REPUBLIC OF SOUTH AFRICA

Reportable

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JA70/10

In the matter between:

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY — **Appellant**

and

COMMISSIONER M H MARCUS N.O. — **First Respondent**

COMMISSIONER FOR CONCILIATION, MEDIATION AND ARBITRATION — **Second respondent**

RICHARDS RENTALS (PTY) LIMITED — **Third Respondent**

CORAM: WAGLAY, DJP, ZONDI, AJA *et* MOLEMELA, AJA

Delivered: 12 December 2012

JUDGMENT

MOLEMELA, AJA

Introduction

[1] This is an appeal against the judgment of the Labour Court[1] dismissing an application to review and set aside a demarcation award issued by the first respondent, a commissioner, which found that the business of the third respondent did not fall within the appellant's registered scope.

Background

[2] The appellant is a bargaining council, established in terms of section 27 of the Labour Relations Act 66 of 1995 ('LRA') and registered in terms of section 29 of the LRA for the road freight industry. The appellant's industry as defined in its Certificate of Registration is "the transportation of goods for hire or reward by means of motor transport in the Republic of South Africa". The third respondent is in the business of hiring out tipper-trucks and drivers to its clients in the mining and construction industries. These tipper-trucks are used to convey landfill and aggregate rubble generally within the relevant site areas but occasionally to and from landfill or dumping points outside such sites. The third respondent charges a rental fee for both the truck and the driver. It does not charge per load (of the landfill and aggregate) or per distance travelled. At the arbitration proceedings conducted under the auspices of the second respondent, the third respondent contended that the nature of its activities placed it more appropriately within the mining or construction industry and not under the appellant's council and thus sought an award declaring that it was not

[1] The Labour Court case is reported as *National Bargaining Council for the Road Freight Industry v Marcus NO and Others* (2011) 32 ILJ 678 (LC).

subject to the appellant's jurisdiction as it did not fall within the appellant's industry definition.

[3] Pursuant to arbitration proceedings, the first respondent rendered an award under section 62 of the LRA in terms of which he found that the third respondent did not fall within the appellant's industry definition. The appellant took the first respondent's award on review to the court *a quo*. Those proceedings were not opposed by any of the respondents. The Court *a quo* ruled against the appellant. The appellant lodged an appeal attacking the court *a quo*'s judgment on various grounds. Only the third respondent is opposing the appeal. The main issue on appeal is whether the third respondent falls within the appellant's registered scope.

[4] During the hearing of the appeal this Court enquired from counsel as to whether the award under consideration had been a subject of consultation with National Economic Development and Labour Council ("NEDLAC") as contemplated in section 62(9) of the LRA and whether it was appropriate to entertain an appeal emanating from a review of an arbitration award that was only provisional. This question was prompted by the fact that the first respondent termed the award a 'Provisional Demarcation Award' (issued subject to consultation with NEDLAC). It turned out that there was uncertainty as to whether such consultation had taken place. The court accordingly issued a directive requiring both parties to investigate whether such consultation had taken place and thereafter to submit a report on the matter to the court.

[5] From the documentation filed by both parties the following appears to be common-cause:

5.1 That pursuant to the award being issued by the first respondent, the Commission for Conciliation Mediation and Arbitration (CCMA) (second respondent) forwarded the award to the parties under a covering letter stating as follows: 'Please find attached herewith

Provisional Award together with proof of consultation with NEDLAC in terms of section 62(9) of the LRA 66, 1995 for your attention.'

5.2 It appeared that notwithstanding the CCMA's aforementioned letter, consultation with NEDLAC had not yet taken place even though NEDLAC had received the provisional award in October 2008.

5.3 In response to the parties' enquiries, NEDLAC, in a letter dated 20th December 2011 indicated that it was in support of the first respondent's award. The CCMA, in a letter dated 2nd March 2012, indicated that the provisional award had become final without any changes.

5.4 The status of the award and consultation with NEDLAC had never been raised as an issue by any of the parties.

[6] The appellant contends that now that the provisions of section 62(9) of the LRA have been complied with, this Court is at liberty to deal with the merits of the appeal. The third respondent, on the other hand contends that the investigations have revealed that, prior to the proceedings at the court *a quo* and the prosecution of the appeal, there had been no compliance with the provisions of section 62(9) of the LRA, with the result that both the application for review and the prosecution of the appeal were premature, thus warranting the dismissal of the appeal. Given the circumstances of this case, especially given the misleading content of the letter sent by the second respondent to the appellant and the third respondent advising them that consultation with NEDLAC had already taken place, it would serve the interests of justice to consider the merits of the appeal as opposed to dismissing it on a technicality. This inclination is made more appealing by the fact that both NEDLAC and the CCMA now consider the award under consideration to be a final award.

[7] I now turn to deal with the merits of the appeal. The grounds of appeal as gleaned from the Notice of appeal are as follows:- that the court *a quo*

erred in dismissing the review application relying on the concept of deference to the decision of the decision-maker as espoused in the case of *Coin Security (Pty) Ltd v CCMA & Others* (2005) 26 ILJ 849 (LC) ("the *Coin Security* judgment"), instead of finding that there was no place for deference given the substantial misconceptions and material errors of law committed by the first respondent; that the court *a quo* erred in misconstruing the appellant's reliance on the *Coin Security* judgment and ought to have found that the aforesaid judgment made it clear that there was no basis for a restrictive interpretation of the industry definition as account should be taken of collective bargaining imperatives in interpreting the industry definition itself; that the court *a quo* ought to have found that the first respondent committed a material error of law by following a restrictive approach and instead found that the first respondent had not applied a restrictive approach; that the court *a quo* erred in dismissing the second ground of review on the basis that 'the applicant seeks to 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' instead of finding that the transportation activity was undertaken by the third respondent itself; that the court *a quo* adopted an erroneous approach to a demarcation dispute and misconceived aspects of the industry definition by failing to find that the only reason the third respondent earned money was because its clients made use of the third respondent's tipper trucks and its drivers for the purpose for which they were designed and employed respectively, viz transportation of heavy loads.

[8] As stated before, the appellant's registered scope is "the transportation of goods for hire or reward by means of motor transport in the Republic of South Africa". Its Certificate of Registration defines "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, dispatching 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.'

The appellant maintains that the third respondent falls within paragraph (i) above of the industry definition.

[9] The following important facts were common cause at the arbitration:

(i) That the third respondent's trucks are used to convey landfill and rubble, known as "aggregate", both within mining and construction sites and to and from dumping points outside such sites on the instructions of its clients.

(ii) That the third respondent's trucks are specialised vehicles designed for the carrying of heavy goods such as landfill and aggregate.

(iii) The third respondent is in the service industry. The hiring out of trucks and drivers for the purpose of conveying landfill and aggregate is the service provided by the third respondent to its clients. The third respondent has 23 tipper trucks and 23 driver operators. The trucks are hired out to the third respondent's clients

with a qualified driver at a flat rate for an agreed period, with the cost of the driver being included in the flat rate charged.

(iv) If the third respondent did not fall under the appellant's jurisdiction, it would not fall under any bargaining council or be subject to any collective agreements.

The arbitration award

[10] The first respondent stated in his award that he would adopt the approach to demarcation as adopted by the court in the case of *Greatex Knitwear (Pty) Ltd v Viljoen and Others, NNO* 1960 (3) SA 338 (T) ("*Greatex Knitwear* judgment ") at 344H – 345D. Following the industry definition, the first respondent recorded that for the third respondent to fall within the definition and the scope of the appellant, 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. The following extract of the first respondent's award is significant:

> 'Accepting for purposes of this demarcation that the aggregate and landfill material conveyed by the [appellant's] tippers both on and off site can constitute "goods" capable of being transported within the meaning of the [appellant's] industry definition, can [third respondent] be said to be engaged in association with its drivers in the business of transporting aggregate for hire or reward? Frankly I do not see how it can. The uncontroverted evidence before me discloses that [third respondent] incurs no obligation under its contract with its clients to transport aggregate and the like. It is the clients who engage in the activity of transporting the material, making use of the truck and driver hired from the [third respondent] to do so. That the client makes use of the [third respondent's] driver for this purpose does not affect this conclusion. That arrangement derives from the requirement that these tippers must be driven by specially trained drivers with special permits and

certification….Goldman's uncontroverted testimony is that if the contract obliged the [third respondent] to transport material for the client, [third respondent] would levy the client with transportation charges which would have to be calculated per ton or cubic metre of the material being transported and with reference to the distance travelled. The sample invoices to clients tabled in [the third respondent's] bundle contain no such charges for transportation of material; they reflect only a hiring charge whereby the trucks are hired out at a minimum daily rate. The standard terms and conditions of hire of the Contractors Plant Hire Association tabled in the bundle which are unrelated to haulage or transportation contracts are incorporated in the clients' contracts….There is a considerable distinction between an activity involving the hiring out of vehicles to clients at a daily rate or hire charge (as in the ordinary car hire business) and one requiring the ferrying or cartage of specified goods or passengers to a destination. It is the latter form of activity, described as one of road freight, cartage or motor transport (goods), that is contemplated in the definition of the [appellant's] industry and scope. The former activity, described by the [third respondent] as one of plant or vehicle hire, does not entail the hirer undertaking obligations involving it in freight or transportation activities. It merely requires that the vehicle be made available to the client for the latter's use at its discretion…The transportation activities ensuing from the implementation of the contract are undertaken by the client, not by the [third respondent]. I agree with Mr Goldman that the fact that these are undertaken by the client making use of the services of a driver supplied by the [third respondent] does not alter the nature of the activity from one of hiring to one of transportation… The term "hire" as used here does not refer to the hiring activities undertaken by the [third respondent] 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 the [appellant's] case that it was. [Appellant's] case was always premised on the contention that [third respondent] 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 the [third respondent] 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.'

[11] It is clear from the above-mentioned extract that the issue pertaining to whether the appellant fell within the appellant's registered scope turned on the question whether the third respondent and its employees could be said to be associated for hire or reward in the transportation of goods. The first respondent answered this question in the negative. The reasoning adopted by the first respondent was that the third respondent did not oblige its clients to use its vehicles for any specific purpose. He thus likened the third respondent's business to the "ordinary car hire business" where the car is made available to the client for the latter's use at its discretion, without the obligation to use it for any particular purpose. The first respondent rejected the appellant's contention that the words "for hire or reward" in the industry definition bring the third respondent within the appellant's registered scope. According to the first respondent the term "hire" did not refer to the hiring activities undertaken by the third respondent, but to activities involving "the transportation of goods by means of motor transport" and thus the activity of hiring out plant or vehicles for rental, was not one contemplated in the road freight industry definition. The first respondent concluded that the third respondent's business did not fall within the appellant's registered scope.

Proceedings in the labour court

[12] The appellant sought to review the first respondent's award on three grounds, *viz*:

(i) That the first respondent's approach constituted an error of law as it was unjustifiably restrictive and also failed to take account of collective bargaining imperatives that were laid down in the case of *Coin Security (Pty) Ltd v CCMA and Others* (2005) 26 ILJ 849 (LC).

(ii) That the first respondent misconceived the industry definition and unduly narrowed it by finding that the transportation activities were undertaken by the third respondent's clients and not by the third respondent itself.

(iii) That the first respondent misconceived and unduly narrowed the meaning of the phrase "for hire or reward" in the industry definition, effectively rendering the term "for hire" redundant.

[13] The Court *a quo* held that it was not apparent that the first respondent had applied an unduly restrictive approach to the application of the industry definition. The Court *a quo* went on to state that it did not understand the judgment of *Coin Security (Pty) Ltd v CCMA and Others* (2005) 26 ILJ 849 (LC) ("*Coin Security* judgment") 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. The Court *a quo* pointed out that the *Coin Security* judgment laid down 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.

[14] With regards to whether the transportation activity was required to be undertaken by the third respondent itself, as concluded by the first respondent, the Court *a quo* agreed with the first respondent's interpretation of the term "for hire", i.e. that the industry definition is intended to qualify "the transportation of goods by means of motor transport" and not to qualify the business activity in which the third respondent is engaged.

<u>The appeal</u>

[15] The grounds of appeal were alluded to earlier in this judgment. With regards to the arguments advanced on behalf of the parties, it needs to be

pointed out, from the outset, that the appellant's submission (made in paragraphs 3 and 36 of its written heads of argument) is misleading as it incorrectly states that the court *a quo* 'correctly recognised [that] the appellant's case was pleaded and argued on the basis of process-related errors.' The correct reading of the judgment reveals that in the paragraphs relied upon by the appellant, viz paragraph 14 of the court *a quo*'s judgment, the court *a quo* was merely repeating the argument that the appellant presented to it during the review proceedings. The same applies to paragraphs 16 and 17 of the judgment. The court *a quo's* own views on that specific aspect are expressed from paragraph 18 of the judgment onwards. These views, which will be canvassed later in this judgment, clearly run parallel to the appellant's assertion.

[16] It was argued on behalf of the appellant that the first respondent adopted the "wrong legal approach in applying a restrictive interpretation of the industry definition" as suggested in the *Greatex Knitwear* judgment and that the Court *a quo* should have followed the principle laid down in the *Coin Security* judgment which made it clear that in a demarcation dispute there was no basis for a restrictive approach to the interpretation of the applicable industry definition as account must be taken of collective bargaining imperatives.

[17] The appellant further contended that although deference to the decision of a commissioner may legitimately be invoked, it may so be invoked only if a number of reasonable outcomes are possible and cannot be invoked where process-related errors, such as a material error of law have occurred. Consequently, so it was argued, the Court *a quo* erred in deferring to the first respondent's award which was a product of a material error of law. According to the appellant, the court *a quo* did not squarely decide the issue pertaining to the entity that was carrying out the transportation activity.

[18] It was argued on behalf of the third respondent that the first respondent had correctly found that the transportation activities ensuing from the implementation of the contract between the third respondent and its clients were undertaken by the client and not by the third respondent, as this reasoning was based on the fact that the third respondent hired out trucks and the services of a specialist driver at a flat rate, with the result that the usage of the trucks lay solely on the decision of the client, such that the client would still be liable for the daily rate even if it had not been put to use by the client.

Analysis and evaluation

[19] In the *Greatex Knitwear* judgment the court stated that the method used to determine whether a class of employers is engaged in a particular industry entailed the following exercise:

> '(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. Although not specifically invoked, the mode of interpretation appears to be that applied in *Venter v R* 1907 TS 915 (cf *Rex Scapszac and Others* 1929 TPD 980; *Rex v Ngcobo* 1936 NPD 408; *Rex v Goss* 1957 (2) SA 107 (T) at 110).
>
> (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. If none of the activities fall under the definition, *caedit quaestio*; if some of the activities fall under the definition, a further question arises: are they separate from or ancillary to his other activities? If they are separate he is engaged in the industry (unless these activities are merely casual or insignificant - *Rex v CTC Bazaars (SA) Ltd* 1943 CPD); if they are ancillary to his other activities, he is not engaged in the industry (unless these ancillary activities are of such a magnitude that it

can fairly be said that he is engaged in the industry within the meaning of the definition (*A.G. Tvl V Moores SA (Pty) Ltd* 1957 (1) SA 190 (A)).

(d) Inherent in this approach is the possibility that an employer may be such in more than one industry (*Rex v Giesken & Giesken* 1947 (4) SA 561 (A) at p 566), despite the difficulties that may arise from such a situation (cf *Rex v Auto-Parts (Pty) Ltd and Ano*ther 1948 (3) SA 641 (T) at 648).' [2]

[20] Having considered the first respondent's award as well as the court *a quo*'s judgment, I have to agree with the court *a quo*'s finding that it could not be concluded that the first respondent had failed to apply his mind to the matter just because he stated in his award that the approach he would adopt was that contained in the *Greatex Knitwear* judgment. I agree with the court ***a quo'***s conclusion that even though the first respondent made reference to the approach referred to in the *Greatex Knitwear* judgment, it can hardly be said that he purported to reach his decision by the application of one or other approach or that his approach amounted to a wrong application of the law that prevented a fair trial of the issues. The court *a quo* correctly pointed out that the first respondent had not been 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. The Court *a quo* thus correctly ruled that the outcome of the arbitration proceedings was a mere application of facts to the definition and there was no application of a restrictive interpretation. Given the view that this Court takes on this matter, the appellant's argument that the first respondent committed process-related errors on the basis of adopting a wrong approach or applied a wrong test has no merit.

[21] In the case of *Coin Security,* the Labour Court had occasion to deal with a review of a demarcation award. The applicant company had applied for the review and setting aside of a demarcation award issued by a CCMA

[2] At 344H-345D.

commissioner in terms of which it was found that the company's assets in the transit division was engaged in the Road Freight Industry and fell within the jurisdiction of the National Bargaining Council for the Road Freight Industry. The court found that the demarcation process 'is one entrusted to a specialist tribunal in terms of the provisions of the LRA 1995.' The court found that the commissioner's award had been properly based on the evidence before her, reflected an application of the mind to all the relevant facts and considerations including those dealt with in argument by the company and was clearly rational and justifiable, and indeed correct. Significantly, the court also comprehended more than one method of analysis or approach and held that it could not be said that the approach and result arrived at by the commissioner was incapable of justification. The court accordingly dismissed the application with costs.

[22] I am satisfied that the approach adopted by the first respondent passes muster against the principles enunciated in the *Coin Security* judgment. This is particularly so when consideration is paid to the following remarks made by the court in paragraph 63 of the *Coin Security* judgment. It is apt to refer to the court's remarks, which appear at paragraphs 59, 63 and 64 respectively:

> 'Under the Act (LRA), demarcations need to be seen in the context of the system of bargaining councils established there-under aimed at achieving the primary objects of the Act, including the promotion of orderly collective bargaining at a sectoral level. These statutory imperatives require the demarcating tribunal to enquire, beyond mechanistic comparison of jobs, into the relevant bargaining practices and structures... The demarcation process is one entrusted to a specialist tribunal in terms of the provisions of the Act. **The demarcation decision is one involving facts, law and policy considerations. In demarcation decisions, there will, more often than not, be no one absolutely correct judgment. Particularly in decisions of this sort, and given the provisions of the Act, there must of necessity be a wide range of approaches and outcomes that would be in accordance with the behests of the Act. Due deference**

> **should therefore be given to the role and functions and resultant decisions of the CCMA in achieving the objects of the Act.** This approach will not only be consistent with these principles, but also consistent with the need for the Act to be administered effectively. The case for judicial deference becomes all the more compelling in this matter given that NEDLAC agreed to support the provisional award.' (my emphasis).

[23] Significantly, NEDLAC was established in terms of the National Economic, Development and Labour Council Act 35 of 1994. Section 5 thereof defines its objects and purposes as including striving 'to promote the goals of economic growth, participation in economic decision- making and social equity', and 'to continually evaluate the effectiveness of legislation and policy affecting social and economic policy'. NEDLAC is thus fully conversant with collective bargaining imperatives. It is thus noteworthy that NEDLAC has supported the first respondent's provisional award.

[24] As stated in paragraph 11 above, the first respondent correctly found that the word "hire" applies to activities involving "the transporting of goods by means of motor transport" and not to the business activity in which the third respondent is engaged. 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 focussing on the association between the employees and the clients of the third respondent instead of correctly looking at the third respondent and its employees and thus whether its employees were associated with the transportation of goods. The court *a quo* correctly found that 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 the ambit of that definition.

[25] It is clear from the award that the first respondent was alive to the true nature of the enquiry before him. He embarked on a detailed analysis of

all evidence before him, including the evidence relating to the nature of the third respondent's business. The reasons the first respondent has advanced for his conclusion, captured in the extract in paragraph 10 and 22 of this judgment, are sound as they are firmly supported by the evidence. He found, on an application of 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 transport. It therefore cannot be said that he misconceived the relevant industry definition or failed to apply it to the facts of the case.

[26] As regards the appellant's submission (made in paragraph 42 of the appellant's written heads of argument) which suggests that the first respondent took the view that he was entitled to have regard to the LRA's objective of orderly collective bargaining **only** if faced with a possibility of alternative demarcations or when the industry definition was ambiguous, it is clear that this submission amounts to a distortion of the second respondent's reasoning and thus warrants no further consideration. This distortion is evident from the following extract of the first respondent's award:

> 'Whilst I accept that an arbitrator faced with the possibility of alternative demarcations might properly opt for a demarcation which would achieve the Act's objective of orderly collective bargaining in preference to one that does not, this does not empower an arbitrator to demarcate the employer's activities under the jurisdiction of a bargaining council under which it does not resort in accordance with the arbitrator's interpretation and assessment of that Council's definition and scope and the nature of the employer's business. Such an award would undoubtedly be *ultra vires* and outside the arbitrator's powers and as such unlawful.'

[27] For all the reasons mentioned above, I find that the Court *a quo* correctly found that the first respondent had not committed any of the acts warranting the review of the arbitration award and thus correctly dismissed all the grounds of review. There is no basis for interference with the first

respondent's award. Under the circumstances, the appropriate order would be one dismissing the appeal with costs.

Order

[28] The appeal is dismissed with costs.

M B Molemela AJA

Waglay DJP and Zondi AJA concurred with this judgment.

APPEARANCES:

FOR THE APPELLANT:	Advocate P Kennedy SC
INSTRUCTED BY:	Moodie and Robertson Attorneys
FOR THE THIRD RESPONDENT:	Mr C Levin
INSTRUCTED BY:	Clifford Levin Attorneys