REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

REASONS FOR THE ORDER

Reportable

CASE NO.: D495/11

CASE NO.: D02/12

In the matter between:

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

and

ALMEIRO DEYZEL N.O. **First Respondent**

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **Second Respondent**

NATIONAL TEXTILE BARGAINING COUNCIL **Third Respondent**

REASONS FOR THE ORDER

Heard: **9 September 2014**

Order: **9 September 2014**

Delivered: **10 December 2014**

Summary: **Review of demarcation award — jurisdiction; whether a demarcation dispute must be preceded by conciliation**

MOOKI AJ

[1] The court dismissed the two reviews with costs on 9 September 2014. These are the reasons for the orders.

[2] This matter concerns review proceedings in case number D495/11 and D02/12. The first review application (case D495/11) is about the dismissal of an exception and a challenge to the jurisdiction of the CCMA. The second application (case D02/ 2012) is a review of a demarcation determination. Cele J made an order on 6 May 2014 consolidating the two reviews.

[3] The third respondent submitted a demarcation dispute in terms of section 62 of the Act. The demarcation concerned whether the applicant was subject to the main agreement governing parties subject to the auspices of the NTBC ("the NTBC").

[4] The applicant is a temporary employment service in terms of section 198 of the LRA. The applicant places its employees for service in different economic sectors. The applicant placed some of its employees for service with Neat Packing CC, which runs a factory in the textile industry.

[5] Neat Packing CC is registered as an employer within the scope of the NTBC. Workers at Neat Packing CC sow the edges of fabric, remove over-threads and pack towels and dish cloths. Some half of the workers at the Neat Packing CC operation are employed directly by Neat Packing CC. The remaining workers

were placed by the applicant. The workers employed directly by Neat Packing CC and those placed by the applicant perform the same functions.

[6] The NTBC obtained a compliance order to oblige that all workers at the factory be paid in accordance with the main agreement. The applicant objected to the compliance order, contending that it was not associated in the textile industry. The NTBC referred a demarcation dispute to the CCMA.

[7] The applicant raised the following points at the beginning of the proceedings before the CCMA:

7.1 The application was vague and embarrassing and the applicant did not know the case it had to meet.

7.2 The CCMA lacked jurisdiction because the hearing was not preceded by a conciliation.

[8] The Commissioner dismissed the complaints on 9 May 2011. He gave a brief oral explanation for his decision and advised the parties that he would address the dismissal of the preliminary points in the award.

[9] The applicant brought an urgent application on 6 July 2011 to stay the arbitration. Steenkamp J dismissed the application. He determined that the application was not urgent. Steenkamp J also took issue with the applicant's claim that it did not know the case that it had to answer in the arbitration.

[10] The applicant then brought an application to review the findings made on 9 May 2011, ("the first review"). The applicant alleged that the Commissioner "committed gross irregularities in the conduct of the proceedings." The applicant set out a long train of complaints in its founding affidavit as the bases for the first review.

[11] Mr Jackson appeared for the applicant when the matter came before the court. He submitted that the applicant was only persisting with the following complaints in the first review:

11.1 The Commissioner failed to give written reasons.

11.2 The arbitration should have been preceded by conciliation.

11.3 The referral was vague, with the result that the applicant did not know the case it had to meet; and

11.4 The Commissioner was biased.

[12] The first review came before Cele J on 6 May 2014. Cele J made an order that this application be consolidated with the review application on the merits. Both applications came before this Court on 9 September 2014.

[13] Mr Jackson made the following submissions concerning the first review. The Commissioner made a brief oral ruling and indicated that he would give reasons for the ruling later during the proceedings. The Commissioner did not give written reasons. It was submitted that the applicant was prejudiced because the Commissioner did not provide a rationale for his ruling and, in addition, that the

applicant could not test the rationality of the decisions including whether they were not decisions that a reasonable decision maker could make.

[14] It was further submitted that the arbitration should have been preceded by conciliation, as set out in section 133(1)(b) of the Act. He submitted that the dispute was "any other dispute" within the meaning of section 133(1)(b) and that conciliation was a necessary pre-requisite step to arbitration. Mr Jackson also submitted that Annexure "B" of the NTBC's main collective agreement provides that disputes regarding the interpretation or application of that agreement should first be referred to conciliation. The arbitration was not competent because neither of the parties requested that the dispute be referred to arbitration in terms of section 133(2)(a) of the Act.

[15] Mr Jackson submitted that the Commissioner was biased in favour of the NTBC because the Commissioner made the case for the NTBC during argument. Mr Jackson submitted that the applicant is entitled to complain about first respondent being biased and to make that complaint for the first time in review proceedings. He submitted that there is no obligation on the applicant to have raised the complaint about bias during the arbitration. I had enquired from Mr Jackson whether it was competent for such a complaint to be made for the first time in review proceedings; without the Commissioner first having been given the opportunity, during the arbitration, of being informed that his impartiality was being attacked.

[16] Mr Euijen appeared on behalf of the NTBC. He submitted that there was never any merit to the preliminary points; that the applicant knew what the dispute was about. Mr Euijen pointed out that Steenkamp J remarked in the applicant's urgent application that the applicant knew what the dispute was about.

[17] Mr Euijen submitted that the jurisdictional point was bad because there is no statutory foundation that a section 62 dispute, unlike other disputes in the Act, had to go through a two-step process of conciliation followed by arbitration. He submitted that a section 62 dispute is not a "referral" but is "an application" for consideration by the CCMA. He also submitted that there is no practice at the CCMA and there was no law that he was aware of that required that a section 62 dispute had to be conciliated.

[18] Mr Euijen further submitted that there would be no point to conciliating a demarcation dispute. This was because a council had jurisdiction or lacked jurisdiction in relation to the particular demarcation dispute. The parties to a demarcation dispute cannot, in a conciliation, agree to vest a council with jurisdiction when a council lacked jurisdiction; or agree that they were not subject to a council when a council had jurisdiction. This, according to Mr Euijen, illustrates why conciliation is not a jurisdictional requirement in a demarcation dispute.

[19] The following pertains to the review application on the merits.

[20] The NTBC sought a demarcation that:

20.1 The whole or part of the businesses of the Workforce Group falls within the textile sector; and

20.2 To the extent that the whole or parts of the business of the Workforce Group fall within the textile sector it is obliged to give effect to the Main Collective Agreement.

[21] The issues for decision were:

21.1 Whether the [applicant] and some of its employees were/are engaged or employed in the textile sector; and

21.2 Whether the main collective agreement of the NTBC was/is binding on the [applicant] and its employees.

[22] The Commissioner made the following determination on 18 October 2011:

(a) The respondent, the Workforce Group (Pty) Ltd, and its employees placed at Neat Packing CC were/are engaged or employed in the textile sector for as long as such placement endured/endures.

(b) That part of the respondent's business that involves the placement of employees with Neat Packing CC to perform work relating to the manufacturing of textiles products falls within the textile sector and within the registered scope of the National Textile Bargaining Council; and

(c) The main collective agreement of the National Textile Bargaining Council was/is binding on the respondent and its employees placed at Neat Packing CC for as long as the placement referred to in paragraphs (a) and (b) endured/endures.

(d) The respondent is ordered to pay the costs of the National Textile Bargaining Council on the highest scale applicable in the magistrate's court which costs are to include the costs of counsel.

[23] The Commissioner made his determination by taking into account that whether an employer is engaged in a particular industry is a question of fact decided in the light of all the surrounding circumstances with regard to any relevant evidence, the law and policy considerations. He referred to the authorities on the method to be used to determine whether the applicant was involved in the textile industry.

[24] The Commissioner took account of following evidence in making the determination:

24.1 Employees placed by the applicant at Neat Packing CC perform functions similar to those performed by employees directly employed by Neat Packing CC.

24.2 The applicant denied that it was at all associated in the textile industry and that the applicant simply placed its employees in textile factories.

24.3 The applicant contended that it was associated with the enterprise of temporary employment services.

[25] That Commissioner did not accept that the applicant and employees whom the applicant placed with particular clients are associated for a common purpose to provide clients with employees. He found that the evidence did not indicate that employees working at different clients were even aware of each other. The

Commissioner further concluded that it was more probable that the common purpose entailed the services rendered to clients with which the applicant placed its employees.

[26] The Commissioner had regard to the fact that the applicant placed employees at different factories. The Commissioner concluded that the placement of employees at a specific factory, such as in the case with employees placed with Neat Packing CC, was a separate enterprise and that the purpose of placing employees at a particular factory or business was different from the purpose of placing employees at other factories or businesses. The association in relation to employees placed at Neat Packing CC "can only be to provide Neat Packing CC with services relating to the manufacturing of textile products." He concluded that the enterprise that the applicant and its employees are associated with at Neat Packing CC was a separate enterprise falling within the registered scope of the NTBC.

[27] Both parties sought a cost order in their favour during the arbitration. The applicant submitted that costs should not follow the result. The Commissioner ruled that the applicant pay costs because the applicant acted frivolously in opposing the relief in all circumstances. The Commissioner pointed out that the first two days of the arbitration were taken by the applicant's in argument relating to jurisdictional points and an application for adjournment that had no or very little merit. The Commissioner also took into account that the applicant opposed the relief notwithstanding the applicant' awareness of the decisions by the CCMA in

Workforce Group Holdings (Pty) Ltd v National Bargaining Council for the Road Freight Industry[1] and The Workforce Group (Pty) Ltd v Metal Engineering Industries Bargaining Council.[2]

[28] The applicant raised various complaints in its review application on the merits but persisted only with two points during argument. First, that the Commissioner should have found that the applicant does not fall within the textile sector. Second, that the Commissioner should not have made a cost order against the applicant.

[29] Mr Jackson submitted that the finding that the applicant and its employees fall within the registered scope of the NTBC was unreasonable in part because the Commissioner found that the applicant's operations fell within the temporary employment services industry. Mr Jackson submitted that the finding that the applicant's enterprise fell within the registered scope of the NTBC was irrational and that the Commissioner ought to have found that the applicant and its employees were in common purpose in the temporary employment services industry, and not the textile industry.

[30] Mr Euijen made the following submissions in relation to the review on the merits. The applicant is a general labour broker. It does not have a common purpose with its employees regarding labour broking services. The common purpose is assessed with reference to the particular sector where the applicant places its employees for service. He submitted that the Commissioner's conclusion was

[1] (2006) 27 ILJ 2747 (CCMA)
[2] (2008) 29 ILJ 2636 (CCMA)

reasonable and is supported both by decisions of this court in South African Municipal Workers Union v Syntell (Pty) Ltd and Others[3], together with the two rulings of the CCMA referred to by the Commissioner in the award.

[31] Mr Jackson had submitted, in relation to the two CCMA rulings, that such rulings were not on point because the main collective agreements in those cases made express reference to labour brokers in the definition of "employer". Mr Euijen pointed out to the court that the two CCMA rulings were not made with reference to the collective agreements including labour brokers in the definition of "employer". The decisions were made with reference to the sector where the labour broker placed its employees for service.

[32] Mr Euijen submitted that the cost order by the Commissioner was reasonable. He submitted that the applicant intended to delay the outcome of the demarcation dispute, knowing that the outcome was inevitable and against the applicant. He also pointed out to the court that it had been more than four years since the applicant was served with a compliance order and that the applicant did everything to delay compliance. The applicant saw to it that the dispute was not finalised with any particular expedition. Mr Euijen also submitted that the applicant brought a review application without waiting for the conclusion of the arbitration, when the Commissioner had indicated that he would give reasons in the award.

[3] (C917/2010) (2013) 34 ILJ 1263 (LC) (12 October 2012)

[33] Mr Euijen also submitted that the arbitration could have been determined within a day but for the manner in which the applicant conducted itself. The applicant wasted time by claiming that it did not understand the case it had to answer; despite the caution by Steenkamp J. He further submitted that the hearing could have been expedited by deciding the dispute as a stated case but that the applicant declined. That would have curtailed the hearing. Instead, the hearing became prolonged.

[34] Mr Euijen further submitted that the applicant's opposition was frivolous. There was never doubt that the determination would go against the applicant, more so because the applicant raised the same arguments in previous proceedings and lost.

[35] Mr Jackson, in reply, submitted that the review on the preliminary points was not frivolous and that the review could have disposed of the matter if one of the points were successful, which would have avoided the whole litigation. He submitted, in relation to the distinction between "referral" and "application" was illusory and that section 133 (1)(b) applies to a demarcation dispute. He submitted, in relation to the rulings by the CCMA, that such rulings do not bind the court and that they are persuasive at best. He submitted, in relation to costs, that the first respondent did not find that the applicant employed delaying tactics.

[36] The Commissioner gave a well-reasoned award. He had regard to the applicable law and applied that law correctly. He took into account, for example, that the determination had to have regard to the particular facts and policy

considerations. I do not consider it necessary to repeat the law pertaining to the requirements for whether or not an enterprise falls within a particular industry. In addition, I do not consider it necessary to repeat the law regarding the requirements to establish the existence or otherwise of a common purpose for purposes of a demarcation determination. All these requirements are set out in the authorities referred to by the Commissioner.

[37] This application is unique only in relation to the fact that it concerns the demarcation dispute pertaining to a temporary employment service.

[38] Previous decisions concerning a temporary employment service were rulings by the CCMA, which are not binding on this court. I adopt the following statement as a correct statement of the law regarding demarcation disputes involving a temporary employment service:

> The submissions on behalf of the company in respect of reliance on the Workforce Group award emphasise the fact that a TES has a unique tripartite relationship with its clients (with whom it places employees), and its employees. In terms of such relationship, employees of the TES are made available to the client and the client uses these employees (usually directly supervising and managing them in the process) as part of its organisation to pursue its own purposes. The TES employees who are placed by it with a client are not involved or associated in a common purpose with the TES in the conduct of its own business activities. They also do not perform work for, or in association with the TES in the conduct of its own business activities.[4]

[4] South African Municipal Workers Union v Syntell (Pty) Ltd and Others, para 20

[39] The applicant proved rash in bringing a review application prior to the conclusion of the arbitration. This court has previously and on a number of occasions, stated that it looks askance at such applications.[5] That is why the court must first be satisfied that there are exceptional circumstances that merit the court entertaining a matter in *media res*.

[40] The Commissioner advised the parties that he would give reasons in the award. The applicant launched an ill-fated review application, complaining about the absence of written reasons in circumstances where the Commissioner advised the parties that he would give reasons in his award. There was nothing untoward with the stance adopted by the Commissioner.

[41] Steenkamp J made it known to the applicant, prior to the applicant instituting its review application on the preliminary points, that there could be no support for the applicant's complaint that the applicant did not know the case it had to meet in the demarcation case before the CCMA. Steenkamp J remarked that: [6]

"… 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 LR 3.23. On this ground also, the applicant's prospects of success are slim and it has not made out a prima facie right."

[5] Trustees for the time being of the National Bioinformatics Network Trust v Jacobson and Others (2009) 30 ILJ 2513 (LC) at paras 3 and 4.

[6] Workforce Group (Pty) Ltd v National Textile Bargaining Council and Another (J1186/11) [2011] 11 BLLR 1136 (LC), para 24

[42] The applicant ignored Steenkamp J's caution and persisted with a doomed review application.

[43] The same considerations apply to the applicant's jurisdiction point. Mr Jackson could not point to any law or practice at the CCMA that demarcation disputes must first be conciliated. Mr Euijen's analysis is entirely correct. Issues pertaining to jurisdiction cannot be conciliated. Parties to a dispute cannot confer jurisdiction on a forum where the law provides that there is no jurisdiction. Similarly, parties to a dispute cannot agree that a forum lacks jurisdiction when the law provides that such a forum has jurisdiction.

[44] The CCMA has authority to determine a demarcation dispute. This is done on application to the CCMA. The expression "any other dispute" in Section 133(1)(b) could not possibly be interpreted to mean that a demarcation dispute is competent only on a prior conciliation. Such an interpretation will allow parties to a dispute to determine the jurisdiction of the CCMA. The jurisdiction of the CCMA is a matter of law. It is not based on the views of the parties.

[45] The Commissioner's finding on costs is reasonable. The Commissioner justified why the applicant should pay costs. The applicant has not made a case why this part of the award should be disturbed.

[46] The applicant did not, in its founding affidavit in the first review, allege that the Commissioner was biased. The submissions on bias are not founded on the

papers. The applicant may not raise the issue of bias for the first time during argument.

[47] A considerable amount of time during argument on the first review was spent on a document by the Commissioner described as "further reasons". The document was not served on the parties. None of the parties knew how the document made its way into the court file. The “further reasons” are not properly before the court. The court did not have regard to those reasons in determining the first review application.

_____

O Mooki

Judge of the Labour Court (Acting)

Appearances:

For the Applicant:	B Jackson
Instructed by:	Hunts Attorneys (incorporating Borkums)
For the Respondent:	M Euijen
Instructed by:	Cheadle Thompson & Haysom Inc