REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D 1131/2012

In the matter between:

THE WORKFORCE GROUP (PTY) LTD **Applicant**

and

P E VAN ZYL N.O. **First Respondent**

NATIONAL BARGAINING COUNCIL FOR THE

ROAD FREIGHT AND LOGISTICS INDUSTRY **Second Respondent**

M S DLANGISA AND 10 OTHERS **Third and Further Respondents**

Heard: **21 October 2014**

Delivered: **20 February 2015**

Summary: **Bargaining council arbitration proceedings – review of proceedings, decisions and awards of arbitrators – test for review – section 145 of LRA – determinations of arbitrator not irregular – no basis for review made out**

Section 62 – nature of proceedings under this section – related to demarcation

disputes only – does not include a case of invalidity of collective agreement – section 62 not applicable

Demarcation – nature of demarcation proceedings considered – case not one of demarcation – section 62(3A) not applicable

Collective agreement – challenge of unlawfulness and ultra vires – required prior challenge of agreement – no such challenge brought – collective agreement must this be complied with and this challenge cannot be raised in enforcement proceedings

Costs – dilatory tactics by employer – costs award justified

JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside a ruling handed down by the first respondent, in terms of which the first respondent dismissed an application in terms of section 62(3A) by the applicant before the first respondent as arbitrator. This application has been brought in terms of section 145 of the Labour Relations Act[1] ('the LRA').

[2] The third to further respondents are all employees of the applicant. The applicant conducts business as a temporary employment service provider. The third to further respondents all work in the industry resorting under the scope and jurisdiction of the second respondent as bargaining council, and as such, the applicant and the third to further respondents are subject to the main collective agreement of the second respondent and all of the conditions of employment relating to individual employees contained therein. The second respondent

[1] No 66 of 1995.

sought to enforce provisions of the main collective agreement against the applicant, in respect of the third to further respondents and itself but this was resisted by the applicant on a number of grounds. At stake in the current proceedings was an application by the applicant in terms of section 62(3A) of the LRA, to the effect that the enforcement arbitration proceedings against the applicant had to be aborted pending the consideration of issues relating to section 62(1)(b) about the application of the second respondent's main collective agreement to the applicant, by the CCMA. As stated, this application was dismissed by the first respondent, with costs, and it is this determination by the first respondent that forms the subject matter of the review application now brought by the applicant

Background facts

[3] The second respondent is a bargaining council established under the LRA for the road freight and logistics industry. It is, as such, responsible for the enforcement of its own collective agreement. From the documents on record, it appears that dating back to 2011, there were a number of proceedings instituted against the applicant at the second respondent with regard to issues relating to non-compliance with the main collective agreement of the second respondent, by the applicant.

[4] In total, *in casu*, there were 11 cases brought against the applicant. Of these cases, four were brought by the second respondent itself as to payment by the applicant to the second respondent itself in terms of the collective agreement, whilst the other seven cases related to the third and third respondents as individual employees of the applicant with regard to benefits accruing to such employees under the collective agreement.

[5] The applicant, as stated above, is a temporary employment service provider. Its employees are posted and designated to work and render services at the

customers of the applicant, which customers, *in casu*, conduct business in the road freight and logistics industry. From the documentary evidence forming part of the record, these customers are Value Logistics, Stuttafords Van Lines, Frasers International and Kargo National. Whilst it is clear that the third to further respondents, therefore, indeed work and render their services under the scope and jurisdiction of the second respondent, the applicant consistently sought to resist complying with the second respondent's main agreement.

[6] Whilst I am sure there must be preceding events, I only become seized with this matter at the point in time starting with the set down of some of the cases referred to above, on 24 July 2012. On 23 July 2012, the applicant raised a number of objections *in limine* with regard to the hearing set down for 24 July 2012. These included allegations of non-compliance with sections 24(1) and 51 of the LRA, alleged non compliance with parts of Rule 5 of the second respondent's exemptions collective agreement and finally alleged non compliance with section 3(2) of PAJA. Added to that the applicant objected, in terms of section 33A(4)(b) of the LRA, to the appointment of an arbitrator by the second respondent. All of this resulted in the hearing of 24 July 2012 being aborted.

[7] The second respondent, pursuant to the objection in terms of section 33A, then sought the appointment of an arbitrator by the CCMA to conduct the hearing. This was done on 27 July 2012. The first respondent was then specifically appointed by the CCMA to attend to the arbitration of all the disputes, which arbitration would be conducted under the auspices of the second respondent. The applicant was accordingly informed on 7 August 2012 that all 11 matters will be set down on 28 August 2012.

[8] All 11 matters came before the first respondent on 28 August 2012. On that day, the applicant then applied to consolidate these 11 matters with all other cases between the applicant and the second respondent of similar nature, pending in

the entire country. The first respondent considered this consolidation application and dismissed it on 10 September 2012. A new hearing date was scheduled for 16 October 2012.

[9] In the hearing on 16 October 2012, the applicant then raised another point *in limine*. This time, the applicant contended that questions as contemplated by section 62(1)(b) had now been raised by the applicant, and as such, the first respondent was obliged in terms of section 62(3A) to adjourn the proceedings so these questions could be decided by the CCMA.

[10] The applicant filed a written notice on 9 October 2012, setting out the issues it contended was contemplated by section 62(1)(b) of the LRA that it was raising. The applicant contended that the main agreement of the second respondent was not binding on it, and ultra vires, based, in short, on the following argument:

10.1 The second respondent had to have a constitution that complied with section 30 of the LRA.

10.2 In terms of section 30(l) and (m) the second respondent's constitution must provide for banking and investment of funds and the purposes for which funds are to be used.

10.3 The second respondent's constitution provided that expenses of the second respondent shall be met from funds raised by levies.

10.4 Further provision is made in the constitution that the second respondent received income and interest from other funds it created, in addition to the levy income.

10.5 The second respondent is compelled to establish schemes and funds for the benefit of parties to the second respondent council and its members.

10.6 But because the second respondent can in terms of its constitution derive

income from funds other than levies, the second respondent is unjustly enriched at the expense of parties to the council and their members.

10.7 Therefore, the main collective agreement of the council is in conflict with the LRA and its own constitution, and therefore it is ultra vires and not binding on the applicant. This also infringed on the applicant's right to fair labour practices in terms of section 23(1) of the Constitution of the RSA.

[11] The first respondent considered the above argument and decided that section 62(1)(a) did not find application in this case. The first respondent held that the applicant's challenge was one based on the legality of the main agreement and this was the reason why the applicant contended the agreement did not apply to it. The first respondent held that such a legality challenge was not an issue as contemplated by section 62(1)(b) and thus section 62(3A) simply did not find application. The first respondent reasoned further that section 62 in fact relates to demarcation disputes, which was whether employees, employers, classes of employees and/or classes of employers fall within the registered scope of a bargaining council and this had nothing to do with the legality or not of the collective agreements in such bargaining councils. The first respondent concluded that what the applicant was asking for would be tantamount to setting aside the Ministerial extension of the main agreement to non parties which he did not have the power to do. The first respondent finally held that the applicant had taken no steps to challenge the main agreement. The first respondent consequently dismissed the applicant's application in terms of section 62(3A) and after considering the issue of costs, also ordered the applicant to pay the costs.

[12] Finally as to the background facts, it is so that the applicant has never brought a section 62 referral to the CCMA for determination, nor has the applicant challenged the Ministerial extension of the second respondent's main agreement to non parties. The applicant has also not instituted any legal proceedings challenging the validity of the main agreement beforehand.

The test for review

[13] The test for review is trite. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] Navsa AJ set the threshold test for the reasonableness of an award or ruling as: '…Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'[3] Following on, and in *CUSA v Tao Ying Metal Industries and Others,*[4] O'Regan J held: 'It is clear… that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.' What the Constitutional Court means in *Sidumo* and *Tao Ying Metal Industries,* is a review test based on a comparison by a review court of the totality of the evidence that was before the arbitrator as well as the issues that the arbitrator was required to determine, to the outcome the arbitrator arrived at, in order to ascertain if the outcome the arbitrator came to was reasonable.

[14] In deciding a review, it is all, in the end, about a reasonable outcome. As was said in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others:*[5]

> 'The Constitutional Court has decided in *Sidumo* that the grounds of review set out in s 145 of the Act are suffused by reasonableness because a CCMA arbitration award, as an administrative action, is required by the Constitution to be lawful, reasonable and procedurally fair. The court further held that such an award must be reasonable and if it is not reasonable, it can be reviewed and set aside.'

[15] I also mention two recent considerations of the *Sidumo* test. Firstly, the SCA in

[2] (2007) 28 *ILJ* 2405 (CC).
[3] *Ibid* at para 110.
[4] (2008) 29 *ILJ* 2461 (CC) at para 134.
[5] (2008) 29 *ILJ* 964 (LAC) at para 96.

Herholdt v Nedbank Ltd and Another[6] said:[7]

> 'In summary the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings fall within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'[8]

Secondly, the LAC in *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*[9] applied the *Sidumo* test as follows:

> '*Sidumo* does not postulate a test that requires a simple evaluation of the evidence presented to the arbitrator and based on that evaluation, a determination of the reasonableness of the decision arrived at by the arbitrator… In other words, in a case such as the present, where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the result was unreasonable, or put another way, whether the decision that the arbitrator arrived at is one that falls in a band of decisions a reasonable decision maker could come to on the available material.'[10]

[16] In short, and following the *ratios* in *Herholdt* and *Gold Fields*, what is postulated

[6] [2013] 11 BLLR 1074 (SCA) per Cachalia and Wallis JJA.
[7] Id at para 25.
[8] Id at para 25.
[9] [2014] 1 BLLR 20 (LAC) per Waglay JP.
[10] Id at para 14.

is a two stage review test. The first stage is to determine if a material irregularity exists in the arbitration award or the arbitration proceedings. This is done by considering the proper evidence as gathered from the review record, together with the relevant principles of law and then comparing this to the award and reasoning of the arbitrator as reflected in such award. The second stage in the review enquiry only follows if a material irregularity is found to exist and this entails a consideration as to whether, if this irregularity did not exist, it could reasonably lead to a different outcome in the arbitration proceedings. Put differently, the second enquiry step is simply whether another reasonable decision-maker, in conducting the arbitration and arriving at a determination, in the absence of the irregularity and considering the evidence and issues as a whole, could still reasonably arrive at the same outcome.

[17] Against the above principles and test, the determination by the first respondent that the applicant's section 62(3A) be dismissed with costs, must be considered.

The Section 62(3A) application

[18] None of the factual background is in issue in this matter and the whole matter in essence turns on a consideration of law, which is simply whether section 62 of the LRA finds application or not. If section 62 indeed finds application, then this review application has to succeed but if it does not, the review must fail. I say this because if the review test as postulated above is applied, it would be a material irregularity should the first respondent conclude that a particular legal provision does not apply when it indeed does. Further, in terms of this review test, such an irregularity would certainly cause the outcome of dismissing the applicant's section 62(3A) application to be unreasonable. In this regard, I align myself with the following dictum in *Police and Prisons Civil Rights Union v Ledwaba NO and Others*:[11]

[11] (2014) 35 *ILJ* 1037 (LC) at para 18. See also See *MEC: Department of Education, Gauteng v Msweli*

> 'In the current matter, the facts are determined by an agreed statement of case. There is thus no issue whether the arbitrator considered all the evidentiary material before him. The issue on review in essence is one of law, namely whether the arbitrator, in deciding that the department and SACOSWU were entitled to conclude a collective agreement on organizational rights, applied the correct legal principles and if so, whether he applied such legal principles in a manner that is sustainable. There is ample recent authority for the proposition that a material misdirection on a principle of law would constitute a reviewable irregularity….'

So, in essence, all turns on whether section 62 applies.

[19] I will now consider whether the issues as raised by the applicant *in casu* are indeed issues as contemplated by section 62(1)(b). The first respondent, in my view, is undoubtedly correct in concluding that the issues raised by the applicant all pertain to a case as to the legality of the main agreement of the second respondent. In my view, it is undeniable that what the applicant is saying, in short, is that if the main agreement is considered as a whole, it contravenes a number of statutory provisions which taints its legality and for this reason it is not binding on the applicant. The crisp question now is whether section 62 contemplates such a kind of legality challenge. And in deciding this question, it is not necessary to determine whether this legality challenge indeed has substance.

[20] The point of departure in conducing this consideration is section 62 itself. Clearly, the section must be considered in the proper context, starting with the heading which reads 'Disputes about demarcation between sectors and areas'. And it is in this context that section 62(1) must be considered, which reads:

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and Others (2013) 34 *ILJ* 650 (LC) at para 45; *Renier Reyneke Vervoer CC t/a Premium Trucking v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 *ILJ* 1262 (LC) at para 13; *Munnik Basson Dagama Attorneys v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 *ILJ* 1169 (LC) at para 13; *Pam Golding Properties (Pty) Ltd v Erasmus and Others* (2010) 31 *ILJ* 1460 (LC) at para 8.

'Any registered *trade union*, employer, *employee*, registered *employers' organisation* or *council* that has a direct or indirect interest in the application contemplated in this section may apply to the Commission in the *prescribed* form and manner for a determination as to-

(a) whether any *employee*, employer, class of *employees* or class of employers, is or was employed or engaged in a *sector* or *area*;

(b) whether any provision in any arbitration award, *collective agreement* or wage determination made in terms of the *Wage Act* is or was binding on any *employee*, employer, class of *employees* or class of employers.'

Turning then to section 62(3A), this section reads:

'In any proceedings before an arbitrator about the interpretation or application of a *collective agreement*, if a question contemplated in subsection (1) *(a)* or *(b)* is raised, the arbitrator must adjourn those proceedings and refer the question to the Commission if the arbitrator is satisfied that-

(a) the question raised-

(i) has not previously been determined by arbitration in terms of this section; and

(ii) is not the subject of an agreement in terms of subsection (2); and

(b) the determination of the question raised is necessary for the purposes of the proceedings.'

Section 62(4) and (6) to (9) then prescribe the process that must be followed in any application in terms of section 62(1) and this ultimately involves determination by arbitration and consideration by NEDLAC. Also, the prescribed

form of applying in terms of section 62(1) is found in Form 3.23 which specifically records that it is an "Application about a Demarcation Dispute'.

[21] In my view, it is clear from the above that section 62 was enacted to achieve a specific purpose and that purpose is what is commonly known as the demarcation of sectors or areas in which employees are engaged. In *National Manufactured Fibres Employers Association and Another v Chemical Workers Industrial Union and Others,*[12] the Court considered the very meaning of demarcation and said:

> '…. The word 'demarcation' is not used in the Act. However, it is a useful word to describe the function which is performed by an appropriate body when that body decides whether or not an employer and employees of a bargaining council or a statutory council are engaged in activities which fall within a particular sector, ie an industry or service, and an area. Barker and Holtzhausen *SA Labour Glossary* (Juta 1996) define demarcation as:
>
> > "Determining whether any employer, employee or class of employer or employee is employed or engaged in a particular sector or area to ascertain whether any arbitration award, collective agreement or sectoral employment standard is binding upon a specific employer and his or her employees. NEDLAC, the Minister of Labour, demarcates the appropriate sector and area in respect of which bargaining councils and statutory councils should be registered (*see* registered scope). In terms of the LRA, 1995, disputes regarding demarcation are determined by arbitration by the CCMA (s 62)."
>
> The determination or demarcation of a sector takes place in terms of the Act in two distinct and separate situations. First a demarcation is performed when a bargaining council or similar institution is in the process of being set up. The second situation deals with the case where a sector has already been authoritatively established in respect of a bargaining council, statutory council or

[12] (1997) 18 *ILJ* 1359 (LC).

a statutory instrument (a collective agreement or a binding arbitration award etc) and the question is whether or not an employer or employees fall within the ambit of a particular sector and thereby also fall within the ambit of the council concerned or the legislative instrument.'[13]

The Court in *National Manufactured Fibres* then specifically dealt with demarcation in the second situation referred to, in particular where there existed established bargaining councils and said:

'The scheme of the Act is that bargaining councils or statutory councils have jurisdiction in respect of employers and employees who fall within their sectoral area of jurisdiction. Disputes may arise as to whether or not an employer and employee are engaged in a sector regulated by a bargaining council or statutory council or whether they fall within the area of jurisdiction of the council. …. Any registered trade union, employer, employee and registered employers' association or council that has a direct or indirect interest in an application contemplated in terms of s 62 may apply to the CCMA in the prescribed form and manner for a determination as to-

(a) whether any employee, employer, class of employees or class of employers is or was employed or engaged in a sector or area;

(b) whether any provision in any arbitration award, collective agreement or wage determination, made in terms of the Wage Act is or was binding on any employee, employer, class of employees or class of employers (see s 62 (1)).'[14]

The Court in *National Manufactured Fibres* concluded:

'In my opinion, it is clear that in the second situation the determination of a sector or an area is an activity which is done in relation to *(a*) a sector or area of a council, or *(b*) a legal instrument such as an arbitration award, collective

[13] Id at 1365D-G.
[14] Id at 1366H-1367B.

> agreement or wage determination made in terms of the Wage Act 1957. Before a demarcation can be undertaken there must be a yardstick in place. The yardstick, as I have indicated, is the existence of a registered bargaining or statutory council or a legal instrument such as a collective agreement, arbitration award or wage determination. In the absence of such a yardstick there can be no meaningful or purposeful determination in terms of s 62 of the Act….'[15]

[22] In applying the above reasoning of the Court in *National Manufactured Fibres*, it is in my view clear that any determination contemplated by section 62(1) is a determination as to whether parties resort under a defined sector or area. The sector or area can be defined by way of the establishment of a council, in a collective agreement, or by way of other statutory instrument. I agree with this reasoning and shall follow suit. Therefore, currently what constitutes a sector or area can be established by way of the certificate of registration of a council, a collective agreement,[16] and with the abolishment of the Wage Act, a sectoral determination under the BCEA.[17] This is the 'yardstick' referred to in *National Manufactured Fibres*. In simple terms, if no such defined sector or area exists, there can be no meaningful or purposeful demarcation. Therefore, at its core, the purpose of section 62 is to place employees into a specific sector or area. In *SA Municipal Workers Union v Syntell (Pty) Ltd and Others*,[18] the Court specifically dealt with demarcation proceedings and said:

> 'The ambit of the statutory framework for demarcation proceedings and the nature of the proceedings per se require examination.
>
> The initial demarcation of sectors of industry is a function performed by NEDLAC. Section 29 of the LRA regulates that role. Section 29(8) provides that NEDLAC must demarcate the 'appropriate sector' over which a bargaining council will

[15] Id at 1367F-G.
[16] For example the industry collective agreements in the contract cleaning and contract security services sectors.
[17] See sections 51 and 55 of the BCEA 75 of 1997.
[18] (2014) 35 *ILJ* 3059 (LAC).

> exercise jurisdiction. A fail-safe provision authorizes the Minister of Labour to perform the task if no agreement is reached by NEDLAC.
>
> Thereafter, demarcation disputes are subjected to a dispute-resolution process as provided for in s 62 of the LRA…'[19]

[23] In *Golden Arrow Bus Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*,[20] the Court held:

> '… The determination or demarcation of a sector takes place in terms of the LRA in two distinct and separate situations…
>
> The second situation, provided for in s 62 of the LRA, deals with the case where a sector has already been authoritatively established in respect of a bargaining council, statutory council or statutory instrument such as a collective agreement and the question is whether or not an employer or employees fall within the ambit of a particular sector and thereby also fall within the ambit of the council or legislative instrument.'

[24] The first respondent, as arbitrator, was very much alive to the above. The first respondent actually said in his ruling that section 62 was about deciding whether employers and employees resort under the registered scope of a bargaining council. This conclusion is undoubtedly correct. The first respondent then also determined that the applicant's case had nothing to do with such a determination, and once again, the first respondent is correct in coming to that conclusion. The applicant never said that it and its employees should be extracted from the area of jurisdiction of the second respondent because this was not the area in which the applicant did business and in which it was associated with its employees. The enquiry contemplated in this regard was set out in *Coin Security (Pty) Ltd v*

[19] Id at paras 18 – 20.
[20] (2005) 26 *ILJ* 242 (LC) at 250B-E.

Commission for Conciliation, Mediation and Arbitration and Others[21] as follows:

> '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 employees and 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…'

The Court in *Coin Security* further said:

> 'The method used to determine whether a class of employers is engaged in a particular industry was summarized as follows by Jansen J in *Greatex Knitwear (Pty) Ltd v Viljoen and Others* 1960 (3) SA 338 (T) at 344H-345D:
>
> '*(a)* The meaning of ''industry' as used in the agreement, is determined. This usually requires the interpretation of some definition appearing in the agreement. It seems that a restrictive interpretation is often applied, cutting down the scope of the general words in the definition…
>
> *(b)* The activities of the employer (personal and by means of his employees) are determined.
>
> *(c)* The activities and the definition (as interpreted) are now compared…'[22]

The point that I make is that the issues raised by the applicant in its section 62(3A) notice raised none of these considerations that actually form the subject matter of a determination under section 62 of the LRA. What the applicant has raised in its notice placed before the first respondent are therefore not issues as

[21] (2005) 26 *ILJ* 849 (LC) at para 54.
[22] Id at para 57.

contemplated by section 62. The first respondent was, therefore, correct in his application of the law and in finding that section 62 did not find application.

[25] The applicant in its argument before the first respondent placed much emphasis on the judgment of the SCA in *Johannesburg City Parks v Mphahlani NO and Others*.[23] The first respondent considered this judgment and found it to be distinguishable. I agree. In the *Johannesburg City Parks* judgment, the Court specifically recorded that SAMWU and IMATU (the two unions) contended that the employer fell within the scope of the bargaining council, which the employer, as the Court put it, 'vigorously' disputed.[24] In addition, in that matter, a dispute had actually been referred to the CCMA for determination in terms of section 62 of the LRA by both unions and this dispute was still pending. The issue then raised by the employer before the arbitrator was that the bargaining council did not have jurisdiction because the employer did not resort within the particular industry covered by the scope of the bargaining council. The Court concluded:[25]

> 'It is not in dispute that the demarcation dispute herein had been referred by SAMWU and IMATU during 2004 to the CCMA for determination of the question whether the appellant falls within the scope of the second respondent. It is furthermore common cause that as at 16 September 2005 when the arbitration proceedings were held this dispute was still pending before the CCMA. It makes little sense to me that the arbitrator could proceed to arbitrate the matter against an objection to the jurisdiction of second respondent (SALGBC) based on s 62(3A) of the LRA. It appears to me plain that such conduct circumvents the mischief which s 62(3A) seeks to address, ie that the arbitrator shall not adjudicate in a matter where his or her jurisdiction is being challenged on the basis of whether one of the parties is bound by the collective agreement…'[26]

The basis of distinction is immediately apparent. *In casu*, the applicant has never

[23] (2011) 32 *ILJ* 1847 (SCA).
[24] See para 9 of the judgment.
[25] Id at para 13.
[26] Id at para 13.

referred a demarcation dispute to the CCMA and there is no demarcation dispute pending. Further, the applicant has never disputed that it resorted under the area (scope) of jurisdiction of the second respondent. In short, the question posed by the applicant *in casu* is not a question as contemplated by sections 62(1)(a) or (b) of the LRA. The applicant's reliance on the judgment in *Johannesburg City Parks* is thus entirely misplaced and the first respondent's decision that the judgment is distinguishable is correct.

[26] I accept that section 62(1)(b) refers to the determination of an issue as to whether a collective agreement is binding on an employer such as the applicant. But this does not mean that this section can be used as a basis for deciding if a collective agreement is bindings based on a case of it being unlawful or ultra vires, as the applicant says. As I have said, section 62 has a context and that context, where it comes to deciding whether a collective agreement is binding, specifically relates to the question whether the employer resorts within the scope and jurisdiction of a bargaining council as defined in the collective agreement of the council. In other words, the issue as to whether a collective agreement is binding on an employer as contemplated by section 62(1)(b) is one inextricably linked to a determination whether the employer resorts under the scope and jurisdiction of the bargaining council. Section 62(1)(b) was thus never intended to be used to challenge the validity or lawfulness of the collective agreement of the bargaining council. Where it comes to the issue of the collective agreement of a bargaining council being unlawful, irregular or ultra vires, as a basis to challenge its binding effect, this has to be an issue to be dealt with by way of another course of action and not using section 62.

[27] The applicant has also argued that all it needs to do is to raise an issue as contemplated by section 62(1)(b) and then it is up to the first respondent as arbitrator to adjourn proceedings and refer the matter to the CCMA. I cannot agree with such a contention. Section 62(3A) must be read in proper context with

section 62(1). In terms of section 62(1), it would be up to the applicant as an interested party to refer such an issue to the CCMA. Then, if in enforcement arbitration proceedings, it becomes apparent that such a question has indeed been raised but remains undetermined, section 62(3A) was enacted so as to make adjournment of the enforcement proceedings compulsory so that the CCMA can have the opportunity to determine the issue. Considering the nature of the enquiry in section 62 proceedings, it simply cannot be said that it is the duty of the arbitrator such as the first respondent to initiate the proceedings, as the applicant contends. In short, the applicant has the duty to raise a question as contemplated by section 62(1)(b) with the CCMA, in the prescribed form and if it did so, the duty is then on the first respondent to adjourn the proceedings so the CCMA can determine the question. In *G A Motor Winders (East Cape) CC and Another v Director, Commission for Conciliation, Mediation and Arbitration and Others,*[27] the Court said:

> 'It is no empty formality to insist on compliance with the procedures prescribed by s 62 of the Act. There may be competing interests involved in a determination as to whether a particular undertaking falls within one industry or another, or within one area or another. There may be competing claims by bargaining councils to exercise control over a particular type of undertaking. Subsections (6) to (11) of s 62 establish a means of addressing such difficulties as may arise.'

I am aware that Conradie JA held in *G A Motor Winders*[28] that:

> '... It does no violence to the language of the statute to say that a demarcation may be 'raised' by the material before a commissioner. It need not be 'raised' by a party to the proceedings'.

But I remain compelled to say that in considering the *ratio* in this very same

[27] (2000) 21 *ILJ* 323 (LAC) at para 10.
[28] Id at para 8.

judgment quoted above, together with all the developments[29] that subsequently came about where it comes to the proper determination of demarcation disputes, it remains my view that the issue must be raised by an interested party contemplated by section 62(1) by way of following the prescribed process, in order to serve as a basis for the application of section 62(3A) compelling an arbitrator to adjourn the proceedings. I find support for my view in the judgment of *Building Industry Bargaining Council (East London) v Naidoo t/a Dev's Construction Trust and Another*[30] where the Court dealt with section 62(3), being the comparable section to section 62(3A) applicable to proceedings in the Labour Court, and said:[31]

> 'I am enjoined by s 62 (3) when a demarcation is raised to adjourn these proceedings and refer the matter to the CCMA for determination. However, I agree with applicants that this means properly and genuinely raised. For it to have been properly raised the basis for the defence should have been laid at the outset…'[32]

I agree with the above reasoning. A matter as contemplated by section 62(1) can only be properly raised if the prescribed process is followed. But even if I am wrong in the above conclusion, the fact remains that the issues raised by the applicant in its section 62(3A) are simply not issues as contemplated by section 62(1)(b), for the reasons I have already set out.

[28] The first respondent was, in deciding this matter, very much alive the necessity for the applicant to have pursued another course of action with regard to the points raised in its purported section 62(3A) notice. The applicant, however, complains that the first respondent should never have had any regard to such kind of considerations. I, however, do not consider there to be any merit in the

[29] See *National Bargaining Council for the Road Freight Industry v Marcus No and Others* (2013) 34 *ILJ* 1458 (LAC) at paras 19–24.
[30] (2000) 21 *ILJ* 2253 (LC).
[31] Id at para 33.
[32] Id at para 33.

complaints raised by the applicant in this regard. As was said in the *dictum* in *Dev's Construction Trust* referred to above, part of the enquiry in terms of section 62(3A) has to be whether the issue has in fact been 'properly and genuinely' raised by the applicant. An enquiry as to whether the issues raised by the applicant are indeed 'properly and genuinely' raised would certainly encompass the very issues the first respondent had regard to in his ruling and which the applicant said he should not have done.

[29] The applicant has taken issue with the first respondent's reasoning that the kind of challenge raised by the applicant was tantamount to the applicant seeking to set aside Ministerial extension of the collective agreement, which was not within his powers to do. In this respect, I do believe the applicant's complaint has merit. The applicant has never taken issue with the extension of the main agreement nor with the fact that it, insofar as it concerns the third to further respondents, resorts under the scope and jurisdiction of the second respondent. The first respondent was thus never required to consider such an issue and, insofar as the first respondent refers to and relies on this in coming to a conclusion, it would be an irregularity. But does it render the ultimate outcome to be unreasonable? I think not. Even if one completely extracts this part of the reasoning of the first respondent from the award in its entirety, the dismissal of the applicant's section 62(3A) application would nonetheless be entirely reasonable, and justified, based on all the other considerations I have referred to above, and later in this judgment.

[30] In my view, and what the first respondent did seem to appreciate, was that in the absence of a proper legal challenge to the validity of the collective agreement of the second respondent, it had to be complied with. And such a proposition would be in my view correct. If the applicant wanted to challenge the validity of the collective agreement of the second respondent on the grounds set out in its purported section 62(3A) notice, it needed to have approached the Labour Court

seeking an order to set the collective agreement aside. In *National Bargaining Council for the Clothing Manufacturing Industry (Cape) and Others v Zietsman NO and Others*,[33] the Court said the following:

> 'Fields Wear has not brought an application to review and set aside the extension of the relevant agreements; nor has it alleged that the minister was not satisfied as required by s 32(3)*(f)* and *(g)*. That is a sufficient and valid basis to dismiss the 'unfair discrimination' and 'unreasonableness' constitutional defences. If there is any merit in these complaints initially raised by Fields Wear, its remedy lies in proceedings to review the minister's decision and not in a constitutional defence…'

In order for the applicant to competently seek an adjournment of the arbitration proceedings, as based on the challenge founded on the grounds it raised, and whether relying on section 62(3A), the applicant needed to have challenged the validity of the collective agreement, on the grounds raised, to the Labour Court. Its failure to do this has to reasonably lead to the conclusion that the issues it then sought to raise in the purported section 62(3A) notice some 7 days before the enforcement arbitration was not properly and genuinely raised.

[31[The failure by the applicant to have properly challenged the validity of the collective agreement beforehand has another important consequence. The fact is that considering the nature of the second respondent's collective agreement and the fact that it is statutorily extended to non parties, the collective agreement is akin to subordinate legislation. This means that it must be considered to be valid and complied with accordingly, until set aside. One can do little better than refer to *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others,*[34] where the

[33] (2013) 34 *ILJ* 151 (LC) at para 59.

[34] 2004 (6) SA 222 (SCA) at para 26. This *ratio* in *Oudekraal Estates* has followed in *Manok Family Trust v Blue Horison Investments 10 (Pty) Ltd and Others* 2014 (5) SA 503 (SCA) at para 17; *Kouga Municipality v Bellingan and Others* 2012 (2) SA 95 (SCA)*; Camps Bay Ratepayers' and Residents' Association and Another v Harrison and Another* 2011 (4) SA 42 (CC) at para *62; Seale v Van Rooyen NO and Others; Provincial Government, North West Province v Van Rooyen NO and Others* 2008 (4) SA

Court said:

> '… Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.'

[32] In the circumstances, for all the reasons set out above, it is my view that the application of the relevant legal principles by the first respondent firstly does not constitute any kind of irregularity and is actually correct. Secondly, and in the instance where the first respondent's reasoning does constitute an irregularity, it does not render the ultimate outcome to be unreasonable, in any event. In short, the first respondent was correct in concluding that: (1) the applicant's reliance on section 62(1)(b) and with it section 62(3A) is misplaced as section 62 simply does not apply; (2) that the grounds of complaint raised by the applicant in its section 62(3A) notice do not concern a demarcation dispute contemplated for the application of section 62; and (3); it was incumbent on the applicant to have challenged the collective agreement beforehand on the basis of the grounds that it had raised, which it never did. The first respondent's dismissal of the applicant's section 62(3A) application thus had proper foundation in law and must, therefore, sustained. I, therefore, uphold the dismissal of the applicant's section 62(3A) application by the first respondent.

Concluding remarks

[33] As touched on above, the first respondent made a costs order against the

43 (SCA) at para 14.

applicant, in dismissing its application. In this regard, the first respondent actually provided detailed reasoning, which included an analysis of the history of this matter. In particular, the first respondent considered that all of the points *in limine* that the applicant has raised in the current proceedings had been raised before in 2010 and again in 2012 and had all been disposed of by other arbitrators and even the Labour Court. Also, the first respondent specifically considered the fact that if the applicant was indeed 'serious' about the grounds now raised in its section 62(3A) notice, it would have raised them much earlier. The first respondent concluded:

> 'I am of the view that the current application is yet another attempt by The Workforce to delay and prolong the pending proceedings against it'.

For the reasons I will now set out, I consider the reasoning of the first respondent in this regard to have proper foundation in fact and to be entirely justified.

[34] In my view, it is quite clear that the applicant has a penchant for seeking to extract itself from compliance with the collective agreements in several bargaining councils. The applicant has clearly demonstrated an approach of avoidance, rather than compliance. The approach of the applicant to bargaining council collective agreements is regrettable, and should be discouraged. The applicant has attempted virtually everything it could think of so as to justify not complying with these collective agreements. In the reported arbitration awards in *Workforce Group Holdings (Pty) Ltd v National Bargaining Council for the Road Freight Industry*[35] and *Workforce Group (Pty) Ltd v Metal and Engineering Industries Bargaining Council*[36] the applicant sought to extract itself from application of two bargaining council collective agreements by contending that its business of a TES does not resort under the jurisdiction of the bargaining councils, which contention was rightly rejected by the arbitrator on the basis that

[35] (2006) 27 *ILJ* 2747 (CCMA) at 2752.
[36] (2008) 29 *ILJ* 2636 (CCMA) at 2639 – 2640.

its employees perform no work for or in association with the applicant in the conduct of its business activities but rather that the employees' services are offered within its clients industry and it is the latter industry that applies.

[35] The applicant then shifted its approach of avoidance onto other avenues, all of which was aimed at prolonging or obstructing enforcement of the collective agreements. As has been referred to above, it would seem that the applicant in fact resists all enforcement across the country, considering its unsuccessful application in this matter to consolidate all these kinds of cases that it has across the country, into this matter. Grounds of resistance range from inappropriate reliance on provisions in the LRA, which have rightly been rejected, to Constitutional challenges. I have referred to these above. Even in the matter now before me, the same points *in limine* were again initially raised at the commencement of the arbitration before the first respondent and these points were then either dismissed or ultimately not pursued. Finally, seven days before facing arbitration on the merits of the enforcements, the applicant for the first time raises the invalidity grounds referred to above. If these grounds indeed have substance, these grounds would have been in existence all along and it is simply inexplicable why these grounds are only raised on the eve of arbitration on the merits. A proper consideration of the award of the first respondent reveals that he was certainly alive to all of this.

[36] In my consideration of this kind of conduct of the applicant, I have come across the judgment in *Workforce Group (Pty) Ltd v National Textile Bargaining Council and Another*[37] which once again is reported authority involving the current applicant before me. In this case, the National Textile Bargaining Council applied to the CCMA in terms of section 62 to determine a demarcation dispute, in which it sought a demarcation that the applicant fell within the textile sector and thus that it is obliged to give effect to the main collective agreement governing that

[37] (2011) 32 *ILJ* 3042 (LC).

sector. Once again, the applicant was seeking to extract itself from being bound by this sector collective agreement. In the instance of this judgment, the applicant resisted the demarcation proceedings by way of two points *in limine*, similar to the kind of objections now being raised in the case before me. The CCMA arbitrator dismissed both points *in limine*. The applicant then, in a fashion virtually identical to the proceedings *in casu*, sought to obstruct the continuation of the demarcation arbitration on the merits by filing a review application at the last moment before the arbitration; and then seeking a postponement of the arbitration pending this review. When the bargaining council refused to agree to postpone the arbitration, alleging that the applicant was merely seeking to delay the demarcation proceedings, the applicant approached the Labour Court for urgent intervention. Steenkamp J refused the relief sought by the applicant, finding that the applicant had the proper alternative remedy of participating in the arbitration proceeding to finality.[38] The Learned Judge also said the following:

> 'Furthermore, the allegation that the applicant did not know what case to meet appears to be baseless. The demarcation dispute is clearly set out in the application to determine the dispute in the prescribed form LR3.23. On this ground also, the applicant's prospects of success are slim and it has not made out a *prima facie* right.'[39]

I find it ironic that the applicant would seek to avoid section 62 proceedings when it is brought to compel the applicant to comply with a sector collective agreement, but now, *in casu*, tries to use these very same section 62 proceedings to avoid compliance sought in enforcement proceedings. I am comfortable in saying that the applicant's conduct is not genuine and designed to avoid compliance with each and every industry collective agreement in which it deploys employees.

[37] I further consider, as the first respondent also did, that the applicant was doing

[38] See para 17 of the judgment.
[39] Id at para 24.

nothing more that applying delaying tactics with the view to obstruct and prolong the enforcement of the collective agreement in the second respondent against it, to which it is clearly bound. This not only undermines the primary objective of the expeditious resolution of employment disputes,[40] but also negates the very objective sought to be achieved by orderly collective bargaining at a central (sectoral) level, being part of the defined primary purposes of the LRA in Section 1, which reads:

> 'The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are- …. (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can- (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and (ii) formulate industrial policy; and (d) to promote- (i) orderly collective bargaining; (ii) collective bargaining at sectoral level….'

In *Police and Prisons Civil Rights Union v Ledwaba NO and Others*[41] the Court said that '… the fact remains that collective agreements have special status and authority, as the very product of collective bargaining', and '…. What all of this show is that a collective agreement, as the product of the collective bargaining process, has preference over all else…' which is equally applicable *in casu.* I of course agree with what Van Niekerk J said in *National Education Health and Allied Workers Union and Others v MEC: Department of Health, Eastern Cape and*

[40] See *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal* (2014) 35 *ILJ* 613 (CC) at para 42 where the Court said: '… the importance of resolving labour disputes in good time is thus central to the LRA framework...' *Aviation Union of SA and Another v SA Airways (Pty) Ltd and Others* (2011) 32 *ILJ* 2861 (CC) at para 76 where the Court held: '….Speedy resolution is a distinctive feature of adjudication in labour relations disputes…'; and *National Education Health and Allied Workers Union v University of Cape Town and Others* (2003) 24 *ILJ* 95 (CC) at para 31 where it was said: 'By their very nature labour disputes must be resolved expeditiously and be brought to finality so that the parties can organize their affairs accordingly. They affect our economy and labour peace. It is in the public interest that labour disputes be resolved speedily…'

[41] *Police and Prisons Civil Rights Union v Ledwaba NO and Others* (*supra*) at para 27.

Others[42] to the effect that collective agreements are subject to the principle of legality where the learned Judge held:

> '… It follows that a collective agreement that contains terms in conflict with any applicable statutory instrument must yield to the instrument, at least to the extent that the terms of the collective agreement are inconsistent with the applicable instrument…'

But notwithstanding, the fact remains that until it has been determined in a competent forum or the Labour Court that the collective agreement must so yield, it must be complied with, considering its primacy. The conduct of the applicant, in my view, which in essence promotes unjustified non compliance, was deserving of the censure meted out by the first respondent when it came to the costs award.

[38] There is, accordingly, no reason to upset the costs order made by the first respondent. I accept that the first respondent properly exercised the discretion that he had in this regard and came to a proper and reasonable determination. Therefore, the costs order made by the first respondent must also be upheld.

Conclusion

[39] Therefore, based on the reasons set out above, I conclude that the first respondent's ruling dismissing the applicant's section 62(3A) with costs must be sustained. I thus uphold the same. It follows that the applicant's review application must be dismissed.

[40] This then only leaves the issue of costs in this review application. In terms of the provisions of section 162(1) and (2) of the LRA, I have a wide discretion where it comes to the issue of costs. I must confess that I find the conduct of the applicant, seen as a whole and in context of the history of this matter, to be unacceptable. I believe that these review proceedings brought by the applicant

[42] (2013) 34 *ILJ* 2628 (LC) at para 19.

was yet another component of its campaign and approach of prolonging enforcement of collective agreements to which it clearly bound, upon it. The review application had little merit. In addition, the applicant could have still participated in the arbitration proceedings so it could be finalised on the merits thereof and keep all its challenges to the end. I fully align myself with what Steenkamp J said in *Workforce Group (Pty) Ltd v National Textile Bargaining Council and Another,*[43] where the learned Judge held:

> 'Mr *Euijen*, for the council, submitted that this application was brought merely to delay the demarcation dispute further; that it was part of a pattern of delaying tactics, and that costs should be awarded on a punitive scale.
>
> Although the application is, in my view, without merit and did not warrant an urgent application during the recess, there is not enough evidence on the papers before me to bear out the contention that the application forms part of a pattern of delaying tactics. In law and fairness, costs should follow the result…'

In casu, I am actually satisfied that the current proceedings before me are part of a pattern of delaying tactics. I am satisfied that a costs order against the applicant is justified.

Order

[41] In the premises, I make the following order:

> The applicants' review application is dismissed with costs.

[43] *Workforce Group (Pty) Ltd v National Textile Bargaining Council and Another* (*supra*) at paras 25 – 26.

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Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant:	Advocate B M Jackson
Instructed by:	Hunts Attorneys
For the Second Respondent:	Mr A J Prior of Prior & Prior Attorneys