conclusion to which I can come from their reasons is that they had laid down a hard and fast rule to be applied to all requests for certificates for refreshment rooms where there was internal communication with other parts of the premises. When once that fact was established, no other circumstances were taken into consideration, but the general rule was applied. And if that be the proper conclusion to draw from their reasons, as I think it is, I do not think that they exercised their discretion as required by law. In the case of *Britten v Pope* (1916 AD 150) the question was considered of how far a licensing court is entitled to give effect to a general rule which it has adopted in dealing with applications requiring the exercise of its discretion. And the principle laid down in that case, as I read the judgments, is that, while a committee of the licensing court is entitled to take for its guidance a rule laid down by the full licensing court of which it approves, it would not be exercising its discretion if it treated the rule as a hard and fast one to be applied as a matter of course in every application, but that it must consider carefully each application with a view to determining whether, in the special circumstances; of the particular case, it should apply the rule.'

[19] *Kemp* (supra) at para 10.

upon the adequacy of preventative measures that were proposed by potential importers, and that he was not entitled to initiate, and then enforce, preventative measures devised by himself, which is manifestly not so. The whole scheme of the Act is directed towards authorising the Directorate of Animal Health, through its director, to initiate measures to protect the country's livestock against the risk of disease, which necessarily contemplates that preventative policies would be formulated to that end, and that the discretion to grant or refuse permits would be exercised within the framework of those policies. If the decision to impose the embargo was itself lawful (and there is no suggestion that it was not), I do not think the first respondent was called upon (though it was open for him to do so) to re-evaluate its imposition merely because he was presented with an alternative proposal that might have been equally effective. He was entitled to evaluate the application in the light of the directorate's existing policy and, provided that he was independently satisfied that the policy was appropriate to the particular case, and did not consider it to be a rule to which he was bound, I do not think it can be said that he failed to exercise his discretion. As it was explained in *R v Port of London Authority*; *Ex parte Kynoch Ltd* [1919] 1 KB 176 at 184:

> "There are on the one hand cases where a tribunal in the honest exercise of its discretion has adopted a policy, and, without refusing to hear an applicant, intimates to him what its policy is, and that after hearing him it will in accordance with its policy decide against him, unless there is something exceptional in his case... (I)f the policy has been adopted for reasons which the tribunal may legitimately entertain, no objection could be taken to such a course. On the other hand there are cases where a tribunal has passed a rule, or come to a determination, not to hear any application of a particular character by whomsoever made. There is a wide distinction to be drawn between these two classes."

And in British Oxygen Co Ltd v Minister of Technology [1971] AC 610 (HL) ([1970] 3 All ER 165) at 625D - E (AC)*:*

> "What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say - of course I do not mean to say that there need be an oral hearing."'

[36] On the papers before this Court, it is difficult to conclude that the exemption board (Meyer NO) did not properly exercise its discretion. The Court has also taken into account that Meyer was not properly informed by the applicant when it applied initially for an exemption that it was applying for an exemption in favour of a retirement annuity. I have perused the papers and the numerous attachments and apart from one document (attached to a letter dated 9 June 2009) wherein scant reference is made to a retirement annuity, no explicit reference was made in the application for an exemption in that, what the applicant was seeking, was for an exemption in favour of a retirement annuity. It is, therefore, accepted that Meyer when he exercised his discretion to allow the exemption was not fully apprised of the fact that he was exercising a discretion in respect of a retirement annuity. It was only after the exemption was withdrawn and the applicant explicitly requested to provide information pertaining to the in-house provident fund that it became apparent to the respondent that the in-house fund in respect of which the exemption was sought is a retirement annuity fund.[20] I have also considered that when the applicant was informed of the withdrawal of the exemption that the applicant was informed of the reasons as to why the exemption was cancelled. More in particular, the applicant was referred to the resolution adopted by MIBCO that "it is not acceptable to replace a Provident Fund provision in the Motor Industry with a Retirement Annuity Policy. The reasons are set out in the attached document." I have also taken into account that there is nothing before this Court to show that Meyer did not apply his mind when he made the decision to refuse (withdraw) the exemption.

[20] On 22 October 2009.

[37] It is common cause that the applicant then lodged an appeal in accordance with clause 22 of the Administrative Agreement.[21] The applicant then, with reference to the guidelines as contained in "Annexure AA8" proceeded to address each and every consideration/concern listed in the aforesaid document as to why retirement annuities are regarded to be fundamentally negative and motivated why the exemption should be granted in favour of the in-house retirement annuity. The response from the Appeals Board on 8 February 2010 was that the appeal was "duly considered by the Independent Board" and that the appeal was dismissed.

[38] I am in agreement with the respondent that no basis is laid by the applicant upon which this Court ought to interfere with this discretion. I can, therefore, find no basis upon which to conclude that the finding was arbitrarily or that it was irrational, senseless or without foundation. There are certainly no facts before this Court to find that the members of the Appeals Board had failed to apply their minds to the matter and that it had arrived at an unreasonable decision. In the event, it is found that there is no basis on which to interfere with the discretion exercised by MIBCO's Exemption Board and MIBCO's Appeals Board.

[39] In respect of costs, I can find no reason why costs should not follow the result.

[40] In the event the following order is made:

40.1 The application is dismissed with costs.

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AC BASSON, J

Judge of the Labour Court

[21] On 18 January 2010.

Appearances:

For the Applicant:	Advocate F Venter
Instructed by:	Bowman Gilfillan Attorneys
For the Respondents:	Advocate W.LaGrange
Instructed by:	Cliffe Dekker Hofmeyr Attorneys