THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not reportable

Of interest to other judges

Case no: C 855/15

In the matter between:

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY	**Applicant**
and	
CCMA	**First Respondent**
HILARY MOFSOWITZ N.O.	**Second Respondent**
ROCKET TRADING 117 CC	**Third Respondent**

Heard: 21 November 2018

Delivered: 6 February 2019

Summary: Review of demarcation award. LRA s 62.

JUDGMENT

STEENKAMP J

Introduction

[1] This is an application to have a demarcation award reviewed and set aside.

Background facts

[2] The applicant is the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI). The second respondent, Ms Hilary Mofsowitz, is a commissioner of the CCMA[1]. She found that the third respondent, Rocket Trading 117 cc, does not fall within the registered scope and jurisdiction of the Bargaining Council.

[3] The company (Rocket Trading) manufactures a sand and stone product that it sells and delivers to its customers. It rents out containers, building huts and earth moving equipment. It is involved in the demolition of buildings. It also collects rubble from building sited by transporting “v-bins” or skips. The Bargaining Council sought jurisdiction over that part of the business, arguing that it falls within the transport industry.

The evidence

[4] A member of the cc, Rynard Swanepoel, testified that the company previously transported goods for gain but no longer does so. The disputed aspect of the business involves the collection of rubble using the company’s vehicles. They collect rubble in skips or V-bins from customers’ premises, process it and convert it into a further product to be sold or they simply dump the rubble. The customer the renting out of containers is the essence of the business transporting the rubble is not the dominant aspect of the activity.

[1] Commission for Conciliation, Mediation and Arbitration, the first respondent.

[5] A driver, Nicholas Johannes Huysamen, testified in support of the Bargaining Council's submissions. He testified that he would deliver v-bins or skips to customers and collect the full containers from customers' sites and transport them back to the business premises or to other sites such as landfill tipping sites. He would transport 5 to 7 bins a day and there were 12 drivers carrying out the same job.

The award

[6] The arbitrator correctly set out the issue to be determined whether the activities of fall within the ambit and scope bargaining Council's certificate of registration, constitution and main collective agreement. The dispute was referred in terms of section 62 of the LRA.

[7] The arbitrator referred to the following definition contained in the main collective agreement:

The Road Freight and Logistics Industry means the sector in which employers and employees are associated carrying out one of the following activities hire or reward:

a) transportation of goods by means of transport.

[8] And "goods" is defined as follows:

"Goods" means any movable property, including but not limited to any article, commodity or substance such as sand, soil, gravel, stone, coal, water or other liquid, gaseous or solid matter and includes containers or containerised goods."

[9] The arbitrator noted that the activities of the company were not placed in dispute. Neither was the content of the main collective agreement. She had to determine the true nature of the business. And in this regard she referred to

Coin Security[2] where it was held that the character of the business 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.

[10] The arbitrator compared the activities of the company against the definition in the main agreement. She correctly identified the material dispute as being whether the company transported its own goods or that of its customers. There was no dispute that rubble is classified as "goods" in the definition.

[11] The arbitrator concluded that once the rubble is collected, the customer has no further interest in it. The company elects whether to dump the rubble or to process it and then to on-sell it. In essence, the company transports its own goods. Its main profit is not made from transporting goods, but from the rental of containers and the selling of processed products. Whilst it is so that the rubble is collected, the containers are loaded on to the company's vehicles and it takes them away, the transporting of goods is not its primary business activity. That activity is the business of the rental of containers.

[12] The arbitrator also had regard to *Greatex Knitwear*[3]:

"The meaning of 'industry' had to be determined, and the definition thereof was often restrictively interpreted; the activities of the employer had to be determined; and the activities of the employer had to be compared with the definition, as interpreted. If some of the activities of the employer fell under the definition, the next question was whether those activities were separate from or ancillary to the other activities. If the activities were ancillary to the employer's other activities, the employer was not engaged in the industry (unless the activities were of such magnitude that it could be said to be so engaged)".

[13] Applying those two judgements, the arbitrator was satisfied that the activities of the company did not fall within the definition of the road freight and

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[2] *Coin Security (Pty) Ltd v CCMA* [2005] 7 BLLR 672 (LC).

[3] *Greatex Knitwear (Pty) Ltd v Viljoen* 1960 (3) SA (T).

logistics industry. The main business of the company was the rental of skips and V-bins; transportation of the rubble is merely ancillary to this function.

[14] The arbitrator was also persuaded and led by the Labour Appeal Court decision in *Richards Rentals.*[4] In that case, the company (Richards Rentals) was in the business of hiring out tipper-trucks and drivers to its clients in the mining and construction industries. These tipper-trucks are used to convey landfill and aggregate rubble generally within the relevant site areas but occasionally to and from landfill or dumping points outside such sites. The Labour Court and the LAC both agreed with the arbitrator in that case that the activity of hiring out vehicles for rental did not fall within the road freight industry.

[15] In this case, the arbitrator accepted – as has been set out in case law – that the demarcation of an enterprise or business is a policy laden decision with far-reaching consequences. She did not find any socio-economic factors that would override the established demarcation principles. She considered the undisputed evidence that the drivers played in the business receive the same salary rates as those prescribed in the Bargaining Council. She did not find any ulterior motive in the fact that one driver from the business was registered with the council. In conclusion she found that the operations and activities of rocket trading did not fall under the registered scope and jurisdiction of the Bargaining Council.

Review grounds

[16] The Bargaining Council submitted that the arbitrator committed a gross irregularity when she found that the rubble that was being transported was the company's own goods; and that its main business was the hiring out of bends and not the transportation of the rubble. It argued that the arbitrator applied too restrictive an approach when considering the nature of the business. And it argued that the case of *Richards Rentals* had to be distinguished from the current one.

[4] *National Bargaining Council for the Road Freight Industry v Marcus NO and Others* (2013) 34 *ILJ* 1458 (LAC).

Evaluation / Analysis

[17] In *Richards Rentals*[5] the LAC paid particular consideration to the following remarks made by the court in paragraph 63 of the *Coin Security* judgment. It referred to the court's remarks, which appear at paragraphs 59, 63 and 64 respectively:

'Under the Act (LRA), demarcations need to be seen in the context of the system of bargaining councils established there-under aimed at achieving the primary objects of the Act, including the promotion of orderly collective bargaining at a sectoral level. These statutory imperatives require the demarcating tribunal to enquire, beyond mechanistic comparison of jobs, into the relevant bargaining practices and structures... The demarcation process is one entrusted to a specialist tribunal in terms of the provisions of the Act. The demarcation decision is one involving facts, law and policy considerations. In demarcation decisions, there will, more often than not, be no one absolutely correct judgment. Particularly in decisions of this sort, and given the provisions of the Act, there must of necessity be a wide range of approaches and outcomes that would be in accordance with the behests of the Act. Due deference should therefore be given to the role and functions and resultant decisions of the CCMA in achieving the objects of the Act. This approach will not only be consistent with these principles, but also consistent with the need for the Act to be administered effectively. The case for judicial deference becomes all the more compelling in this matter given that NEDLAC agreed to support the provisional award.'

[18] It is with those remarks in mind that the Court has to consider the award. And both Messrs *Prior* and *Jacobs* also referred to the LAC's judgment in *SAMWU v Syntell*[6] where Sutherland AJA reiterated the *sui generis* character of an arbitration award.

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[5] Above par [22].

[6] *SAMWU v Syntell (Pty) Ltd* (2014) 35 *ILJ* 3059 (LAC) par [22].

[19] In this case, the arbitrator carefully considered the evidence before her; the applicable jurisprudence; and the principles relating to demarcation disputes.

[20] On the evidence before her, the arbitrator correctly found that the company rents out bins and collects them from its customers. It does not transport goods for reward. The property remains its own. And the rubble it collects from its customers is either disposed of or reprocessed. Once the rubble is collected from the customer, it becomes the property of the company and it is undisputed that the skips remain the property of the company.

[21] The arbitrator's finding that the transport of containers is ancillary to the company's main business cannot be faulted. It is an entirely reasonable factual finding on the evidence before her. And in applying that factual finding to the applicable jurisprudence, she came to a carefully reasoned conclusion. It is not open to review.

[22] With regard to costs, the Court takes into account that there is an ongoing relationship between the parties. A costs order is not appropriate when considerations of both law and fairness are considered.

Order

The application for review is dismissed.

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A J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: A J Prior (attorney).

THIRD RESPONDENT: W Jacobs (attorney).