REPUBLIC OF SOUTH AFRICA

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Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 390/2016

In the matter between:

NUM	First applicant
BCCEI	Second applicant
and	
SYLCO PLANT HIRE (PTY) LTD	First respondent
CONTRACTORS PLANT HIRE ASSOCIATION	Second respondent
CCMA	Third respondent
D I K WILSON N.O.	Fourth respondent

Heard: 2 March 2017

Delivered: 25 April 2017

SUMMARY: Demarcation dispute – review. Commissioner found that company does not fall within jurisdiction of Bargaining Council for Civil Engineering Industry. NUM contended that it does. LRA ss 62 and 145. Award not reviewable.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant is the National Union of Mineworkers. It seeks to have an arbitration award set aside in a demarcation dispute. The arbitrator, Mr D I K Wilson (the fourth respondent), found that the first respondent, Sylco Plant Hire (Pty) Ltd, does not fall within the jurisdiction of the Bargaining Council for the Civil Engineering Industry (the second applicant).

[2] Sylco opposes the application. It agrees with the arbitrator's finding. The Bargaining Council and the Contractors Plant Hire Association (the second respondent) – both of which are legally represented – abide the Court's decision, although the Council had supported the application until a day before the hearing.

Background facts

[3] NUM has members who work for Sylco. The union referred a dispute to the CCMA (the third respondent) in terms of s 62(1) of the LRA[1] contending that the activities of Sylco fall within the jurisdiction of the BCCEI and that it is obliged to comply with the collective agreements concluded in that Bargaining Council. The Council supported the union's contention. Sylco and the Contractors Plant Hire Association dispute it.

Arbitration award

[4] The Commissioner heard the evidence of three witnesses for NUM, one for the CPA and on for Sylco. He concluded that Sylco's activities do not fall within the jurisdiction of the BCCEI. He ordered NUM to pay Sylco's costs in the amount of R10 000. NEDLAC approved the award.

[1] Labour Relations Act 66 of 1995.

[5] The Commissioner noted that NUM had limited its case to only the plant hire operators employed by Sylco and hired out with equipment to the civil engineering industry.

[6] The 17 identified plant hire operators are employed by Sylco. Sylco hires out equipment to other businesses. The plant operators usually operate the equipment on the other businesses' premises, e.g. bulldozers, excavators, front end loaders etc. Those businesses are involved in a variety of industries, including construction, civil engineering, agriculture, mining and film.

[7] The Commissioner identified the main issue as a demarcation dispute, i.e. whether the employees and employer fall within the jurisdiction of the Bargaining Council. In order to make that determination he had to consider the definition of the industry in the Council's certificate of registration together with the activities of the employer and employees. If those activities fall mainly within the definition of the industry, the employer and employees fall within the jurisdiction of the Council.

[8] The Commissioner had regard to relevant case law. In *R v Sidersky*[2] the court held that the character of a business was determined not by the occupation in which the employees were engaged but by the nature of the enterprise in which the employer and employees were associated for a common purpose. Following this reasoning, the Labour Court held in *Coin Security*[3]:

> "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".

[9] The arbitrator also had regard to *Greatex Knitwear*[4] where it was held that an employer may be engaged in more than one industry. Turning to the facts of this case, he noted that it was common cause that some of the activities performed by the plant operators, while working for clients in the civil engineering industry, fall within the definition of the industry (for

[2] (1928) TPD 109.

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

[4] *Greatex Knitwear (Pty) Ltd v Viljoen* 1960 (3) SA 338 (T).

example excavation, earthworks etc. conducted in the process of work of a civil engineering character). But, he said, "the question in this case is not so much whether the work performed falls within the definition, but rather whether the [company] and its employees are associated for the purpose of carrying out such work".

[10] The arbitrator did not accept the argument of the Council and the NUM that the digging of trenches, planting of fence poles or bush clearing on a farm falls within the definition of civil engineering. He relied, amongst other things, on the definition of a "civil engineer" in the Collins English Dictionary as "a person qualified to design, construct and maintain public works, such as roads, bridges, harbours etc.".

[11] Much of the arbitrator's finding relied on the case in *Richards Rentals.*[5] In that case, the company hired out tipper trucks and drivers to the construction and mining industries. The National Bargaining Council for the Road Freight Industry claimed that its business fell within that industry's definition, comprising "the transportation of goods for hire or reward by means of motor transport in the Republic of South Africa". The "transportation of goods" was further defined, somewhat circuitously, as follows:

> "For the purposes hereof the 'transportation of goods' means the undertaking in which employers and their employees are associated for carrying out one or more of the following activities for hire or reward:
>
> (i) The transportation of goods by means of motor transport;".

[12] The arbitrator in *Richards Rentals* compared the company's activities to the industry definition and found that it did not fall within that definition. Its main business was plant hire, not the transportation of goods.

[13] On review, the Labour Court upheld the demarcation award. It found that the commissioner had not applied an unduly restrictive approach in interpreting the industry definition. And that judgment was upheld on appeal.[6]

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[5] *NBCRFI v Marcus NO* [2011] 2 BLLR 169 (LC).

[6] *NBCRFI v Marcus NO* (2013) 34 *ILJ* 1458 (LAC).

[14] The arbitrator in this case found that the facts before him bore a significant resemblance to those in *Richards Rentals*, with the major difference being that the whole of that company's business comprised the hiring out of trucks, whereas in this case plant hire to the civil engineering industry comprises only a small part of Sylco's business. As in *Richards Rentals*, he was satisfied that Sylco and its plant operators are not associated for the purpose of conducting work of a civil engineering character, but only for the purpose of hiring out plant and equipment to a variety of clients. It has no say in what the client does with the equipment, once delivered. It is not engaged in the civil engineering industry and it does not fall within the jurisdiction of the BCCEI.

[15] Given that he had specifically referred the parties to *Richards Rentals* at an *in limine* hearing and ruling, and the NUM still proceeded with the arbitration, the arbitrator ordered the NUM to pay the costs of the arbitration.

Grounds of review

[16] Both the NUM and the BCCEI challenged the award on review. The BCCEI withdrew shortly before the hearing of this application but after all the pleadings had closed.

[17] The NUM raised the following grounds of review:

17.1 The commissioner limited the applicants' case as regards the nature of the enterprise (Sylco).

17.2 The commissioner held that civil engineering work is limited to public works.

17.3 The commissioner found that 'housing or supports for plant, machinery or equipment' in the definition relates to construction.

17.4 The commissioner found that paragraph (d) of the definition is not applicable.

17.5 Whether *Richards Rentals* is on point.

17.6 The commissioner failed to give consideration to policy considerations.

17.7 The activities of Sylco are covered by the industry definition.

17.8 The commissioner should have taken other relevant considerations into account.

17.9 The commissioner should not have ordered NUM to pay costs.

[18] In its supplementary heads of argument delivered a week before the hearing, the union's attorneys further submitted that the arbitrator committed a gross error of law by applying the incorrect legal test to determine whether Sylco's business falls within the sector and area of the Bargaining Council.

Evaluation

[19] Before dealing with the specific review grounds, I will briefly consider the legal framework.

[20] The legal principles regarding demarcation awards have largely been crystallised in the LRA and in case law. The starting point is s 62 of the LRA:

> "**Section 62 Disputes about demarcation between sectors and areas**
>
> (1) 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.
>
> (2) If two or more councils settle a dispute about a question contemplated in subsection (1)(a) or (b), the councils must inform the Minister of the provisions of their agreement and the Minister may publish a notice in the Government Gazette stating the particulars of the agreement.
>
> (3) In any proceedings in terms of this Act before the Labour Court, if a question contemplated in subsection (1)(a) or (b) is raised, the Labour

Court must adjourn those proceedings and refer the question to the Commission for determination if the Court 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.

(3A) 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.

(4) When the Commission receives an application in terms of subsection (1) or a referral in terms of subsection (3), it must appoint a commissioner to hear the application or determine the question, and the provisions of section 138 apply, read with the changes required by the context.

(5) In any proceedings in terms of this Act before a commissioner, if a question contemplated in subsection (1)(a) or (b) is raised, the commissioner must adjourn the proceedings and consult the director, if the commissioner 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.

(6) The director must either order the commissioner concerned to determine the question or appoint another commissioner to do so, and the provisions of section 138 apply, read with the changes required by the context.

(7) If the Commission believes that the question is of substantial importance, the Commission must publish a notice in the Government Gazette stating the particulars of the application or referral and stating the period within which written representations may be made and the address to which they must be directed.

(8) If a notice contemplated in subsection (7) has been published, the commissioner may not commence the arbitration until the period stated in the notice has expired.

(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.

(11) If the Commission believes that the nature of the award is substantially important, it may publish notice of the award in the Government Gazette.

(12) The registrar must amend the certificate of registration of a council in so far as is necessary in light of the award."

[21] In this case, the award was sent to NEDLAC in terms of s 62(9) and NEDLAC approved it.

[22] In *NBCRFI v Marcus NO*[7] it was held that due deference ought to be paid to a commissioner making a demarcation award. In demarcation disputes there will be, more often than not, no single correct judgment and a wide range of approaches and outcomes is inevitable. A reviewing court should therefore interfere only in cases where the boundary of reasonableness is crossed. Furthermore, a demarcation is provisional since section 62(9) of the LRA requires a commissioner to consult with NEDLAC before making

[7] [2011] 2 BLLR 169 (LC), with reference to *Coin Security (Pty) Ltd v CCMA* [2005] 7 BLLR 672 (LC), discussed in Du Toit et al, *Labour Law through the Cases*

an award. The case for judicial deference is all the more compelling in these circumstances.[8]

[23] And in *Coin Security (Pty) Ltd v CCMA*[9] it was noted that the character of an industry (or sector) 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 employer and employees are engaged. Once the character of the industry is determined, all employees are deemed to be engaged in that industry. However, it is possible for the same employer to be engaged in two or more industries at the same time.

[24] The *dicta* in these cases were endorsed by the LAC in *SAMWU v Syntell (Pty) Ltd*[10]*.*

[25] It is against those legal principles that the grounds of review must be considered, as well as the test for review in *Sidumo*[11] and *Herholdt*[12]*.*

Commissioner limited applicants' case

[26] NUM complains that the Commissioner limited its case to the 17 operators working on the plant and equipment that Sylco hires out, instead of all Sylco's employees.

[27] But that limitation was not unreasonable. The Commissioner explains it in some detail:

> "At the *in limine* hearing prior to arbitration, Mr Luzipo, a union official representing the [NUM] at that time, conceded that its case related only to the plant operators hired out with equipment to the civil engineering industry. This concession was in line with the BCCEI's communications with the respondent in which it noted that it sought registration only in respect of operators accompanying the equipment hired out. I am satisfied that the applicant is bound by this concession, which was made at a

[8] Para 22.

[9] [2005] 7 BLLR 672 (LC) at pars 54–55.

[10] (2014) 35 *ILJ* 3059 (LAC) paras 23-24. See also *National Textile Bargaining Council v De Kock NO* (2014) 35 *ILJ* 1017 (LC); *Henred Fruehauf (Pty) Ltd and Another v Marcus N.O. and Others* (2014) 35 *ILJ* 3147 (LC); [2016] 4 BLLR 401 (LAC); *SBV Services (Pty) Ltd v NBCRFLI* (2016) 37 *ILJ* 708 (LC).

[11] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

[12] *Herholdt v Nedbank Ltd* (2013) 34 *ILJ* 2795 (SCA).

> hearing specifically held to deal with preliminary issues and to clarify the issues in dispute. The *in limine* ruling issued, setting out the issues in dispute, is akin to the minute of a pre-arbitration conference and is binding on the parties. Respondent would have prepared for arbitration accordingly. I am therefore limiting my enquiry to the question of whether the plant operators (agreed to be 17 in number) fall within the jurisdiction of the BCCEI."

[28] The Council also limited its allegation that employees fell within his jurisdiction to plant operators. In an email to Sylco on 29 May 2015, its General Secretary summarised its position as follows:

> "It was brought to the council's attention that Sylco Plant Hire, hire plant with operators, to construction companies in the civil engineering industry and this made registration compulsory. However, if Sylco hired plant or equipment to companies in the civil industry without an operator, they will not be liable for registration. Registration is therefore only with regard to the employees that operate the plant which was supplied to the client."

[29] In a letter dated 9 June 2015, the General Secretary reiterated that:

> "The registration is only with regards to machinery hired to the civil engineering industry with an operator. (The Council's agreement's [*sic*] will therefore only apply to the machine operators and not to other staff and only to those hired to the civil engineering industry.)"

[30] The union's referral form to the CCMA is similarly limited. It alleges that:

> "The company is operating in the hiring of plants, though subcontracting in other companies in the engineering sector."

[31] It is against that background that the union expressly limited the ambit of its dispute at the *in limine* hearing on 13 October 2015, resulting in the commissioner's ruling.

[32] It was not unreasonable of the Commissioner to hold the union to that ruling. As Mr *Leslie* (for Sylco) pointed out in his argument, the decision of this court in *Solomon v CCMA*[13] is on point. In that matter, the Commissioner conducted an exercise at the commencement of the arbitration hearing in order to clarify and narrow the issues in dispute

[13] (1999) 20 *ILJ* 2960 (LC).

between the parties. On review, the Labour court held that the Commissioner should have confined himself to those issues:[14]

> "I am not satisfied that the process of reasoning adopted by the arbitrator is rationally justifiable or that, having so narrowed the issues, he stuck to the issues as limited, either in regard to the evidence which he allowed or in regard to the issues on which he pronounced."

[33] The arbitrator also acted reasonably by finding that the ruling is akin to the minute of a pre-arbitration conference and is binding on the parties. In *Fila-Matrix (Pty) Ltd v Freudenberg*[15] the company sought to resile from a limitation of issues reached at a pre-trial conference. Harms JA rejected it:

> "To allow a party, without special circumstances, to resile from an agreement deliberately reached at a pre-trial conference would be to negate the object of rule 37 which is to limit issues and to curtail the scope of the litigation. If a party elects to limit the ambit of his case, the election is usually binding. No reason exists why the principal should not apply in this case."

[34] Although a demarcation hearing should not be equated to a hearing in the High Court, it was not unreasonable of the arbitrator to hold that similar principles apply in this case. There were no special circumstances to find that the union should not be held to its own limitation of its case.

[35] The dictum in *Fila-Matrix* was cited with approval by Zondo JP in *Driveline Technologies*[16] when he confirmed the ordinary principal that limitation of a party's case in pre-trial proceedings is binding, unless exceptional circumstances exist. In that case, the court held that the union had not, through the conclusion of a pre-trial minute dealing with one cause of action, abandoned its right to rely on another, distinct cause of action in future. But in this case, when the union limited the issues in dispute before the Commissioner, its representative was fully aware of Sylco's different business activities. With that knowledge, the union limited its case to the position of the plant operators.

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[14] at 2966 E-F.

[15] 1998 (1) SA 606 (SCA) at 614C.

[16] *NUMSA v Driveline Technologies (Pty) Ltd* (2000) 4 SA 645 (LAC); (2000) 21 *ILJ* 142 (LAC).

[36] This ground of review fails.

Civil engineering confined to public works?

[37] The Commissioner noted that it was common cause that some of the activities performed by the plant operators, while working for clients in the civil engineering industry, fall within the definition of the industry. But he did not accept the argument that excavation, earthworks et cetera carried out on farms or where ever else also comprised work of a civil engineering nature. It is in that context that he commented that "work of a civil engineering character" is not defined in industry definition, but is "limited to public works", referring to the definition of "civil engineer" in the Collins English Dictionary as "a person qualified to design, construct and maintain public works, such as roads, bridges, harbours etc."

[38] I agree with the union that it may well be that civil engineering cannot be confined to public works, but occurs in respect of both private and public works. Does that make the award reviewable? I think not.

[39] The award must be viewed holistically. The finding that Sylco and its employees could not be said to be "associated for the purposes of carrying out work of a civil engineering character", is not unreasonable, given the evidence before the Commissioner. The overriding nature of its plant hire business is to provide a rental service to clients across a range of industries. And only a small part of that business falls within the civil engineering industry when the operators do that type of work for a client to whom Sylco had rented its equipment.

Definition relating to construction

[40] The Commissioner rejected the union's contention that Sylco's activities were included in the industry definition of "housing or supports for plant, machinery or equipment". On review, the union argues that that was unreasonable.

[41] In his evaluation of that argument, the Commissioner found that, on a proper reading of section (a) of the definition, it related to <u>the construction of</u> housing or supports etc. Sylco is not involved in construction activities.

That does not appear to me to be an unreasonable reading of the definition. Sylco and its employees are not engaged in "work of civil engineering character normally associated with the civil engineering sector".

Is paragraph (f) of definition applicable?

[42] The industry definition defines it as "the civil engineering industry in which employers… and employees are associated for the purposes of carrying out work of civil engineering character normally associated with the civil engineering sector and includes such work in connection with any one or more of the following activities: "and then set out various examples in paragraphs (a) – (d). It further includes, in paragraph (f):

> "The making, repairing, checking or overhauling of tools, vehicles, plant, machinery or equipment in workshops which are conducted by employers engaged in any of the activities referred to in subclauses (a) to (f) inclusive."

[43] The activities in clause (f) must therefore take place within the civil engineering industry. The union argued that Sylco has two workshops on its premises and that it derived most of its income from the sale of used equipment. It argued that, because equipment is repaired and maintained in its workshops before it could be hired or sold, it fell within the definition in clause (f).

[44] The Commissioner reasonably argued that, having found that Sylco is not involved in civil engineering activities as defined in subclauses (a) to (f), it would be nonsensical to consider clause (f) on its own and it was not applicable. That finding is not so unreasonable that no other arbitrator could have come to a similar finding.

Richards Rentals on point?

[45] The bulk of the arbitrator's award was based on *Richards Rentals*[17], which he considered to be on point. The union argues on review that it constitutes a material error of fact and law.

[17] *NBCRFI v Marcus NO* [2011] 2 BLLR 169 (LC); (2013) 34 *ILJ* 1458 (LAC).

[46] I disagree. In that case, the company hired out tipper trucks and drivers to clients in the mining and construction industry:[18]

> "The trucks are hired out, with a qualified driver, at a flat rate, for an agreed period, with the cost of the driver included in the flat rate charged.… The [company's) employees, the drivers, transport the goods, on the instructions of the client.
>
> …
>
> "… It was the clients who engaged in the activity of transporting the material, making use of the truck and driver supplied by [Richards Rentals]. The fact that [the company] supplied a driver was not relevant – it was an arrangement derived solely from the requirement that the tipper trucks had necessarily to be driven by specially trained drivers with special permits and certification."

[47] In this case, Sylco also hires out specialist equipment (along with an operator) for hire at a flat rate. The fact that the operator is supplied by Sylco is purely incidental to its primary business, i.e. hiring art plant and machinery. Sylco and its employees are not associated for the purpose of the civil engineering industry. The correct enquiry in a demarcation dispute focuses on the purpose of the association between the employer and employees in question, and not the alleged association between the employer's employees and the employer's clients. It was entirely reasonable of the Commissioner to consider himself bound to the authority of the LAC in *Richards Rentals* in this regard. He was satisfied that Sylco and its plant operators "are not associated for the purpose of conducting work of a civil engineering character, but rather for the purpose of hiring art plant and equipment to a variety of clients." In doing so, he applied the correct test as set out by the LAC in *Richards Rentals*[19]:

> "The court *a quo* correctly found that the appellant, by arguing that it was sufficient if the third respondent's employees were merely associated with the activities of transportation, was attempting to incorporate the third respondent into the jurisdiction of the Council by focusing on the association between the employees and the clients of the third respondent

[18] Recorded in paras 6 and 10 of the Labour court judgment.

[19] Para 24.

> instead of correctly looking at the third respondent and its employees and thus whether it's employees were associated with the transportation of goods. The court a quo correctly found that since the activity of hiring art plant and vehicles for rental is not contemplated by the industry definition, the third respondent's business activities fell outside the ambit of that definition."

[48] The Commissioner's conclusion in this regard is entirely reasonable. This was not a case where the employer and its employees are involved in more than one industry, such as was the case in *KWV*[20] or *Golden Arrow.*[21]

Policy considerations

[49] The Commissioner had regard to the reasoning in *Coin Security*[22] that additional considerations need to be borne in mind by the person making a demarcation award in light of the socio economic objectives of the LRA and its objectives in establishing and promoting a centralised system of orderly collective bargaining at sectoral level. That requires the arbitrator to extend the enquiry, where appropriate, beyond mechanistic comparison of jobs and industry activities to a second phase involving a consideration of collective bargaining practices and structures and socio-economic considerations. In this case he was satisfied that Sylco does not fall under the jurisdiction of the BCCEI and considered that there was no purpose in taking the investigation further.

[50] That approach does not appear to me to be unreasonable. Having found that, on the facts, Sylco's activities do not fall under the jurisdiction of the council, it would serve little purpose to consider the social economic factors implicated if it had. Those factors could not, on the facts of this case, play a decisive role like it would in a case where it might sway the decision maker one way or the other.

[20] *KWV v Industrial Council for the Building Industry* 1949 (2) SA 600 (A).

[21] *Golden Arrow Bus Services v CCMA* [2004] ZALC 72.

[22] *Coin Security (Pty) Ltd v CCMA* (2005) 26 *ILJ* 849 (LC).

Sylco's activities covered by industry definition?

[51] The Commissioner's finding that the balance of Sylco's business activities did not fall within the jurisdiction of the Bargaining Council cannot be said to be unreasonable.

[52] The evidence was that the majority of its transport activities involve transporting aggregate (sand, stone and ration dust) from quarries to concrete batching plants for one customer, Megamix. This comprises 90% of Sylco's transport income. Those truck drivers are in no way engaged in the civil engineering industry. The only truck driver called testified by the union confirmed that he never carried loads to a civil engineering site.

[53] The balance of Sylco's transport work involves moving plant and shipping containers to and from clients across a range of industries. This comprises about 3% of its total income. On the fact, it was not unreasonable to hold that its transport activities do not fall within the Council's registered scope.

[54] The sale of second-hand plant and equipment had become Sylco's primary source of income (43% of its total income) and its core business. That is self-evidently not with in the civil engineering industry.

[55] It also hires out shipping containers used as storage and for offices as well as spaza shops. There is no evidence to suggest that this falls within the civil engineering industry.

[56] On the evidence as a whole, Sylco and its employees could not be said to be "associated for the purposes of carrying out work of civil engineering character" as required by the industry definition. In fact they are associated for the purpose of carrying out a service, namely, a hiring or rental service to clients across a range of industries. The conclusion reached by the Commissioner is not is not so unreasonable that no other Commissioner could have come to the same conclusion. And in demarcation disputes this court should defer to the decision maker, more so than in other reviews.

Other relevant considerations

[57] The union finally argued that, “although not decisive”, the fact that other companies engaged in plant hire voluntarily registered with the BCCEI ought to have been taken into account. But the Commissioner reasonably found that there was no evidence as to the business activities of those businesses and that he could not draw any inference from the registration of those businesses.

[58] The fact that the NUM had organised that Sylco without resistance could similarly not turn the company’s factual activities into activities that fell within the jurisdiction of the Council. Neither could the fact that there was no other bargaining council contending that Sylco’s activities fell within its jurisdiction.

Arbitration costs

[59] The award of costs fell within the Commissioner’s discretion. In deciding that the union had to pay Sylco’s costs – limited to R6000 for the first day and R4000 rate for the second day of arbitration – the Commissioner reasonably exercised that discretion. He took into account that he had specifically referred the parties to *Richards Rentals* in the *in limine* ruling. Despite that, it chose to proceed to arbitration despite its limited prospects, putting the company to considerable cost in defending the matter. That is not an unreasonable exercise of his discretion.

<u>Conclusion</u>

[60] The award is not reviewable.

[61] With regard to costs, I take into account that there is an ongoing relationship between the parties.

[62] Despite that, Mr *Leslie* urged me to award costs in favour of Sylco. That request must also be considered in the context where the union asked for costs to be paid by “any respondent who opposes the application”; and where the Bargaining Council (the second applicant) only withdrew on the day before the hearing.

[63] As set out above, much of the demarcation award was based on the binding authority of this Court and of the LAC in *Richards Rentals*. The award was a reasonable one. The applicants were well aware of that authority and their attempts to distinguish it were unsuccessful. The matter should have ended at arbitration. In those circumstances, the applicants should pay the costs of the first respondent, who had little choice but to oppose the application for review. The Bargaining Council opposed the application up until the day before the hearing. It should bear the costs necessitated by its opposition up until that date.

Order

[64] I therefore make the following order:

64.1 The application for review is dismissed.

64.2 The applicants are ordered to pay the first respondent's costs, jointly and severally.

64.3 The costs to be paid by the second applicant must exclude the costs of the hearing on 2 March 2017.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

FIRST APPLICANT:	Reynaud Daniels and Tapiwa Ralehoko of Cheadle Thompson & Haysom.
SECOND APPLICANT:	Hugo Pienaar of Cliffe Dekker Hofmeyr.
FIRST RESPONDENT:	Graham Leslie Instructed by Harmse Kriel attorneys.
SECOND RESPONDENT:	Knowles Hussain Lindsay Inc.