IN THE LABOUR COURT OF SOUTH AFRICA **NOT REPORTABLE**

HELD IN CAPE TOWN

Case no: C940/2009

In the matter between:

BOBCRETE (PTY) LTD **APPLICANT**

and

BUILDING INDUSTRY BARGAINING

COUNCIL **1ST RESPONDENT**

COMMISSIONER STEPHAN CLOETE NO **2ND RESPONDENT**

JUDGEMENT

CHEADLE AJ

[1] The applicant manufactures concrete slabs and similar components for use in the building industry. The first respondent is the bargaining council registered for the building industry. The applicant contends that it does not fall within the scope of the Council and its collective agreements while the council contends that it does.

[2] The failure of the employer to comply with the Council's main agreement (GG No 30059 of 27 July 2007 as amended by GG 30586 of 21 December 2007) was referred to arbitration by the second respondent, the Commissioner.

[3] It is common cause that the applicant manufactures products for use in the building industry. Its principal business consists of structural design (approximately 40% of what the company does), the manufacture of pre-stressed and pre-cast concrete products which are commonly referred to a 'T-beams' (approximately 20% of what the company does) and the manufacture of concrete beams and stairs (approximately 40% of what the

company does). The manufacture of the T-beams and the concrete beams and stairs is not done on site although about 20 employees out of 128 employees will periodically assist client builders in the installation of the beams and stairs without charge. In summary the assistance in delivery and installation is a very small percentage of what the applicant does.

[4] The Commissioner founded his authority to determine whether the applicant fell within the scope of the main agreement on clause 25 of the agreement, which gives the Council the authority to determine a dispute arising from the interpretation and application of the agreement. It is trite that the authority to determine such a dispute includes the authority to determine a dispute over the enforcement of a collective agreement. And in doing so an arbitrator must satisfy herself that she has jurisdiction, namely whether or not the employer and employees subject to the arbitration fall within the scope of the agreement.

[5] However if in any proceedings before a Commissioner about the interpretation or application of a collective agreement, a question is raised as to whether any employer or employee is bound by any provision of a collective agreement, section 62(3A) requires the Commissioner to adjourn the proceedings and refer the question to the CCMA if she is satisfied that the three conditions set out in that subsection are met.

[6] The three conditions are:

6.1 the question must not have been previously determined by arbitration under the section;

6.2 the question is not the subject of an agreement between two or more councils contemplated in subsection (2);

6.3 the determination of the question is necessary for the purposes of the proceedings.

[7] It is quite clear from the record and the second respondent's award that the question of whether the applicant was bound by the provisions of the main agreement was raised by the applicant. The second respondent ought then to have considered whether the three conditions were met and,

if so, then referred the question to the CCMA for determination under section 62(3A). The failure to do so is a material irregularity vitiating the award.

[8] The question is then whether this Court should refer the matter back to the second respondent in order for him to satisfy himself whether the three conditions referred to in section 62(3A) have been met or to substitute his decision with a decision by this Court. A reviewing court only substitutes its decision in place of an arbitrator's in circumstances where the decision of the arbitrator is a foregone conclusion. In this case it is evident from the award itself that there has been no determination of the question – the council's decision to decline jurisdiction was merely an opinion not a determination (para 19 of the Award at 56 of Bundle A). It is not the subject of an agreement between two councils. The determination of the question is clearly necessary to determine whether the applicant is bound by the provisions of the main agreement. It follows that it is unnecessary for me to refer the matter back to the second respondent and it is permissible and in the interests of the expeditious resolution of the dispute to refer the question of whether the applicant is bound by the provisions of the main agreement to the CCMA for its determination under section 62.

[9] The applicant has sought to persuade me to make a finding on the merits of the respective contentions and to declare that the applicant is not an employer engaged in the building industry. But that would be requiring this Court to do what section 62 requires the CCMA to do – it would be pre-empting what the CCMA must decide.

[10] There being no opposition, no order of costs is sought against either of the respondents.

[11] Accordingly the following order is made-

11.1 The award of the second respondent dated 9 October 2009 that the applicant is an employer engaged in the building sector as defined in the main agreement for the building industry (GG No 30059 of 27 July 2007 as amended) is reviewed and set aside;

11.2 The question of whether the applicant is bound by the provisions of the main agreement for the building industry (GG No 30059 of 27 July 2007 as amended) is referred to the Commission for Conciliation, Mediation and Arbitration for determination under section 62 of the Labour Relations Act, 66 of 1995;

11.3 No order is made as to costs.

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CHEADLE AJ

Date of Hearing : 15/04/2010

Date of Judgment : 04/05/2010

Appearances

For the Applicant : Adv. Rautenbach

Instructed by : Maserumule Inc Attorneys