IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG

CASE NO: JR774/08

In the matter between:

METAL AND ENGINEERING INDUSTRIES BARGAINING COUNCIL	**Applicant**
and	
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION	**First Respondent**
STONE, P N.O	**Second Respondent**
PICM RANDFONTEIN (PTY) LTD	**Third Respondent**

JUDGMENT

JAMMY AJ

1. In a demarcation dispute between the Applicant, the Metal and Engineering Industries Bargaining Council and the Third Respondent, PICM Randfontein (Pty) Ltd ("the Company"), referred to Arbitration under the auspices of the First Respondent, the Commission for Conciliation, Mediation and Arbitration ("CCMA"), the Second Respondent, the duly appointed Commissioner in that Arbitration determined *inter alia,* that the Company's workshop in Randfontein and the employees there employed do not fall within the jurisdiction of the Applicant.

2. It is that determination which the Applicant in these proceedings, seeks to have reviewed and set aside, with the additional prayer that this Court must in turn determine that the Third Respondent and its employees at its Randfontein workshop –

> "are engaged in activities that fall within the registered scope of the Applicant and that the Third Respondent must register its workshop at Randfontein and the employees employed there with the Applicant".

3. The dispute is sourced in the fact that the Company conducts its business in three different localities, - in workshops at Randfontein, Rustenburg, and Northam. In that context, the Second Respondent, based on the evidence before him, correctly recorded the following further facts as being either common cause, not disputed or conceded (the Applicant referred to by him is of course the Third Respondent in these proceedings):

> "1. Of a total headcount of 407 employees, the Applicant employees 220 employees at Rustenburg, 108 employees at Northam and 79 employees at Randfontein.
>
> 2. The income from the Applicant's contracts with the Mining Industry is approximately R80 million per annum while the income from the Randfontein workshop generates R20 million per annum, or 25% of the Applicant's total turnover.
>
> 3. 70% of the income generated by the Randfontein workshop was in respect of business with 'external clients' i.e. not work conducted internally in support of the Applicant's primary business activity.
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> 4. The Respondent (the Applicant in these proceedings) conceded that in respect of Rustenburg and Northam approximately 11 employees are employed at each site in general engineering activities".

4. Of material relevance in the demarcation context, is an agreement reached by agents of the Applicant and the Bargaining Council for the Building Industry following an inspection *in loco* of the Third Respondent's Randfontein business premises on 22 January 2008 to the effect that:

> 4.1. The Third Respondent's primary business relates to civil engineering support services to the mining industry;
>
> 4.2. The employees at the Third Respondent's workshop in Randfontein are engaged in work which falls within the registered scope of the Applicant; and
>
> 4.3. Apart from the Randfontein workshop, the Third Respondent employs personnel at mining operations at Rustenburg and Northam.

5. When due regard is had to the fact that the Third Respondent's primary business is civil engineering in the mining industry, it was argued before the Arbitrator on its behalf that the relatively small size of the Randfontein workshop operation, both in respect of employee numbers and turnover and the fact that it has no independent legal status, render the business operations as ancillary to the Third Respondent's main business. If, in these circumstances, the Randfontein operation were to be designated as an industry separate from the main business of the Third Respondent, collective bargaining within the Third Respondent's business would be undesirably fragmented.

6. The Applicant's response to those contentions was based on the submission that where an employer, to a substantial extent, is engaged in activities separate, but ancillary to its main business, which activities are characteristic of, or fall under the definition of a different industry from that of its main business, a separate demarcation of the ancillary undertaking would be justified where the activities, independently assessed, were of sufficient dimension to justify a conclusion that the employer concerned was carrying on a business in more than one industry.

Whilst the statistical evidence relating to the employee complement and turnover in the Randfontein operation was not disputed, these, contrary to the Company's contentions in that regard, are, it was argued, of a sufficient proportion to justify a separate demarcation of the ancillary activity, more particularly in the light of the acknowledged fact that 70% of the Randfontein business is for the "open market".

7. These submissions, in his award under review, were in my view properly and responsibly considered by the Second Respondent. Quite apart from the fact that the statistical information relating to the Randfontein workshop is not, he determined, "the primary consideration in determining whether the operation is ancillary to the main business or a separate industry", he found that this notwithstanding, those statistics did not support the Bargaining Council's argument that the Randfontein workshop should be treated "as a discrete industry sector". Submissions relating to the collective bargaining ramifications of a separate demarcation of the Randfontein operation were, in essence, of no relevance in the absence of evidence of any existing collective bargaining relationships within the Company's scope of operations.

8. As far as the Second Respondent was concerned, the "crisp issue" for determination by him was whether or not the Randfontein workshop "should be classified as a discrete industrial enterprise" within the Company's overall business. On the evidence before him, he concluded, he found "a direct linkage between the activities of the Randfontein workshop and the Applicant's primary business activity" and in that context the size of the Randfontein workshop, when viewed against the Company's total business activity did not justify a determination that the employees engaged there in general engineering work fell within the jurisdiction of the Bargaining Council. The Applicant in these proceedings contends that that determination by the Second Respondent is not a decision that a reasonable Arbitrator could reach, primarily for the reason that he "failed to appreciate the nature of the decision he was required to make. Emphasis in support of that contention was placed by the Applicant's Counsel on what has now become a compelling examination of the grounds properly to be considered in

applications for the review of Arbitration Awards. In the Constitutional Court case –

> **Sidumo and Another v Rustenburg Platinum Mines Ltd and Others (2007) 12BLLR 1097(CC)**

Navsa A J at page 1130, said this –

> "The better approach is that Section 145 is now suffused by the Constitutional Standard of Reasonableness … is the decision reached by the Commissioner one that a reasonable decision-maker could not reach?"

9. The Second Respondent, in his finding that the Randfontein workshop could not be demarcated as an undertaking in an industry different from that engaged in at the Company's other undertakings, failed, it is submitted, "to appreciate what he was required to do".

10. In the leading case of –

> **KWV v Industrial Council for the Building Industry 1949(2SA600A)**

Centlivres J A, examining the issue of the separate demarcation of an ancillary undertaking, commented, in essence, that this would be justified if -

> "… the activities in question, viewed by themselves, were of sufficient dimensions to justify the conclusion that the parties concerned carried on more than one industry".

11. In –

> **Coin Security (Pty) Ltd v CCMA and Others (2005) 7BLLR 672(LC)**

The Court said this at page 684 –

> "It is possible for the same employer to be engaged in two or more industries at the same time, and for the employer to be an employer in each one. The question is one of fact and where it arises each of the two enterprises is to be treated as separate from the other … The two or more industries may be utterly distinct or the one may be ancillary to the other. Where the one industry is ancillary to another, it is a matter of degree whether a person who carries on one particular industry is also carrying on another industry. It is a question whether the activities were of sufficient dimensions to justify the conclusion that the employer carries on and is associated with its employees in more than one industry".

12. An ancillary business, is in my view correctly, defined in **Coin Security** (*supra*) as one –

> "rendering services to existing customers or clients of the main business. Whilst what is ancillary is a question of degree, that is not the only enquiry. Ancillary business is also required as a matter of both language and law to be performed as ancillary to or, put differently, to support existing business within a defined customer base".

13. In **R v Sidersky 1928 TPD109**, referred to with approval in **KWV** (*supra*) what was noted as important in issues of this nature is that the character of an industry is determined not by the occupation of the employees engaged in the employer's business, but by the nature of the enterprise in which the employees and the employer are associated for a common purpose. Once the character of the industry is determined, all employees are engaged in that industry. The precise work that each person does is not significant. At page 112 of **Sidersky**, the following was said by Solomon J –

> "Dr Reitz argued that the character of an industry is determined, not by the kind of occupation in which the employees are engaged, but by the

> nature of the enterprise in which both employers and employees are associated for a common purpose. Once the character of the industry is determined, all the employers are engaged in that industry, whatever the actual work may be which the employer allots to them".

14. The evidence before the Second Respondent was, that in addition to the "external" activities conducted at Randfontein, the workshop there provides steel fabrication to the larger part of the main business of the Third Respondent, namely civil engineering support. Whilst the Second Respondent's award is concise in its terms, there is nothing in its language to support the Applicant's contention that he was not cognisant of and did not take into account the concept of "ancillary" and the principles enunciated in the authorities. In his determination, as I have stated, he considered the crisp issue before him to be whether or not the Randfontein workshop could be separately classified "as a discrete industrial enterprise within the Applicant's overall business" and found in that regard "a direct linkage between the activities of the Randfontein workshop" and the primary business conducted by the Third Respondent.

15. I can find nothing in the papers before this Court or in the submissions made on behalf of the Applicant to justify a conclusion that the Second Respondent failed to appreciate his function or properly to consider the evidence before him. There is no suggestion that his determination was not rationally supported by the evidential and legal considerations which he was required to take into account and certainly nothing to suggest that his ultimate determination was one that a reasonable decision-maker could not reach.

16. In the result, the Applicant has failed, in my view, to establish a basis for interference in any context with the Second Respondent's Award and the order I make is accordingly the following:

16.1. The application is dismissed.

16. 2 The Applicant is to pay the Third Respondent's costs

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B M JAMMY
ACTING JUDGE OF THE LABOUR COURT

24 April 2009