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IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Case No: JR 2411/08

In the matter between:

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY Applicant

and

COMMISSIONER M H MARCUS N.O. First Respondent

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION Second Respondent

RICHARDS RENTALS (PTY) LIMITED Third Respondent

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an unopposed application to review and set aside a demarcation award handed down by the first respondent ("the commissioner") on 2 September 2008.

[2] The third respondent is in the business of hiring out tipper trucks and drivers to the mining and construction industry. The tipper trucks operated by third respondent's drivers, are used to convey landfill and rubble both within the relevant mining and construction sites and to and from dumping points outside these sites.

[3] The applicant is a bargaining council, established under s 27 of the LRA registered under s 29 for the road freight industry. The issue before the commissioner was whether the third respondent's business fell within the applicant's registered scope as defined in its certificate of registration. This is *"the transportation of goods for hire or reward by means of motor transport in the Republic of South Africa."* The applicant's certificate of registration goes on to define "transportation of goods" 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**;*
>
> *(ii)* *The storage of goods, including the receiving, opening, unpacking, packing, despatching and clearing of, or accounting for of goods where these activities are ancillary or incidental to paragraph (i) above;*

(iii) *The hiring out by labour brokers of employees for activities or operations which ordinarily or naturally fall within the transportation of goods irrespective of the class or undertaking, industry, trade or occupation in which the client is engaged as an employer"* (emphasis added).

For present purposes, paragraph (i) of the above definition is relevant. For convenience, I refer to this as "the industry definition."

[4] At the arbitration hearing, the third respondent sought an award declaring that it did not fall within the industry definition and was accordingly not subject to the applicant's jurisdiction. The applicant opposed this and contended that the third respondent's business did indeed fall within its registered scope. The commissioner ruled that its business did not fall within the applicant's registered scope.

[5] In these proceedings, the applicant submits that the commissioner adopted an erroneous approach to the demarcation dispute before him, and that he misconceived certain aspects of the industry definition. In the result, it is contended that the commissioner misconceived the true nature of the enquiry before him, and that his award thus falls to be reviewed and set aside in terms of section 145 of the LRA. The applicant submits further that since all the facts are before this court and since the award is flawed by virtue of misconceptions and errors of law committed by the commissioner, no purpose would be served by

remitting the dispute back to the second respondent and the dispute may properly be determined by this court. The applicant accordingly seeks an order reviewing and setting aside the commissioner's award, and substituting it with an order declaring that the third respondent's business falls within the applicant's registered scope.

Factual background

[6] There was no material dispute of fact at the arbitration hearing, and a detailed analysis of the evidence led at the arbitration hearing is unnecessary. The only factual point in respect of which there was any conflict relates to other plant hire companies and whether they historically have been registered with the applicant, an issue that is not relevant in the present proceedings. It was common cause that the third respondent has 23 tipper trucks and 23 driver operators, and that its business is the hiring out of tipper trucks to the mining, construction and allied industries. 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. In other words, the third respondent does not levy charges on the basis of tonnage moved (the basis on which a contractor would operate) rather than at a rate per hour, day or week. The third respondent's employees, the drivers, transport the goods, on the instructions of the client. It was common cause that tipper trucks are specifically designed to convey heavy loads (typically landfill and rubble, known as "aggregate") over short distances, both within

mining and construction sites and to and from dumping points outside these sites. The third respondent's tipper trucks are used by the third respondent's clients for that particular application and are hired out by the third respondent for that purpose.

[7] The applicant's case at the arbitration hearing was, in essence, that the third respondent's vehicles were on the road transporting goods, and that this was sufficient proof of the fact that the third respondent fell within its jurisdiction. The third respondent contended that it was not rewarded for the transport of goods; it hired trucks and drivers to third parties on a time-related basis. In other words, the third respondent claimed that the nature of its business is plant hire, not cartage. The third respondent's position is perhaps best reflected by the following passage from the evidence of Mr Goldman, the third respondent's managing director:

> *We purely and simply hire out the truck with a driver. What the client does and what he puts into that vehicle is not of concern to us. We do not charge him per cubic metre, per kilometre, per tonne whatever the case may be. We charge him purely and simply on an hourly basis with a minimum of so many hours a day. That vehicle goes on site and we have no control over what the client puts into the back of that truck, whether it is tree stumps or whether it is iron ore or whether it is anything is not our*

concern we have never carried goods for reward and never will. It is not our line of trade….

The commissioner's award

[8] The commissioner adopted the approach set out by Jansen J in *Greatex Knitwear (Pty) Ltd v Viljoen & others* 1960 (3) SA 338 (T) . This required the commissioner first to determine the industry for which the applicant is registered; secondly, to determine the nature of the business activities in which the third respondent is engaged in association with its employees and thirdly, a comparison of these activities with the industry definition to assess whether the activities (or some of them) fall within the industry definition.

[9] Following the industry definition, the commissioner recorded that for the third respondent to fall within the definition and scope of the council, it would have to be found that the third respondent "*in association with its employees, is in the business of transporting goods for its clients in its tipper trucks for hire or reward."* He concluded that *"the applicant's business undertaking involving the hiring out of tipper trucks and drivers to customers in which it is associated in common purpose with its employees is declared not to be an activity or undertaking falling within the registered scope of the respondent."* (References in the award to "the applicant" are to the third respondent in these proceedings, and references to "the respondent" are references to the applicant in these

proceedings). Next, the commissioner embarked on a detailed analysis of the evidence relating to the nature of the third respondent's business. For this purpose, he accepted (with some misgivings) that aggregate, landfill and the like could constitute "goods" for the purposes of the industry definition, and proceeded to summarise the nature of the business as follows:

> *It is clear from the uncontroverted evidence of the terms of applicant's contractual arrangements with its clients and manner of charging them at an hourly and daily rate as evidenced by the sample invoices submitted by Goldman and testified by the latter, that the nature of such arrangements is one whereby applicant hires out its tipper truck to the client, accompanied by a qualified driver supplied by applicant, for use by the client on mining and construction sites in moving and conveying landfill and other aggregate as required by the client and at the latter's sole discretion, for which service applicant charges the client a daily flat rate or fixed rental charge based solely on the number of hours or days for which the tipper truck is retained by the client. The implications of such arrangement for the present dispute is that applicant incurs no obligation to the client under the contract to transport goods for the client even if the conveyance of landfill or aggregate amounts to transportation of goods within the meaning of respondent's scope and definition as earlier cited…"*

[10] Turning then to consider whether the third respondent's business activities fall within the industry definition, the commissioner posed the following question: "*…can applicant correctly be said to be engaged in association with its drivers in the business of transporting aggregate for hire or reward?"* He answered the question in the negative. First, he held that the uncontroverted evidence before him disclosed that the third respondent incurred no obligation under its contract with its clients to transport aggregate and the like. Rather, it was the clients who engaged in the activity of transporting the material, making use of the truck and driver supplied by the third respondent. The fact that the third respondent 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. The sample invoices tabled in evidence reflected only a hiring charge whereby the trucks were hired out at a minimum daily rate. The standard terms and conditions of hire of the Contractors Plant Hire Association incorporated into the third respondent's contracts and tabled in evidence were unrelated to haulage or transportation contracts. It was also the uncontroverted evidence of Goldman, the third respondent's chief executive officer, that a haulage or cartage business would require a different form of capital investment on a much larger scale, including costly investment in additional plant such as weight bridges and load sensors. The business model for the cartage business was quite different, requiring substantial investment in trucks (usually in the form of horse and trailer) and incidental equipment required for long distance haulage. Goldman testified that the third respondent would not

be in business if it charged clients for transporting loads per weight or cubic metre. The commissioner stated further:

> *Messers Kock's and Beckenstrater's reasoning on this aspect appears to overlook the critical fact that the activity of transporting landfill, whilst being performed with the use of applicant's trucks and drivers (which is the purpose for which these are hired out by applicant to its clients), is not being performed by applicant but by and at the discretion of the client, who, in doing so, is making use of applicant's trucks and drivers whose services are hired out to them by applicant for this purpose. …This endorses applicant's argument that that the business activity in which it is engaged in common purpose with its employee drivers is that of hiring out its trucks with drivers for use by the client at its will and discretion, a contention further borne out by the fact that the activity which entitles applicant to payment of its hiring charges is simply that of making the tipper truck with driver available for use during the period of hire. Were the client to elect not to make use of the truck and driver's services, its liability to pay the hiring charges during the period of hire would remain intact, since the basis of this liability is that the truck has been made available for its use over the hire period as required; just as in the instance of conventional car hire arrangements where the hire company incurs no obligation to transport the client hiring the vehicle, whose liability to pay the hiring charge derives from the mere fact that he is given access to the*

hired vehicle to use for his transportation at his will, which liability remains whether he chooses to use the vehicle as contemplated in the hire contract or not…. Applicant's contracts do not involve it in any obligation to transport landfill for the client. Its obligations under the contract are limited to the provision of tipper trucks in good working order to enable the client to engage in such transportation of material as it might elect, together with a specialist driver qualified to drive the truck as directed by the client. ***The transportation activities ensuing from the implementation of the contract are undertaken by the client, not by the applicant*** (commissioner's emphasis).

[11] The commissioner then proceeded to consider the meaning of the phrase "for hire or reward" in the industry definition. He came to the following conclusion:

The term "hire" as used here does not refer to the hiring activities undertaken by the applicant but to activities involving "the transportation of goods by means of motor transport". The words "for hire and reward" in the industry definition qualify the activity of "transportation of goods by means of motor transport". The activity of hiring out plant or vehicles for rental is not one contemplated in the road freight definition, nor was it ever respondent's case that it was. Respondent's case was always premised on the contention that applicant is engaged for hire or reward in the business of transportation of goods by means of motor transport in terms

of the industry definition, which requires applicant to be rewarded for the activity of transportation of goods by means of motor transport in terms of the industry definition in the respondent's certificate of registration.

[12] The commissioner concluded as follows:

In the end, the question that has to be answered in this matter is whether the nature of applicant's activities bring it within the ambit and scope of the industry definition in respondent's certificate of registration. I am satisfied that they do not. Applicant's business in which it is engaged in association with its drivers and other employees is that of hiring out tippers or dump trucks to its customers, generally mining or building contractors operating on mining and construction sites, for the latter's use in moving aggregate or landfill, for which service the applicant charges it customers a daily hire charge or rental over the period of hire. In my view, this is not an activity falling in the registered scope and ambit of respondent's definition.

[13] The commissioner then issued an award to the effect that the third respondent's business undertaking was declared not to be an activity or undertaking falling within the applicant's registered scope, and that the third respondent was accordingly not required to register as an employer or to register its employees with the applicant.

The review test

[14] I turn now to the test to be applied by a reviewing court in applications for review based, as the present case is, on an assertion to the effect that the commissioner committed process-related errors. In other words, the applicant does not attack the outcome of the arbitration proceedings rather than the process itself – the case is pleaded and was argued on the basis of process-related errors that prevented a fair trial of the issues, resulting in material prejudice to the applicant

[15] In *Southern Sun Hotel Interests (Pty) Ltd v CCMA & others* [2009] 11 BLLR 1128 (LC), I had occasion to say the following after a consideration of the judgments in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC), M*inister of Health & another v New Clicks South Africa (Pty) Ltd & others (Treatment Action Campaign & another as* amici curiae) 2006 (2) SA 311 (CC), and *CUSA v Tao Ying Metal Industries* & others (2008) 29 *ILJ* 2461 (CC):

> *[17] In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this court from scrutinising the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and*

a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.

Grounds for review

[16] In essence, the applicant seeks to review the commissioner's award on the basis that he commissioner failed properly to apply his mind to the relevant question, namely, whether the third respondent and its employees are associated for the carrying out of the transportation of goods by means of motor transport for hire or reward. The applicant contends that had the commissioner applied his mind to this question in accordance with the correct legal approach and in the light of the common evidence to the effect that the third respondent's trucks are specialised vehicles designed for the carrying of heavy goods such as aggregate, are used by the third respondent's clients for that particular application and are hired out by the third respondent for that purpose, the commissioner would have concluded that the third respondent's business fell within the applicant's registered scope.

[17] There are three elements to this contention. First, the applicant submits that the commissioner adopted the wrong approach to the demarcation dispute before him. As is evident from what has been set out above, the commissioner adopted the approach set out in the *Greatex Knitwear* judgment. The applicant contends that the commissioner ought to have adopted the approach set out by

this court in the judgment of *Coin Security (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2005) 26 *ILJ* 849 (LC). In that case, the court held as follows:

> *Most of the decided cases relate to the position [prior] to the coming into operation of the [LRA] on 11 November 1996. Under the [LRA], demarcations need to be seen in the context of the system of bargaining councils established thereunder aimed at achieving the primary objects of the Act, including the promotion or orderly collective bargaining at a sectoral level. <u>These statutory imperatives require the demarcating tribunal to enquire, beyond mechanistic comparison of jobs, into the relevant bargaining practices and structures</u>. (emphasis added)*

The *Greatex Knitwear* judgment is pre-1996 authority. Indeed, it was decided as far back as 1960 when the previous Act – the Industrial Conciliation (later renamed the Labour Relations) Act 28 of 1956 – was in force. It called for a restrictive interpretation of the industry definition *"cutting down the scope of the general words used in the definition."* The applicant contends that a restrictive approach to the interpretation of the industry definition in demarcation disputes is no longer permissible or appropriate, and that the proper approach is now that set out in the *Coin Security* judgment. This approach does not unduly restrict the terms of the industry definition. Moreover it goes beyond such terms and takes account of collective bargaining imperatives in interpreting the industry definition itself. To the extent that the commissioner failed to adopt this approach, he committed an error of law and misconceived the true nature of the enquiry before him.

[18] I do not understand the judgment in *Coin Security* to suggest that a commissioner engaged in a demarcation dispute is not required to have regard to all of the relevant facts and circumstances when seeking to identify the nature of the enterprise in which employees and their employer are associated for a common purpose (see *Kohler Brothers v Pio* 1929 EDL 369 and *R v Sidersky* 1928 TPD 109, both decisions referred to in paragraph [54] of the judgment in *Coin Security*). What *Coin Security* does suggest is that a demarcation involves considerations of fact, law and social policy, and that due deference ought to be given to a commissioner making a demarcation award (at paragraph [63] of the judgment). In these circumstances, the first challenge to the commissioner's award must fail.

[19] In any event, it is not apparent to me that the commissioner applied an unduly restrictive approach to the application of the industry definition. In the introductory paragraph to the award, the commissioner refers to the *Greatex Knitwear* judgment and the three-stage test to be adopted in a demarcation. In relation to the first element of the test (i.e. a determination of the meaning of the industry or enterprise for which the respondent is registered, the commissioner observes that "*the Court suggests a restrictive approach be adopted in interpreting the industry definition…"*. But it is far from clear, from the terms of his award, that the commissioner actually applied a restrictive approach when faced with the task of interpreting the industry definition and applying it to the factual

circumstances before him. The commissioner simply found, on an application of the definition to the facts, that the business of hiring out trucks to mining and building contractors for operation on site was not an activity amounting to the transportation of goods by means of motor transport. He was not required to consider whether an expansive or a restrictive definition ought to be applied, nor did he purport to reach his decision by the application of one or the other approach.

[20] There is one respect in which an interpretative issue may be relevant, and that is the issue raised in the second element of the grounds for review. The applicant submits that it is evident from what has been set out above that key to the commissioner's finding that the third respondent's business did not fall within the applicant's industry definition was the finding that "*the transportation activities ensuing from the implementation of the contract are undertaken by the client not by the applicant.*" Indeed, this particular sentence is highlighted in the commissioner's award. The applicant contends that it is clear from the terms of the industry definition that it is not required that the transportation activity be undertaken by the third respondent. What is required is that the third respondent be associated with its employees for the carrying out of the transportation activity for hire or reward. On this basis, it is submitted that the commissioner misconceived the industry definition, asked the wrong question and failed to apply his mind properly to the true issues and relevant information.

[21] There is no merit to this submission. The basis of any scope of registration of a bargaining council is the undertaking in which employers and their employees are associated for a particular purpose. Bargaining councils by definition comprise registered trade unions and registered employers' organisations that respectively represent employees and employers engaged in defined sectors and areas. What the applicant seeks to do is have a demarcation made on the basis not of an association of the third respondent and its employees, but the third respondent's employees (the drivers) and its clients. Since these clients, on the undisputed facts, are drawn from the mining and construction industries, I fail to appreciate on what basis the commissioner's conclusion that this activity does not fall into the industry definition can be called into question.

[22] 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 – s 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. In these circumstances, in my view, the commissioner's approach cannot be faulted and the first two challenges to his award must fail.

[23] The third basis of attack on the commissioner's award is that he ought to have found that the term "hire" in the industry definition exists precisely in order to cover the third respondent's situation, that is, where a hire charge rather than a cartage charge is levied.

[24] The relevant portion of the commissioner's award is reproduced in paragraph [11] above. As I understand the commissioner's reasoning, it is that the word "hire" does not apply to the business activity in which the third respondent is engaged. Rather, it applies to activities involving "*the transport of goods by means of motor transport.*" Since the activity of hiring out plant and vehicles for rental is not contemplated by the industry definition, the third respondent's business activities fell outside of the ambit of the definition. I fail to appreciate on what basis this conclusion can be assailed. To suggest that the

[1] The commissioner's award is marked 'provisional', but it is not apparent from the papers that the necessary consultation with NEDLAC has taken place. I have assumed that this is so.

word “hire” should be read to extend to the nature of the third respondent’s business activities, as the commissioner recognised, begs the question whether those activities can be said to extend to the transportation of goods by means of motor transport. There is accordingly no merit in this submission.

[25] In conclusion, the commissioner was acutely aware of the true nature of the enquiry before him. It cannot be said that he in general terms misconceived the true nature of the enquiry, or more particularly, that he misconceived the industry definition or failed properly to apply it to the facts. There is accordingly no basis on which to interfere with the commissioner’s award.

I accordingly make the following order:

1. The application is dismissed.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of application: 7 September 2010

Date of judgment: 8 September 2010

Appearances:

For the applicant: Adv Heidi Barnes, instructed by Moodie and Robertson.