REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no: C917/2010

In the matter between:

SOUTH AFRICAN MUNICIPAL WORKERS UNION	Applicant
and	
SYNTELL (PTY) LTD	First Respondent
COMMISSION FOR CONCILIATION	
MEDIATIONAND ARBITRATION	Second Respondent
D.I.K WILSON N.O	Third Respondent

Heard: 13 June 2012

Delivered: 12 October 2012

Summary: Application to review a demarcation award, consultationwith NEDLAC in terms of section 62 (9) of the LRA - should an audi right be read into the provision where a commissioner changes his initial ruling.

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Rabkin-Naicker, J

[1] This is an opposed application in which the applicant union seeks to have a demarcation award issued by the Third Respondent (the Commissioner) reviewed and set aside. The First Respondent(the company) opposes the application. The relief sought by the union is that the dispute be remitted back to the CCMA for determination anew.

Background

[2] During 2010, the company and the City of Cape Town and other municipalities established in terms of the Local Government Housing Structures Act 117 of 1998, entered into an agreement whereby the company was to provide certain traffic related services to the municipalities.

[3] The company is a technology business, providing technology solutions through a combination of products and services. Its employees are in the main skilled technology professionals employed to develop, maintain and deliver products and services. It was not disputed on the papers that 90% of its staff are engineers and design staff. According to the company, it provides products and services to certain authorities outside of the local government sphere as well as companies in the private sector.

[4] The company's roads safety division provides technology products and services to these authorities, including to municipalities, who are responsible for

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road safety. The products and services are utilised to assist these authorities to fulfil their road safety duties. Examples of the products and services provided by the company include: so-called smart roadblocks, which is technology that enables automatic number plate recognition; comprehensive systems; integrated systems to enable the production of traffic fines, summons and warrants documentation in respect of traffic law contravention; an automated online payment services for the payment of traffic fines by offenders.

[5] The company also has a revenue collection division and a traffic management division which provides products and services to national and provincial road agencies, major toll companies in Southern Africa and municipalities to assist them with traffic control. The sorts of products and services supplied in this regard include traffic light controllers, systems for the remote management of traffic flows, equipment for collecting traffic data, traffic counting and weigh in information. These products and services facilitate the relevant authorities planning and management of traffic on the roads.

[6] The contracts with the City of Cape Town municipality and the George municipality which were referred to in the arbitration proceedings under review, were contracts for the supply of road safety- related products and services, rather than traffic management services. The company avers that neither Cape Town nor George municipalities have outsourced a complete municipal service to it. It further alleges that each municipality is itself responsible in law for delivering municipal services to the respective local communities. The products and services supplied by the company to the municipalities are used by them as part of what they need to deliver their services, but there are other elements

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that they execute themselves or procure from other companies in order to deliver the services required by their mandate. It is also not the case that the employees of the municipalities were transferred from the municipalities to the company when it was awarded the contracts in question. The company uses its own staff, supervised and managed by it, to fulfil its obligation under the contracts.

The union on its part, alleges that the company provides “a significant and critical part” of the municipalities’ traffic management services. As an example it states in reply that the company supplies equipment to create so-called electronic roadblocks. This involves the use of a van supplied by the company and manned by one of its employees. That person, it submits is thus performingthe traditional role of the municipal employee. The union refers to paragraphs 31.1-31.7 of the answering affidavit, and admits that the company supplies the George municipality with the following:

“31.1 A combination at least 6 digital speed and red-light cameras at fixed sites, which were to be rotated between sites as determined by the Traffic Chiefs of the George Municipality;

31.2 The supply of at least 2 mobile digital speed cameras for use by the traffic enforcement officials of the George Municipality;

31.3 The supply of maintenance, repair and calibration services in respect of the equipment supplied under the agreement;

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31.4 The supply of training to the municipality's traffic officers on how to properly operate the equipment supplied;

31.5 The supply of the latest technology cameras and license plate recognition system for use by the municipality;

31.6 The supply of a back office contravention management system (e.g. a helpdesk, call centre and administrative processes necessary to capture traffic offences and prepare the necessary documentation to be used by the municipality in pursuit of offenders);

31.7 The supply of expert testimony in court proceedings for the enforcement of traffic violations."

[7] On 3 June 2010, the union referred a dispute to the CCMA in terms of 62(1) of the LRA seeking a determination to the effect that the company's business (as it applied to the union's members employed by the company) fell within the jurisdiction of the South African Local Government Bargaining Council (the SALGBC). It was admitted by the company that the union had, at the time of the arbitration proceedings, recruited a total of 40 members of the company's workforce of 340 employees.

[8] On 7 July 2010, a hearing took place before the Commissioner in terms of section 62 (4) of the LRA. At the conclusion of the proceedings they were adjourned in order for the Commissioner to comply with section 62(9) of the LRA, by consulting with NEDLAC. The CCMA may choose not to call for written representations in the Government Gazette in terms of section 62 (7) of

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the LRA. In this case, the consultation with NEDLAC, entailed the drafting of a demarcation 'ruling' to be directed to NEDLAC within 14 days.

[9] On or about 18 July 2010, the Commissioner prepared a demarcation ruling which was transmitted to NEDLAC but not to the parties. Under the heading 'provisional award (to be confirmed by NEDLAC)' the Commissioner stated as follows:

" I find that the operations of [first respondent] insofar as they concern the provision of traffic management and associated services to municipalities, fall within the registered scope of the South African Local Government Bargaining Council. The collective agreements of the SALGBC are binding on the company and the applicable employees for the duration of the municipal contracts in pursuance of which the said employees are employed."

[10] On or about 17 August 2010, the executive director of NEDLAC directed a letter to the national director of the CCMA indicating that the standing committee of NEDLAC did "not support" the draft award issued by the Commissioner. Reasons for this view were contained in the letter.The said draft awardsubsequently came into the union's possession through the COSATUrepresentative to NEDLAC, the union being an affiliate of that trade union federation.

[11] On or about 26 August 2010, the parties to the demarcation dispute received a Demarcation Award from the CCMA dated 18 July 2010. Under the heading "Award" the following is stated:

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"I find that the operations of [first respondent] do not fall within the registered scope of the South African Local Government Bargaining Council. The collectiveagreements of the SALGBC are not binding on the company and its employees".

Grounds of Review

[12] The Applicant union raises two primary grounds of review. In respect of process, it contends that the Commissioner committed gross misconduct in relation to his duties and made an award which exceeded his powers in that he: "deferred to, rather than consulted with, NEDLAC when making his final determination under section 62and having come to alter his initial views (as reflected in the provisional ruling), he failed to grant parties a hearing so that they might make representations in respect of the concerns expressed by NEDLAC."As regards substance, the union contends that the final demarcation Award made by the Commissioner is not one that a reasonable commissioner could make and constitutes a gross error of law.

[13] In an affidavit deposed to by the Commissioner and filed in the proceedings before me, he avers that he was uncertain about his initial approach to the dispute that he had provisionally arrived at in the ruling, and that it was his consideration of the input received by him from NEDLAC and other Commissioners, together with further reflection on the issues that caused him to reach a different conclusion. The company submits that the Commissioner was entitled to change his mind and the conclusions that he may have preliminary reached at any time before making his Award.

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[14] It is also the company's case that the Commissioner is not obliged to inform the parties to the dispute of his preliminary views or why he changed these. The preliminary ruling is not issued to the parties to the dispute in terms of section 62. It is only created to facilitate the Commissioner's discharge of his duty to consult NEDLAC under section 62 (9) of the LRA, and this consultation duty is owed by him only to NEDLAC and not to the parties, who have already had the opportunity to make representations and state their case in connection with the dispute.

[15] The company further submits that in consulting NEDLAC and in order to give proper due consideration to its input, the Commissioner was obliged to retain an open mind and this is what he did in this matter. The company further denies that the parties are entitled to a hearing when a Commissioner changes his initial view in this manner.

The applicable legal principles

[16] The Local Government Municipal Systems Act 32 of 2000 provides in section 76, that a municipality may provide a municipal service through (a) an internal mechanism;(b) an external mechanism by entering into a service delivery agreement with –(i) municipal entities; (ii) another municipality; (iii) an organ of state; (iv) a community–based organisation or other non–governmental organisations; or (v) any other institution, entity or person legally competent operator business activity. The company falls into the last category.

[17] It is trite that in demarcation disputes the character of an industry (or "sector" and "area") is determined by the nature of the enterprise in which both

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employer and employees are associated for a common purpose. The precise work that each employee is involved in is not significant.[1]

[18] In the Award, the Commissioner found that the union could not refute the following: that none of the affected employees worked from municipal premises; that the employees worked on the premises of the company and their work was clearly associated with the company for the sole purpose of its respective undertakings. He also found that the union had not discharged its onus of proving the extent of the association of the affected employees with the municipalities.A further finding was that the tender contracts involved were of limited duration and there was no guarantee that the company would win future tenders from the municipalities in future, as it had competitors in the country. The Commissioner therefore concluded that the company was a service provider to municipalities and not a local government organisation in its own right, and should not therefore fall under the SALGBC.

[19] The company avers that the Commissioner was correct in that at the time of the arbitration proceedings the company had no employees stationed atthe municipal offices of the City of Cape Town or George municipalities, and that the union had only put up an unsubstantiated denial in response to the company's evidence to the effect that three of its employees had, in the past, worked at the municipal premises of the Cape Town municipality, but no longer did so.

[1] R v Sidersky 1928 TPD 109@ 112/113; Coin Security (Pty) Ltd v CCMA & OTHERS (2005) 26 ILJ 849 (LC) at para 54

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[18] Considerable reliance was placed by the union at the arbitration on the award in **Workforce Group (Pty) Ltd v MEIBC (2008) 29 ILJ (CCMA)**. In that matter, the arbitrator found that the employees who had been placed by a temporary employment service (TES) in order to provide services to a client, must fall under the jurisdiction of the client's Bargaining Council. In the award under review, the Commissioner distinguished the **Workforce Group** awardin the following manner:

> "In the matter of Workforce Group (Pty) Ltd v MEIBC (2008) 29 ILJ 2636 (CCMA) it was stated that an employer might well be engaged in morethan one industry. That case dealt with the temporary employment service (Labour Broker) which placed its employees in various undertakings in different industries, and the Commissioner's findings was that the employees fell within the scope of the respective industries in which they were placed. In that case, however the employees were working from the premises of the clients respective undertakings."

[19] The definition of "local government undertaking" as contained in the constitution of the SALGBC reads: "The undertaking in which the employer and employees are associated for the institution , continuance or finalisation of an act, scheme or activity undertaken by a Municipality and by municipal entities as established in terms of the Local Government Municipal Systems Act , 32 of 2000." In respect of the facts before him, and the said definition, the Commissioner found as follows:

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> "In the absence of concrete evidence relating to the work performed by the respondent's employees in servicing the municipal contracts (the exact extent of the work being disputed by the parties) I do not believe that the applicant has discharged the onus of proving that the respondent's employees were involved in municipal contract work as opposed to private client work. It is possible that some employees may work only on municipal contracts, while others may work only with private sector clients, and yet others may perform work related to both.
>
> A further factor to be taken into account is that the respondent's contracts with the municipalities are of limited duration, and in three years' time it might not be involved in any municipal work whatsoever. Respondenthas competitors in its field of expertise, and it might not necessarily win future tenders. There is no evidence that any of its competitors, who perform similar work, fall under the jurisdiction of the SALGBC.
>
> On the whole it seems to me that the respondent is a service provider to the municipalities, and is not a local government organisation in its own right. It is a private enterprise, and should not fall under the auspices of the Local Government Bargaining Council. It is not (and its employees are not) under the control of the various municipalities. It is therefore not a "local government undertaking."

[20] The submissions on behalf of the company in respect of reliance on the **Workforce Group**award emphasise the fact that a TES has a unique tripartite

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relationship with its clients (with whom it places employees), and its employees. In terms of such relationship, employees of the TES are made available to the client and the client uses these employees (usually directly supervising and managing them in the process) as part of its organisation to pursue its own purposes. The TES employees who are placed by it with aclient are not involved or associated in a common purpose with the TES in the conduct of its own business activities. They also do not perform work for, or in association with the TES in the conduct of its own business activities.

[21] In the award, the arbitrator stated as follows:

> "As I pointed out in the earlier Workforce demarcation, in labour broker placements one cannot talk of a common purpose between a collective of employees and the broker. In the language of Sidersky, each s 198 employee associates individually with the broker in a separate undertaking, the nature of which can only be defined with reference to the client's (de facto employer's) enterprise in which the employee is placed. In applying the Sidersky approach, each such arrangement involving the placement of the employee with a client, is then classified as a separate undertaking or enterprise in which the broker associates with the employee for the common purpose of placing the latter with a specified client, the nature of which undertaking can then only be defined with reference to that of the client with whom the employee is placed, with the demarcation consequence that each such placement will fall to be demarcated in the industry and bargaining council under which the client's enterprise falls, in the absence of any contrary

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definition found in the Act or registered scope of respondent regulating this issue otherwise, as occurred in the workplace demarcation earlier cited . In terms of this analysis, the activity of placing the employee with the client is characterized for demarcation purposes as synonymous with the client's enterprise in which the employee is placed."

[22] I must agree with the submission by the company that the **Workforce Group**award's own reasoning, it cannot apply to a situation in which a company is not a TES in relation to its clients. The union does not suggest that the company is a TES, but relies on the fact that it places its employees, whom it alleges are specifically engaged for this purpose, into positions to perform the services ordinarily undertaken by municipalities, their clients.

Is there a basis for Review?

[23] In terms of the test for substantive unreasonableness, the **Sidumo** test, I do not consider that this application has laid any basis to establish that the outcome of the arbitration is one that a reasonable decision maker cannot reach.In demarcation awards, as this court has held, a wide range of outcomes and approaches is inevitable[2] The disputes are by nature policy laden.

[24] In regard to process-related unreasonableness, there are two aspects to consider, both of which are alleged to have constituted a gross irregularity

[2] Coin Security (Pty) Ltd v CCMA & others (2005) 26 ILJ 849 (LC); National Bargaining Council for the Road Freight Industry v Marcus NO & others (2011) 32 ILJ 678 (LC)

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under section 145(2) of the LRA.[3]The allegation that the Commissioner made a material error of law, is based on his application of the **Workforce Group**award, and as set out above, cannot be sustained. The distinction between the company in this case and a TES, was correctly drawn by the Commissioner on his reading of the saidaward.

[25] The second process-related ground of review relates to the issue of whether the parties should have been given a second hearing after NEDLAC had expressed its view. Section 62 of the LRA provides in sub - section 9 and 10 that:

> "(9) Before making an award, the commissioner must consider any written representations that are made, and must consult *NEDLAC*.
>
> (10) The commissioner must send the award, together with brief reasons, to the Labour Court and to the Commission."

[26] The notion that an *audi* right should be read into the provisions allowing for a second hearing for the parties if, after due consultation, a commissioner comes to a different conclusion from that contained in his original ruling, is problematic. It militates against the approach of this court that in demarcation disputes, a degree of deference is apposite.[4] Such an interpretation also fails to giver requisite weight to the fact that provision for a full hearing for the parties is already contained in section 62. What is suggested by the union's submissions is in essencethat there be an opportunity for the parties to tacklethe views expressed by NEDLAC, in the process of a demarcation dispute. In my view

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[3] The term process-related unreasonableness is used in the sense outlined in Southern Sun Hotel Interests v CCMA & Others (2010) 31 ILJ 452 (LC) at para 17; Herholdt v Nedbnk Ltd (2012) 23 ILJ 1789 (LAC) para 24

[4] NBCRFI v Marcus NO & Others supra at para 63

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this would negate the social policy factors so important in such disputes, and is clearly not envisaged by section 62. An arbitrator comes to his final decision, taking the submissions of both parties, and NEDLAC, into account.

[27] In addition, I wish to point out that decision makers, including judges, can change their approach to a matter any number of times before a decision is finally handed down. This is not out of the ordinary, and is particularly consistent with a process in which a decision–maker is bound by statute to make a final award, after consultation, with a body or bodies.

In the result, I make the following order:

1. The application is dismissed.
2. The Applicant is to pay the costs.

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H. Rabkin-Naicker

Judge of the Labour Court

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Appearances:

Applicant: Cheadle Thompson & Haysom Inc

First Respondent: Edward Nathan Sonnenbergs

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