REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, CAPETOWN

JUDGMENT

Reportable

Case no: CA 3/2013

In the appeal of:

SOUTH AFRICAN MUNICIPAL WORKERS UNION **Appellant**

and

SYNTELL (PTY) LTD **First Respondent**

COMMISSION FOR CONCILATION

MEDIATION AND ARBITRATION **Second Respondent**

D.I.K. WILSON N.O. **Third Respondent**

Heard: **12 March 2014**

Delivered: **27 May 2014**

Summary: Demarcation disputes- NEDLAC empowered by the LRA to be consulted in demarcation disputes- s 62(9) of the LRA requires a commissioner to consult with NEDLAC before making an award- commissioner sending draft award to NEDLAC- Commissioner revising final award in light with NEDLAC comments- no obligation on the commissioner to have parties to comment on NEDLAC views- Commissioner not abdicating his function by accepting NEDLAC comments. Commissioner finding that first respondent not falling within the jurisdiction of the SALGBC. Commissioner

applying his mind to the evidence before him. Award reasonable- Labour Court judgment upheld-. Appeal dismissed with costs.

Coram: Davis JA, Molemela and Sutherland AJJA

JUDGMENT

SUTHERLAND AJA

Introduction

[1] This case originated in a dispute about whether or not the activities of the first respondent (Syntell) render it subject to the jurisdiction of the South African Local Government Bargaining Council (SALGBC) on account of it being allegedly associated with its employees in a Local Government Undertaking (LGU). The appellant (SAMWU) caused a hearing to be held in terms of section 62 of the Labour Relations Act 66 of 1995 (LRA), which section regulates demarcation disputes, in order to determine the controversy. The proceedings were conducted before the third respondent (The Commissioner).

[2] The Commissioner consulted the National Economic Development and Labour Council (NEDLAC), as he was obliged to do, sending to it a draft award declaring Syntell to fall within a LGU, but after the consultation, he changed the award to declare that Syntell was not engaged in a LGU. That decision was taken on review. The review application was dismissed. This appeal is against that decision.

[3] Ultimately the critical question is whether the Commissioner rendered an award that was reasonable in relation to the evidence before him. The review was conducted pursuant to the powers of the Labour Court in terms of Section 158 of the LRA. (*Coin Security v CCMA* (2005) 26 ILJ 849 (LC) at [40])

[4] The following issues anterior to that question were posed both before the court *a quo* and this Court:

4.1. Did the Commissioner commit a process-related error by failing to give the parties the benefit of a hearing on the views expressed by NEDLAC to the Commissioner, which views were solicited after the conclusion of the proceedings, pursuant to the obligation on the Commissioner to consult with NEDLAC as contemplated in section 62(9) of the LRA?

4.2. Did the Commissioner commit a process-related error by changing his initial view and adopting a contrary view to conform with the view as expressed by NEDLAC, thereby delegating his function to NEDLAC?

4.3. Did the Commissioner, in deciding that Syntell was not engaged with its employees in the Local Government Undertaking, fail to properly apply his mind to all the relevant evidence and to the relevant law?

The answer to these questions depends on an examination of the facts of this dispute.

A narrative of the relevant facts

[5] SAMWU has a long history of organising workers in municipalities. It is a party represented, along with other unions, on the SALGBC. It recruited members who are employees of Syntell; about 40 out of 340 countrywide.

[6] An oral hearing was convened. No evidence was adduced. Instead, a trade union official presented a set of documents upon which he offered comment. The thrust of SAMWU's case was that, from these documents, it could be inferred that Syntell operated in the LGU sector because of its operations in relation to traffic management matters. Syntell was represented by a Human Resources manager. She too tendered no evidence under oath, but in her presentation gave information orally and alleged facts about what Syntell did and about its relationship with municipalities.

[7] The Commissioner dealt with the matter on the basis of this information as put before him. He alluded to the data as 'evidence' and although not so, treated the representations as if they were evidence. Owing to the manner in which the Commissioner chose to inform himself, ie on untested statements, it must

follow that the only safe data to rely on were the common cause facts, and the statements by Syntell which were unrebutted by SAMWU. This is an approach that echoes the approach in application proceedings as exemplified in *Plascon –Evans Paints Ltd v Van Riebeeck Paints (Pty (Ltd)*1984 (3) SA 620 (AD) at 634 E-F.

[8] The record shows that SAMWU's case about Syntell being engaged in the LGU sector was premised on lifting passages from Syntell's web site prospectus, from the tender documents put out by some municipalities and from some employment contracts of workers whose terms of employment were linked to the duration of the contract between Cape Town and Syntell. In these documents, several functions of Syntell were mentioned, which it was argued were 'traditionally' performed by a municipality. In this regard, attention was drawn to allusions in the prospectus to Syntell having a road safety unit, a revenue collection unit and a traffic management unit; to an investment of R100 million in public/private partnerships; and to a statement offering a complete outsourcing model for vending systems. From the tender documents, references to the installation and maintenance of cameras, the installation of robots, the collection of data to institute violation proceedings and the service of summons were highlighted. From the employment contracts a reference to the possibility of a Syntell employee working in the municipality's office was noted. In addition, SAMWU alleged, without substantiation, that Syntell's employees did work from municipal premises, but this allegation was denied.

[9] Syntell's case was that the inferences sought to drawn were factually incorrect. It was said that the prospectus was in some respects outdated and included allusions to work not carried on at the present time and to work which could be undertaken but was not necessarily being carried on at the present time .This was from an unsafe source from which to contend what, in reality, was actually happening. The tender documents presented were the municipalities' specifications of a total programme of services which it wanted and goods that it wanted. Because it did not necessarily follow that a tenderer, like Syntell, who was awarded a contract, was in fact contracted to supply all

the goods or to perform all the services mentioned therein**,** the tender documents were an unsafe indicator of what Syntell really did in terms of its contracts with the various municipalities. As to the sample employment contracts, Syntell's representative said that the allusion to the potential siting of employees at the municipalities' offices did not mean any were so situated, and indeed none were situated at a municipality.

[10] Syntell's representative further submitted that Syntell's actions were the following:

10.1. It supplied software, called Opus and Cypress, which captured data used in the preparation of summonses to be issued, but was not involved at all in the issue or service of summonses to anyone.

10.2. It supplied and installed cameras for speed control, but was not at all involved in the collection of films from the units, which was done by municipal officials.

10.3. It installed a very small number of robots and, mostly, what it did in relation to robots was to supply the software to regulate the colour changes.

10.4. It supplied software, designed in-house, to be used in the collection of traffic fines on the Payfine web platform and to be used in the collection of energy charges on an energyonline web platform, but was not involved in the actual administration of the money collections.

10.5. It provided 'back office' support on its software; by this is to be understood the technical support to preserve operationality of the systems.

10.6. About 5% of its 340 staff were on short term contracts tied to the three year contracts it had with municipalities. No personnel were sited at municipal offices. 90% of the staff were engineers of one kind or another.

10.7. All contacts were obtained in competitive bids in response to tenders. No joint venture type of agreement existed and no outsourcing type function was performed.

10.8. On the premise of these facts, Syntell contended that SAMWU was mistaken that its operations could fall with the LGU sector and that rather, it was a technology goods and service supplier.

[11] Moreover, it was stated that Syntell did work for private business too, mainly in back up support of computer systems to smaller businesses without in-house Information Technology staff. The proportion of business undertaken for municipalities and for other entities was not known by the Syntell representative.

[12] The parties offered rudimentary arguments which included a reference to the definition of LGU in the constitution of the SALGBC, and some other demarcation awards of other commissioners; the utility of which is addressed elsewhere in this judgment.

[13] After the hearing, the Commissioner prepared a draft or provisional award. According to his affidavit, when he sent it to NEDLAC, as he was obliged to consult it, his state of mind was that he '….was uncertain whether or not my initial finding was correct'. What he had provisionally concluded was that Syntell was operating in the LGU sector. He offered a rationale. In essence, he reasoned:

13.1. He had no doubt that Syntell was '*involved'* in the traffic management activities undertaken by various municipalities. (Emphasis supplied) He quoted from the prospectus which claimed that Syntell 'delivers technology based services and systems for the effective administration of world class municipalities. Our areas of expertise cover road safety, revenue collection and traffic management' in support of the finding.

13.2. He held that whether or not Syntell's employees were sited at municipal offices was an irrelevance.

13.3. He held that the award in *Workforce Group (Pty) Ltd v MEBC* (2008) 29 ILJ 2636 (CCMA) was properly comparable to the present case: ie because employees were employed to specifically deal with the Cape Town contract, he reasoned that the circumstances were comparable to *Workforce Group (Pty) Ltd,* labour broker, employing workers who were deployed to render services to clients, resulting in the common purpose between the broker and its deployed workers to operate in the industry sector of the client.

13.4. He concluded that what Syntell undertakes falls within the definition of LGU in the SALGBC constitution.

[14] NEDLAC commented on the award's conclusion and provided its reasons in a succinct letter. It made, without further amplification, four points critical of its content and a fifth point not raised previously; these were:

14.1. The insufficiency of evidence to substantiate the inclusion of Syntell in the LGU sector.

14.2. Whatever Syntell did that required on site operations was too unclear to warrant its inclusion in the LGU sector.

14.3. The presence of Syntell employees on municipal premises 'was key' and it was unclear if there were any, or if so, how many.

14.4. The analogy with the award in the *Workforce* Case, in the absence of knowledge that there really were Syntell employees on municipal premises, was unsustainable.

14.5. 'Private enterprises cannot fall within the ambit of the Local Government Bargaining council.' This was a novel point.

[15] Upon receipt of these comments, the commissioner, in his affidavit, says he changed his mind and revised the award accordingly. He abandoned the reasons initially given, save that he persisted in holding that 'he had no doubt' that Syntell was '*involved* in the traffic management activities undertaken by various municipalities.

[16] The Commissioner proffered these reasons to conclude that Syntell was not operating in the LGU sector:

16.1. The claim by Syntell that none of its employees worked on municipal premises could not be refuted, and by implication had to be accepted.

16.2. The *Workforce* case was not comparable after all.

16.3. There was no 'concrete evidence' (sic) relating to the work performed by [Syntell's] employees in servicing the municipal contracts".

16.4. There was no evidence (sic) of how many employees 'were involved' in municipal work as distinct from private work.

16.5. The limited duration of the municipal contracts.

16.6. Therefore, SAMWU had 'not discharged the *onus'* of proving that Syntell's employees are 'associated for the institution, continuance or finalisation of an act scheme or activity undertaken by a municipality' (a quotation from part of the text of the definition of LGU in the constitution of SALGBC)

[17] The details of the change of stance by the Commissioner were then reported to SAMWU by a Labour delegate to NEDLAC. The propriety of the disclosure is not a matter upon which this Court has to pronounce in this case; however, it may well surface for consideration in another forum. SAMWU was aggrieved and instituted a review application.

<u>The process related issues</u>

The Legislative framework for demarcation disputes

[18] The ambit of the statutory framework for demarcation proceedings and the nature of the proceedings *per se* require examination.

[19] The initial demarcation of sectors of industry is a function performed by NEDLAC. Section 29 of the LRA regulates that role. Section 29(8) provides that NEDLAC must demarcate the 'appropriate sector' over which a

bargaining council will exercise jurisdiction. A failsafe provision authorises the Minister of Labour to perform the task if no agreement is reached by NEDLAC.

[20] Thereafter, demarcation disputes are subjected to a dispute resolution process as provided for in section 62 of the LRA. Section 62(4) stipulates, *inter alia*, that such a process shall be in accordance with section 138 'read with changes required by the context'. Section 138 is a provision which lays down the basic arbitration procedure common to all arbitrations conducted under the auspices of the LRA, requiring, subject to an overriding discretion by the arbitrator as to appropriateness, the leading of evidence, cross-examination and the like. A commissioner, in proceeding in terms of section 62, has no discretion whether or not to convene an arbitral hearing; it is peremptory.

[21] In the main, arbitrations under the LRA are those which address disputes of right and are adjudicative proceedings proper. In section 62, the word 'arbitration' is not used to describe the process. Indeed, if a 'demarcation' issue arises in any ordinary adjudicative proceedings, those proceedings must be stayed until the demarcation issue is decided in the distinct process provided for in section 62.

[22] The section 62 process, as is evident from its provisions, contemplates more than a conventional adversarial contest between immediate interested parties. It presupposes a broader investigative role. In such a context, whether or not an *onus* in any sense exists is not obvious.

[23] These considerations which are imbedded in the provisions of the section underscore its *sui generis* character. The section 62 process was commented on by Francis J in *Coin Security (Pty) Ltd v CCMA* (2005) 26 ILJ 840 (LC) at [43] and [63 -64]:

> "[43] The function of a CCMA commissioner in a demarcation dispute is a classic case of the legislature entrusting a functionary with the power to determine what facts are about the making of a decision and the power to determine whether or not they exist. It is fundamental to the effective

operation of the Act that the commissioner must be a repository of such power.

[63] 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.

[64] The case for judicial deference becomes all the more compelling in this matter given that NEDLAC agreed to support the provisional award."

(emphasis supplied)

[24] More recently, Van Niekerk J affirmed this perspective in *National Bargaining Council for the Road Freight Industry v Marcus N. O*. (2011) 32 ILJ 678 (LC) at [22]:

"[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 para 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 recognize it by interfering only in those cases where the boundary of reasonableness is crossed. Further, *Coin Security* recognizes that a demarcation is provisional - s 62(9) of the LRA requires a commissioner to consult with NEDLAC before making an award. 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 recognize the

specific expertise of commissioners who undertake this task and to defer to that expertise."

[25] Section 62(9) provides that: 'before making an award, the commissioner, must consider any written representations that are made, and must consult NEDLAC'. This peremptory requirement is in addition to the oral hearing contemplated by section 138.

[26] The section implies two sources of input.

26.1. The reference to "written representations" is in contemplation of responses to the publication, when decided to be appropriate, in the government gazette inviting interested parties (ie other than the immediate disputants) to express a view, as is provided for in section 62(7) and (8). Such written representations are available to the Commissioner seized of the matter before the oral hearing, because, in terms of section 62(8) the hearing may not be convened until after the date for submission of such representations has occurred. Self-evidently, such representations from other interested persons would be available to the immediate parties to the dispute too. In this matter no publication of a solicitation to other potential interested parties was thought necessary and thus no other representations were submitted.

26.2. As regards the consultation with NEDLAC, section 62(9) does not define consultation for these purposes nor does it prescribe any formalities or stipulate at what stage the Commissioner must consult NEDLAC, other than it must, axiomatically, be before 'making an award'. No indication is given in the Record of the usual practice followed in consulting NEDLAC. Notably, the duty imposed on the Commissioner is not to invite NEDLAC to participate in the hearing, which, it is plain from the text of the section, is a distinct happening. Thus**,** there is no contemplation apparent from the text of the section that there would be any interaction between the immediate disputants and NEDLAC.

[27] What 'consultation' means in this section will not usefully be divined by recourse to dictionaries or to other judicial pronouncements on other enactments where that word is used. The word must bear a meaning that is context-specific and functional to the objective of section 62. The intrinsic notion of 'consultation' embraces a solicitation about a contemplated course of action or decision. In this section it contemplates NEDLAC, the decision-maker which initially demarcated the sector, furnishing the Commissioner with its views about a decision to be taken by him. Accordingly, it would seem wholly appropriate that the timing of this peremptory consultation be the moment when a prima *facie view* can be expressed by the Commissioner and comment can be solicited about that *prima facie* view. Self-evidently, it cannot be the commissioner's final view because that would render the consultation a sham. Lastly, it bears emphasis that the role of NEDLAC is not to 'approve' an award; the decision, from first to last, is that of the commissioner.

[28] The contention has been advanced that the scope of legitimate input to be proffered by NEDLAC is circumscribed by the provisions of the National Economic Development and Labour Council Act 35 of 1994 (NEDLAC Act). The NEDLAC Act is the statutory instrument that created NEDLAC. It is a body composed of representatives of organised Labour, organised Business and the representatives of the State, and also persons to represent 'community and development interests'. Section 5 provides for its objects powers and functions thus:

> '(1) The Council shall-
>
> (a) strive to promote the goals of economic growth, participation in economic decision-making and social equity;
>
> (b) seek to reach consensus and conclude agreements on matters pertaining to social and economic policy;
>
> (c) consider all proposed labour legislation relating to labour market policy before it is introduced in Parliament;
>
> (d) consider all significant changes to social and economic policy before it is implemented or introduced in Parliament;
>
> (e) encourage and promote the formulation of co-ordinated policy on social and economic matters.
>
> (2) For the purpose of subsection (1), the Council-

(a) may make such investigations as it may consider necessary;

(b) shall continually survey and analyse social and economic affairs;

(c) shall keep abreast of international developments in social and economic policy;

(d) shall continually evaluate the effectiveness of legislation and policy affecting social and economic policy;

(e) may conduct research into social and economic policy;

(f) shall work in close co-operation with departments of State, statutory bodies, programmes and other forums and non-governmental agencies engaged in the formulation and the implementation of social and economic policy.

(3) Nothing in this section shall preclude the Council from considering any matter pertaining to social and economic policy.'

[29] The focus of the section is plainly on what may be labelled, for convenience, the social and economic implications of laws and policies conceived by others and to mandate NEDLAC make constructive input about such laws and policies. On the basis of this premise, it was argued by Mr Leslie for SAMWU, that the actual comments offered by NEDLAC to the Commissioner were *ultra vires* these powers and functions as they cannot be read as comment on social or economic policy. Hence the expression of them to the Commissioner was illegitimate and should have been ignored.

[30] This line of argument was not foreshowed in the founding affidavit of SAMWU and as a result there is no factual material on record that could have informed the court about the usual practice of NEDLAC, and what range of comment is in practice offered in demarcation disputes. To the extent that the argument rests wholly on a textual evaluation of section 5 of the NEDLAC Act, it seems to me to be a difficult stance to adopt that the range of comment that NEDLAC may offer is seriously circumscribed in any way, given the centrality of economic dynamics to social life. However, for reasons given elsewhere in this judgment, it is unnecessary to pronounce on this aspect of the import and scope of section 5 of the NEDLAC Act.

[31] The most notable aspect of the NEDLAC Act is the singular absence of any mention of the demarcation process. The role of NEDLAC in that process is mentioned only in section 29 of the LRA which is concerned with the procedure to demarcate an industry sector in order to register bargaining councils and in section 62 dealing with consequential disputes arising from those demarcations.

[32] The registrar is required to undertake the registration of bargaining councils, upon application, and, among other factors, an application must in terms of section 29(4)(b) be evaluated as to the appropriateness of the 'sector and area' over which the potential bargaining council shall exercise jurisdiction. In this regard, sections 29 (7)(8)(9) and (10) provide thus:

> '(7) The registrar, as soon as practicable, must send the application and any objections, responses and further information to NEDLAC to consider.
>
> (8) NEDLAC, within 90 days of receiving the documents from the registrar, must-
>
> (a) consider the appropriateness of the sector and area in respect of which the application is made;
>
> (b) demarcate the appropriate sector and area in respect of which the bargaining council should be registered; and
>
> (c) report to the registrar in writing.
>
> (9) If NEDLAC fails to agree on a demarcation as required in subsection (8) (b), the Minister must demarcate the appropriate sector and area and advise the registrar.
>
> (10) In determining the appropriateness of the sector and area for the demarcation contemplated in subsection (8) (b), NEDLAC or the Minister must seek to give effect to the primary objects of this Act."

The only other reference to NEDLAC in this context is Section 62(9).

[33] When the LRA was enacted, NEDLAC had already been created. The provisions of the NEDLAC Act do not indicate that a role in demarcation was envisaged when the NEDLAC Act was framed. Its role in demarcation was added to its remit afterwards, by way of provisions in the LRA. Hence it is the LRA that is the source of its authority to do so, not the NEDLAC Act. This

leads to the conclusion that the provisions of the NEDLAC Act *per se* have no bearing on its function to demarcate or in disputes thereafter, to be consulted. Accordingly, the provisions of the NEDLAC Act are irrelevant to a demarcation dispute and to what is or is not appropriate to offer comment about.

Should audi alterem partem have been afforded to the parties?

[34] It is plain that the bare text of section 62(9) does not stipulate an obligation on the Commissioner to give the immediate disputants an opportunity to express views about NEDLAC's views. It was not argued that the section could be the source of such an obligation. Instead, it was contended that the source of such duty on the Commissioner is a residual fair process norm which is located in general principles of law and fairness which govern an institution such as the CCMA.

[35] Appeals to general principle in respect of a body which is a creature of statute tend to be fraught with some danger. As a matter of general principle, what a decision-making body exercising public power may do, and how it is to do it, is to be found in the provisions of the statute that empowers it. (*Fedsure Life Assurance v Greater Johannesburg TMC* 1999 (1) SA 374 (CC) at [58]. It was not suggested that was any authority for the proposition that there was a right to a second hearing nor that there was a basis to invoke a legitimate expectation of a second hearing.

[36] However, the circumstances which have aggrieved SAMWU are not novel. The question of what is necessary to facilitate a fair process when *new material* is garnered about which one or more interested parties have not been previously alerted has been addressed by the courts.

[37] In *Earthlife Africa (Cape Town) v D-G, Department of Environmental Affairs and Tourism and Another* 2005 (3) SA 156 (C), a case decided under the Promotion of Administrative Justice Act 3 of 2000 (PAJA), the court was

asked to review a decision of the D-G under section 22 (3) of the Environment Conservation Act 73 of 1989 (ECA). Acting pursuant to that section, the D-G had authorised the construction of a demonstrator model pebble bed nuclear reactor. This had occurred after a process of public consultation during which the applicants had had a full opportunity to express their views about the contents and merits of an environmental impact report (EIR). However, after that comment had been submitted, further facts had been gathered which had then been taken into account in a revised and final report which had not been made available to interested parties for further comment. In defence of refusing further input, the D-G had argued that the Regulations under EIA did not provide for such a further step. The court held otherwise and at [60] – [64] Griesel J stated:

> '[60] I find this approach to be fundamentally unsound. The regulations provide for full public participation in 'all the relevant procedures contemplated in these regulations'. The respondents seek to limit such participation to the 'investigation phase' of the process (as contemplated by regs 5, 6 and 7). After submission of the EIR, however, the 'adjudicative phase' of the process commences, involving the DG's consideration and evaluation, not only of the EIR, but also - more broadly - of all other facts and circumstances that may be relevant to his decision. There is nothing in the Act (ECA) or the regulations that expressly excludes public participation or application of the audi rule during this 'second stage' of the process. In line with settled authority, therefore, it follows that procedural fairness demands application of the audi rule also at this stage.
>
> [61] A further reason why I find the respondents' approach to be unsound is because it overlooks the fact that, on the DG's own version (though not Eskom's), the final EIR was 'substantially different' from the draft EIR. The final EIR made material changes and incorporated substantially more documentation than the draft EIR. The question for decision can therefore be narrowed down to an enquiry whether it was procedurally fair to take administrative action based on 'substantially different' new matter on which interested parties have not had an opportunity to comment.
>
> [62] By analogy with the approach adopted in motion proceedings where new matter is raised in reply, I am of the view that, if such new matter is to be considered by the decision-maker, fairness requires that an interested party

ought to be afforded an opportunity first to comment on such new matter before a decision is made. 21 Support for this attitude is to be found in the following dictum of Van den Heever JA in Huisman v Minister of Local Government, Housing and Works (House of Assembly) and Another:

'Were new facts to be placed before the ''administrator'' which could be prejudicial to an appellant, it would be only fair that the latter be given an opportunity to counter them if he were able to do so, more particularly were the matter one in which the extant rights of an appellant could be detrimentally affected.'

[63] Similar sentiments are expressed by De Ville:

'Where the final decision-maker is not permitted to take account of new evidence or required to hold an enquiry him/herself, but simply has to take a decision on the evidence (and recommendations) presented to him/her after a full enquiry (complying with the requirements of procedural fairness), a hearing will not be required before the taking of a final decision.'

[64] In the present case, where the draft EIR was substantially overtaken by the final EIR, it is clear to my mind that new facts had indeed been placed before the decision-maker on behalf of Eskom. In these circumstances, I am of the view that the applicant, as an interested party, was entitled, as part of its right to procedural fairness, to a reasonable opportunity to make representations to the DG on the new aspects not previously addressed in its submissions in relation to the draft EIR.'

(footnotes omitted)

[38] Significantly, the point of departure of the court was the proper interpretation of the enabling regulations, rather than delving into general principle. Moreover, the reliance on the decision in *Huisman v Minister of Local Government, Housing and Works (House of Assembly) and Another* 1996 (1) SA 836 (AD) is equally significant for its emphasis on the distinction between the marshalling of new facts and the entertaining of additional opinions or arguments on the 'old facts'. In the *Huisman* Case, the Minister was required to decide an appeal against a decision of a municipality to refuse to permit a particular property development to take place having regard to town planning and usage considerations. The Minister dismissed the appeal. The applicant for such development rights was aggrieved by the dismissal on the grounds, among others, that the municipality had expressed adverse views to the

Minister, and that the applicant had not been afforded a chance to address those views. The review against the Minister's decision failed because no new facts were presented to the Minister (at 845G). Van den Heever JA added at 845G -846A:

> 'Mr Buchanan could not point to any additional information contained in either the written memorandum submitted by the Town Clerk in reply to that of the appellant, or the documentation in Dercksen's file, of which the appellant had not been aware and with which he had not dealt earlier. Indeed, the complaint voiced persistently in the appellant's affidavits was that *he had not been given an opportunity to deal with the submissions* advanced by the officials of the municipality .Mr Buchanan repeated this initially: the appellant wanted to have the last word. He had been entitled to a right of reply. Mr Buchanan offered no authority undermining the common-sense approach of the Court a quo, that proceedings could be endlessly protracted were any such 'right' to be held to exist. Why should the municipality not then have a right in turn to reply to the appellant's submissions, and so on? When Mr Buchanan was reminded that in terms of the Rules of this Court, an applicant for leave to appeal and the respondent were ordinarily each offered only one bite at the cherry, without any suggestion ever being advanced that that is ipso facto unfair, he altered his attack and submitted that in terms of the rules of natural justice a hearing should not only be fair, but be perceived to be fair.'

[39] The upshot is that there is no ground upon which to criticise the Commissioner for not offering the parties a second chance to make representations.

Do the facts support the conclusion that the commissioner delegated his function to decide the question to NEDLAC?

[40] The contention that the Commissioner abrogated his responsibility is premised on two ideas; first a slavish deference to the unmotivated points made in the NEDLAC letter, and second, a belief that the Commissioner had already made a reasoned decision which he then reversed, without giving reasons for the reversal, to accord with the unreasoned views expressed by NEDLAC.

[41] The point of departure in examining these contentions ought to be a recognition that the very point of the consultation is to enable NEDLAC to influence an outcome different to the one put to it. Even a slavish about face in my view, does not, necessarily, establish abdication. The adoption of unmotivated views similarly does not result, necessarily, in an inference of improper deference.

[42] The argument is advanced that NEDLAC had no material to consider except the draft award and therefore the Commissioner was better placed to make an evaluation than NEDLAC. This proposition, on the facts, is sound, but is beside the point. It is not obvious that a "proper consultation" required sharing all the data gathered by the commissioner. Indeed to have done so, might, paradoxically, have provoked a complaint about whether the Commissioner was deciding the matter independently or was trying to share the decision-making burden. The possibility that the consultation was inadequate or even slovenly cannot be ruled out, but no attack on such grounds was advanced on review and it is inappropriate to assess it now on appeal. In any event such a factor would, also, not necessarily show a fettering of the decision-maker's power to decide.

[43] The Commissioner in his affidavit denies that he had taken a firm view when he sent the draft award to NEDLAC. This is a fact that must be taken into account. It weighs heavily and no other facts are on record to rebut it. Moreover, to have held no firm view at that stage would have been the correct and proper stance to have taken. The criticisms about the anaemic reasons for holding one or another view belong to an assessment of the third review ground, but do not throw light on this issue because making a bad choice or being unreasonably impressed with a bad suggestion is not evidence that he fettered or abdicated his authority, but simply that he was wrong to have been impressed by a bad point.

[44] Accordingly, on the facts, no case is made out that the Commissioner delegated his decision to NEDLAC.

Did the commissioner apply his mind to all the relevant facts and considerations?

[45] The aim of an enquiry to decide whether an enterprise is operating within a given industry or sector requires an examination of what the enterprise undertakes, in common purpose with its employees, to achieve. The venerable decision in *Rex v Sidersky* 1928 TPD 109 remains our lodestar. Logically, first the industry must be described, secondly the business of the enterprise must be described, then thirdly, upon these facts, the character of the enterprise's business activities is tested to determine for what common purpose is the enterprise and its employees associated. The approach was endorsed and amplified in *Greatex Knitwear (Pty) Ltd v Viljoen* 1960 (3) SA 338 (T) at 344H – 345D, and more recently in *Coin Security* (Supra,) at [54] – [58], Francis J affirmed it.

[46] What is the 'Local Government Undertaking' sector? The SALGBC is registered under section 29 of the LRA. However, it appears to be common cause that the "sector" over which it exercises jurisdiction is not defined in the certificate of registration. The only definition of LGU is that which appears in the constitution of the SALGBC. Therein it is defined as:

> 'the undertaking in which the employer and employees are associated for the institution, continuance or finalisation of any act scheme or activity undertaken by a municipality and by municipal entities as established in terms of the Local Government: Municipal Systems Act 32 of 2000.'

[47] The decision in *Golden Arrow Bus Services (Pty) Ltd v CCMA and Others* (2005) 26 ILJ 242 (LC) at 252B held that the certificate alone ought to be used to determine the scope of an industry. It was contended by Mr Harrison for Syntell that the definition in the SALGBC constitution should therefore be ignored. However, it seems to me that this finding was in the context of a difference between the certificate and the constitution of that bargaining council. Self-evidently, the certificate should trump the constitution, but if there is no inconsistency, no sound reason exists to ignore the only definition of a sector simply because it is in only the constitution. Moreover, the constitution must itself be approved by the registrar in terms of section 29(11)(b)(ii) of the LRA, which implies approval of the definition.

[48] Mr Harrison for Syntell, further argued that the absence of a certificate definition meant that it was necessary to fall back on section 151(1) of the Constitution of the Republic of South Africa, where it is provided that the 'local sphere of government consists of municipalities'. I am of the view that section 151 was not formulated to address the question of the demarcation of industries or undertakings but rather, is intent on distinguishing, in constitutional terms, the third tier of the state; ie local government. Thus, section 151 is not pertinent to the controversy.

[49] In my view, it was not improper for the Commissioner to conclude that the LGU sector was that activity as defined in the SALGBC constitution.

[50] The Commissioner was required to apply his mind to the facts as summarised above in paragraphs [9] – [13] and ask if the information presented to him could be construed to locate the activities of Syntell in the LGU sector, as defined.

[51] The two sets of reasons invoked by the Commissioner to reach opposite conclusions in each of the versions of the award have been set out above in paragraphs [14] and [17].

The provisional draft award

[52] One common finding in both versions of the award is that Syntell was "involved" in the LGU sector. The word "involved" is empty of substance. It may be supposed that what was intended by this term was that Syntell did something that had something to do with what municipalities do. There was an appreciation in this remark that the very issue the Commissioner was required to decide was the content and extent of such involvement. The finding is then made that Syntell's performance falls within the definition of LGU in the SALGBC constitution, a point he reversed in the final award by concluding that there was insufficient evidence to make such a finding.

[53] Three further reasons in the draft award were afflicted with obvious misconceptions. These are:

53.1. He held that the *Workforce* Case was comparable. The basis for comparison which the Commissioner suggested; ie that there were in both instances employees who were dedicated to work for the 'client' was specious. In this regard, the NEDLAC criticism was valid. A labour broker's personnel, when deployed within a client's organisation, understandably function within the client's operations. In addition, section 198(4) of the LRA makes the client co-liable in respect of various aspects of the employment relationship. The material distinction between that situation and the situation of Syntell is manifest.

53.2. The invocation of the claims in the prospectus completely ignored the statements from Syntell's representative about the misimpression that the prospectus could create. Moreover, there is no hint that Syntell's factual input was weighed or evaluated. Given that the Commissioner could not legitimately make a credibility finding against the Syntell's representative, the information given by her made it quite plain that all Syntell did was supply and install software, supply and install cameras, and supply and install robots and nothing more. Moreover, the very claim in the prospectus relied upon, even on a textual analysis, does not support the inference found because it is so generalised that it does not indicate what is actually done. In the review application, numerous other passages were lifted to try to show the role of Syntell was a *de facto* outsourcing operation. The contention is unsound as the puffery in that document does not disclose what was actually happening nor does it trump the information which Syntell's representative gave the commissioner.

53.3. The finding that the place where the work was carried out is an irrelevance is mistaken. It is, indeed, an obvious relevant factor, but it is not dispositive of the question. At NEDLAC's equally wrong-headed comment that the place where the work was carried out was a 'key' factor, he reversed his reasons to invoke the flipside of the same wrong approach.

[54] The major flaw in the provisional award is the abject failure to acknowledge the facts of the case put forward by Syntell or to appreciate the implications of that data. However, it was, after all, only a draft and the Commissioner was, as his affidavit says, not committed to the ideas expressed therein. He was fully entitled to abandon them if upon reflection, he later thought them unpersuasive.

The final award

[55] The final award contains the reasons to which the Commissioner committed himself. The main thrust of the commissioner's reasons was that there was an absence of evidence to establish that Syntell's operations were located it within the LGU sector. This finding, in my view, erred on the side of caution, because, on the body of information (it was not evidence) the statements presented by Syntell, described above in summary, were a complete bar to finding that Syntell operated in the LGU sector.

[56] The misconception in the final award over the significance of where the work was done did not detract from the outcome. Nor did the misguided idea that the short duration of the contract was a useful fact, affect the outcome. Both were superfluous reasons. The issue of the proportionate split between private clients and municipal clients was a relevant factor, but on the body of information gathered which was so weighted in Syntell's favour, the lack of information about the split was not critical to the outcome.

[57] The notion advanced by NEDLAC that a private concern cannot be in the LGU sector was not invoked by the Commissioner to justify the final award. He says nothing to reveal his view on this issue. Although the issue is an important one, and may well be a correct proposition, it is unnecessary for this Court to pronounce on it in these proceedings as the enquiry necessary for the appeal is confined to the reasonableness of the commissioner's award. The question of whether or not, in principle, and if so on what terms, a private concern ought to be subject to the SALGBC remains an issue that requires proper clarification after a proper and focussed enquiry.

<u>Conclusion and the order</u>

[58] In summary:

58.1. The parties' rights to a fair process were not violated by not being given the opportunity to address the views of NEDLAC.

58.2. The Commissioner did not delegate his decision making authority to NEDLAC when he reversed his provisional view and ruled consistently with the view of NEDLAC.

58.3. Despite some misconceptions about tangential issues by the Commissioner in the final award, ultimately the outcome that Syntell does not fall within the LGU sector is supported handsomely by the information on record.

58.4. The award is thus one to which a reasonable Commissioner could have come.

[59] Accordingly, an order is made that the appeal is dismissed with costs.

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Sutherland AJA

I agree

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Davis JA

I agree

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Molemela AJA

APPEARANCES:

FOR THE APPELLANT:	Advocate G. Leslie, Instructed by Cheadle Thompson Haysom Inc Ref J Whyte
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