REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Case no: JR 169/09

In the matter between:

DEWDEV (PTY) LTD T/A BULKBAG MANUFACTURERS	**Applicant**
and	
BARGAINING COUNCIL FOR THE CANVAS GOOD INDUSTRY, WITWATERSRAND & PRETORIA	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
COMMISSIONER PAT STONE, *N.O.*	**Third Respondent**
SOUTH AFRICAN CLOTHING AND TEXTILE WORKERS UNION	**Fourth Respondent**

Heard: 12 April 2012

Delivered: 23 July 2013

Summary: (Review – demarcation determination –applicable test).

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an application to review a determination by the third respondent, a CCMA Commissioner, in terms of which he found that the applicant's business fell within the jurisdiction of the first respondent, the Bargaining Council for the Canvas Goods Industry, Witwatersrand and Pretoria (the first respondent). The application is opposed by the South African Clothing and Textile Workers Union, the fourth respondent.

[2] The review application was seven weeks late and the applicant applied for condonation for the late filing thereof. The respondent's' opposition was formal in nature, principally because they disputed the merits of the review application. I am satisfied that the extent of the delay was not insignificant, but not unduly prejudicial to the fourth respondent and the explanation for the delay was reasonable. Therefore I decided to allow the condonation application so that the review could be decided on its own merits.

Background

[3] For convenience, it is useful to restate the background as summarised in the arbitrator's award:

3.1 On 14 May 2004 a collective agreement concluded under the auspices of the Bargaining Council was published in Government Gazette number 26333 (the main collective agreement).

3.2 The agreement was amended under government notice R1167 of 15 October 2004 and government notice R158 of 24 February 2006. On 10 November 2006 the main collective agreement was extended by Government Gazette number 29353, to non-parties for the period 30 October 2006 to 30 June 2009.

3.3 On 23 May 2007 The South African Clothing and Textile Workers Union ('SACTWU') referred a dispute to NEDLAC and the CCMA over whether or not the applicant's business fell within the jurisdiction of the bargaining council's main collective agreement.

3.4 On 11 April 2008 the CCMA published the dispute in terms of section 62 (7) of the Labour relations act 66 1995 ('the LRA') in Government Gazette number 30947.

3.5 The parties conducted an *in loco* inspection at the business premises of the applicant at Greer Street Brakpan, on 10 November 2008.

Evidence before the arbitrator

[4] The parties concluded a pre-arbitration minute on 17 November 2008 in which they agreed that certain facts were common cause, namely:

4.1 The applicant's business consists of the manufacture of certain goods and/or articles which are described by it as "bulk bags".

4.2 Both parties rely on section 3 of the main collective agreement to define what is meant by "Canvas Goods Industry".

4.3 The only material used by the applicant in its manufacture of "bulk bags" is woven polypropylene which may be coated or uncoated according to customer specifications.

4.4 Customer specifications also determine the size and design of the bulk bags up to 6 panels and the specifications also determine the weight/density of the material used.

4.5 The production process includes cutting, printing when required, sewing by machine (chain stitch and lock stitch), folding and bailing for distribution.

[5] The arbitrator recorded that it was common cause that woven polypropylene is a form of plastic and the dispute between the parties rests on the interpretation of the Canvas Goods Industry definition contained in the main agreement.

[6] The definition of the "Canvas Goods Industry" in the certificate of registration of the Bargaining Council for the Canvas Goods Industry, Witwatersrand and Pretoria ('the bargaining council') reads:

> *""Canvas Goods Industry" or "Industry" for the purposes here of means, without in any way limiting the ordinary interpretation of*

the term, the Industry relating to the making up of goods or articles from any or some of the following materials:

(i) canvas made from cotton, flax, jute, hemp or similar this or decorticated vegetable and/or acrylic fibres or mixtures thereof;

(ii) rope made from manila, sisal, cotton, coir or similar decorticated vegetable and/or acrylic fibres or mixtures thereof;

and includes the manufacture of articles from hessian, bunting, calico, webbing and other similar materials whether unproved, proved or otherwise treated providing that the production thereof is incidental to the activities described in (i) and (ii) above, and includes the manufacture of articles from plastic fibre where such articles form part of and are manufactured by employers engaged in the manufacture of articles described in (i) and (ii) above."

(emphasis added)

[7] The Canvas Goods Industry described above in scope of the Bargaining Council's main collective agreement is identical to the definition of the industry in the Bargaining Council's registration certificate.

The arbitrator's findings

[8] The arbitrator found that it was common cause that the cloth, webbing and sewing threads of the woven polypropylene used by the applicant to manufacture its products is 100% polypropylene polymer, which is a type of plastic produced by chemical gas. He held that this was the nature of the applicant's business.

[9] The arbitrator further found that the meaning of the words contained in the definition were clear and unambiguous. He decided that even though the definition included the manufacture of articles which "may include plastic fibres which 'form part of' the materials utilised, it did *not* include processes where the materials used were not 'canvas made from cotton, flax, jute, hemp... and/or acrylic fibres or mixtures thereof.'" Thus, the

arbitrator accepted the opinion of the union's witness, Mr E Marcusen, that plastic articles were 'not part of the definition'.

[10] However, the arbitrator did not regard Marcusen's extensive experience of manufacturing in the industry as qualifying him as an expert in relation to the definition of acrylic fibre. The arbitrator referred to the Shorter Oxford English Dictionary definition of 'acrylic' which reads: *'Designating or made from resins, plastics, artificial fibres etc., which are polymers of acrylic and or its derivatives.'* The arbitrator concluded that acrylic fibres in the definition included 'woven prolypolene'. He found that adopting a narrower meaning would be nonsensical as it would exclude business activity traditionally falling within the jurisdiction of the council (and by the same token the main agreement) simply on the basis of the materials used.

[11] In arriving at this conclusion he noted that it was the unchallenged evidence of Marcusen that the type of operation the applicant ran was one that historically fell within the canvass goods industry. The arbitrator concluded:

> *"The difference being that while the applicant cuts woven material and sews it into 'bulk bags', a normal activity in the 'Canvas Goods Industry', the change is in the material used, and given that the applicant's business has no conflicting collective bargaining arrangements I find it appropriate to find that the appropriate meaning of 'acrylic fibre' in the second respondent's Main Agreement incorporates – 'woven polypropylene'"*

[12] The employer had argued in its submissions to the arbitrator that "(e)ven though the main agreement 'includes the manufacture of articles from a plastic fabric', in the Applicant's case such articles, i.e. bulk bags, [do] not form part of the manufacture of the articles described in paragraphs (i) and (ii) [of the definition] and therefore [do] not fall within the industry envisaged by the Bargaining Council." The applicant argued that it was clear that the main agreement "did not include goods produced from plastic material which does not form part of natural fibres". In other words, the essence of the applicant's case was that, bulk bags manufactured

from plastic could not be construed as goods or articles made up from canvas or rope made from acrylic fibre.

The grounds of review

[13] The applicant agreed with the arbitrator that the definition of the canvas goods industry is clear and unambiguous but contends that the arbitrator did not give effect to the intention of the wording. It argues that if the intention had been to cover all employees who manufacture articles from plastic fabric, it would not have been necessary to qualify such articles by including the proviso that such articles only fall within the scope of the definition if they form part of and are manufactured by employers engaged in the manufacturing of articles described in (i) and (ii) of the definition. It contends that by interpreting the meaning of acrylic fibre to include plastic he exceeded his powers. The union retorted that it was well within the arbitrator's power to consider the plain dictionary meaning of the word acrylic and his finding that it included plastic

[14] Likewise, the applicant submits that the arbitrator exceeded his powers by finding that ‘acrylic fibres’ incorporated ‘woven polypropylene’.

[15] The Commissioner also committed a reviewable irregularity by not considering the fact that the definition differentiates between the materials used in the operation of the employer and the historical demarcation of an operation forms no part of the definition, nor is it a relevant factor in making a demarcation award.

[16] Further the applicant contends that the arbitrator committed a reviewable irregularity in finding that the fact that the applicant's main competitors did not currently fall within the jurisdiction of the Council was not a relevant criterion to rely on in determining a demarcation dispute. The fourth respondent, by contrast, argued that the mere fact that competitors are not operating within the jurisdiction of a bargaining Council cannot be relevant to the determination of the dispute when there was no evidence led that they had been subject to demarcation rulings.

Evaluation

[17] It was argued by the applicant that the arbitrator's award stood to be reviewed in terms of section 158 (1) (g) of the Labour Relations Act 66 of 1995 ('the LRA'). However it appears to me that the union is correct that the governing provision is section 145 (1) which states that:

> *"Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the commission may apply to the Labour court for an order setting the side the arbitration award."*

[18] The fourth respondent argued also that the appropriate approach was that adopted by this Court in the case of ***NBCRFI v Marcus NO & others*** **[2011] 2 BLLR 169 (LC)**. In that matter Van Niekerk J said:

> *"It should also be recalled that Coin Security is also authority for the point that a demarcation involves considerations of fact, law and social policy and that in these circumstances, due deference ought to be given to a commissioner making a demarcation award (at paragraph [63] of the judgment). As I understand the judgment, in demarcation judgments there will be, more often than not, no single correct judgment, and that a wide range of approaches and outcomes is inevitable. A reviewing court should be attuned to this reality, and recognise it by interfering only in those cases where the boundary of reasonableness is crossed. Further, Coin Security recognises that a demarcation is provisional – section 62(9) of the LRA requires a commissioner to consult with NEDLAC before making an award.[1] As the court in Coin Security observed, the case for judicial deference is all the more compelling in these circumstances. In short, far from encouraging an expansive approach to a demarcation, the Coin Security judgment requires this Court to recognise the specific expertise of commissioners who undertake this task and to defer to that expertise."*[1]

[1] At 177-178.

[19] At the hearing of the matter I expressed some doubt about whether the jurisdictional consequences of a demarcation ruling permitted such a deferential approach. However, on reflection it appears to me that the approach in the *NBCRFI* is correct despite such consequences. This is because demarcation rulings usually do not concern the jurisdiction of the CCMA itself to make such rulings. An arbitrator seized with determining a demarcation dispute, in the absence of other types of incidental jurisdictional challenge, such as a claim that another commissioner had already ruled on the same issue, is determining a question which the LRA has specifically assigned to the CCMA to determine, in the same way that a Commissioner is empowered to determine the fairness of a dismissal for specified reasons. Thus, section 62(1)(a) of the LRA specifically assigned to the CCMA the power to determine *"...whether any employee, employer, class of employees or class of employers, is or was employed or engaged in a sector or area..."* When determining the fairness of a dismissal or which sector and employer or employees engaged in, a Commissioner is determining an issue the statute has specifically empowered the Commissioner to deal with. Provided other jurisdictional preconditions have been met, the arbitrator's finding in a demarcation dispute has no bearing on that arbitrator's own jurisdiction to make the ruling. Consequently, although it may seem paradoxical that the arbitrator is determining an issue that has jurisdictional consequences, that is an issue the statute has assigned to the CCMA to determine. The test of review applicable to such a ruling is no different from the test which applies to other decisions falling within the remit of an arbitrator's power in terms of the LRA.

[20] On this basis, even though there might reasonably be different interpretations of the text of the definition, I cannot say that the arbitrator's analysis of the text was not one of those reasonable interpretations. He embarked on an examination of the ordinary meaning of the words 'acrylic fibres', relying on the definition contained in an authoritative dictionary source. The interpretation he arrived at is not incompatible with the convoluted text of the definition of the industry.

[21] It also cannot be said that the arbitrator considered something irrelevant in taking account of the historical fact that the manufacture of bulk bags had previously fallen within the jurisdiction of the Council.

[22] In this regard it is interesting to note that whereas the applicant argued that this latter fact was something that the arbitrator ought not to have considered, it nevertheless argued somewhat inconsistently that he should have taken account of the fact that other competitors were not currently being regulated by the council. As the fourth respondent points out, in the absence of contrary demarcation rulings being made in respect of such competitors, the fact that they have escaped the council's regulatory oversight to date, does not mean they do not fall within its jurisdiction and ought not to comply with the collective agreements that cover their enterprises.

Conclusion

[23] In light of the analysis above I am satisfied that the arbitrator's award is not a reviewable.

Order

[24] Accordingly, the review application is dismissed with costs.

R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	J P Duvenhage of Jana Beukes Attorneys
FOURTH RESPONDENT:	C Orr instructed by Cheadle, Thompson & Haysom Inc.