REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Reportable

Case no. C431/2011

In the matter between:

NATIONAL TEXTILE BARGAINING COUNCIL **Applicant**

and

C DE KOCK N.O. **First Respondent**

STATUTORY COUNCIL OF THE PRINTING,

NEWSPAPER AND PACKAGING INDUSTRY

OF SOUTH AFRICA **Second Respondent**

BASIC TRIM CC **Third Respondent**

CCMA **Fourth Respondent**

Heard: **10 October 2013**

Delivered: **18 October 2013**

Summary: Review of demarcation award. LRA s 62 considered.

JUDGMENT

Introduction

[1] This is an application to review and set aside a demarcation award. It considers the application of section 62 of the Labour Relations Act.[1] The commissioner (first respondent) found that Basic Trim CC (third respondent, 'Basic Trim'), a company making labels for clothing, does not fall under the applicant, which is the National Textile Bargaining Council. Instead, the commissioner held that Basic Trim falls under the Statutory Council for the Newspaper, Printing and Packaging Industry (the second respondent, 'the printing council').

[2] The applicant believes that Basic Trim operates in the textile industry, not in the printing industry. It asks that the court review and set aside the demarcation award and remit it for consideration afresh, on the grounds that the commissioner did not properly discharge his function and came to an unreasonable conclusion, in that:

a. he regarded the fact that Basic Trim does not manufacture ribbon as decisive and thereby:

i. failed to properly interpret the applicant's registered scope, and

ii. failed to properly determine the nature of the enterprise;

b. he failed to take into account relevant social policy considerations;

c. he did not exercise his discretion to invite public comment in terms of section 62(7), in circumstances where this was necessary; and

d. he did not allow the applicant to call its witness.

[3] The applicant argues that the commissioner misconceived the nature of the inquiry and arrived at an unreasonable result.[2]

[1] Act 66 of 1995 (the LRA).
[2] *Herholdt v Nedbank Ltd* [2013] ZASCA 97 at para 25].

Facts

[4] Most of the facts before the commissioner were common cause. Where there was a dispute, the applicant wanted to call a witness to explain certain aspects of its business. The commissioner disallowed it. I will return to that aspect later.

[5] Basic Trim prints clothing labels (washing instructions) on ribbon, cuts them to size, packages them and delivers them to clothing manufacturers.

[6] The applicant believes that Basic Trim falls under its registered scope. In 2008-9, it attempted to exercise jurisdiction over Basic Trim. It issued two compliance orders requiring Basic Trim to register and to comply with its obligations towards its workers under the Main Collective Agreement.[3] The applicant believed that workers were being underpaid.

[7] When Basic Trim did not comply, the applicant set the matter down for enforcement arbitration on 13 October 2009. Basic Trim told the arbitrator that it operates in the printing industry and that it was in the process of registering with the printing council. The arbitrator adjourned the hearing and advised the parties to resolve the matter of jurisdiction or approach the CCMA for demarcation.

[8] The commissioner heard the matter on 5 April 2011 by which time Basic Trim had still not registered with the printing council. The applicant referred the commissioner to its registered scope and argued that Basic Trim manufactures trims and that its main agreement prescribes minimum wages for label printers. Applicant's scope includes 'finishing' which can involve printing: without the printing the label is incomplete. Applicant requested to lead evidence from a witness who competes with Basic Trim.

[9] Basic Trim, on the other hand, told the commissioner that because it does not manufacture the ribbon on which it prints, it falls under the printing council and

[3] The main agreement was extended to non-parties by the Minister in terms of s 32(2) of the LRA in Government Notice R 1094, published in *Government Gazette* No 33782, 26 November 2010.

not under textiles or clothing. It stated that the textile on which it prints is already 'finished'.

[10] The commissioner established that Basic Trim agreed that it would fall under the applicant only if it manufactured the ribbon upon which it printed. He then decided that 'I have got to just go and make, apply my mind and determine whether that distinction, the fact that you do not manufacture, causes you not to fall under the Bargaining Council. That is all.'

[11] The commissioner held that the evidence the applicant wished to lead through its witness would be irrelevant because the witness's enterprise manufactures as well as prints.

The Award

[12] In his award, the commissioner found that 'only when printing on textiles form part of some manufacturing process would such printing be included under the scope of the Applicant.' He concluded that, in the case of Basic Trim, 'the printing on textiles is not done in the same establishment where textiles are manufactured or, in other words, the printing is not done in a textile factory. The core activities of [Basic Trim], which is the printing of labels, therefore, do not fall under the registered scope of the Applicant.'

Registered scope of the applicant

[13] The applicant is registered in the textile industry, in which employers and employees are associated for any activity relating to the processing or manufacture of fibres, filaments or yarns, natural or man-made and the processing or manufacture of products obtained therefrom, including all activities incidental thereto or consequent thereon. The applicant's registered scope is also defined by product in the gazetted Main Agreement. It includes, and is not limited to, "tapes, frills, tassels, bows and similar finishings, lace and netting, shoe laces, made-up textiles, shoulder padding" as well as "clothing accessories".

[14] Basic Trim's product, washing-instruction labels, is used in the manufacture of garments. Ms *Harvey* argued that a label is a 'trim' analogous to a frill, lace, or shoulder pad: it is a 'part' for clothing manufacture.

[15] The applicant's registered scope defined by process or activity includes "processing, dyeing, finishing and further processing of… textiles… utilising the activities and processes of… printing, dyeing… making-up and finishing". Ms *Harvey* submitted that the process of printing on textile labels, and cutting these to size, fits comfortably into the process of making-up and finishing a textile product – washing-instruction clothing labels - by printing and cutting.

Registered scope of the printing council

[16] The printing council serves the industry in which employers and their employees are associated in the production of printed matter and packaging.[4] It includes trades and occupations relating to book binding, desktop publishing and printing, as well as the manufacture of labels, envelopes, wrappers, paper or cloth tags, cardboard and containers. The scope includes (under subparagraph (d)) 'printing on clothing, textiles, cloth or hessian or other materials: provided the printing is done in an establishment other than a clothing, textile or knitting factory'.

[17] Whilst it is a credible argument that printing clothing labels could be included in this scope, the counter-argument forwarded by Ms *Harvey* is that demarcation provision (d) is in respect of post-production printing by an establishment set up in the printing industry, on items already acquired as finished products, such as corporate t-shirts, bags for conferences, or canvas photo-prints.

The law on demarcation decisions

[18] The CCMA makes demarcation decisions under section 62 of the Labour Relations Act.

[4] Demarcation by Minister of Labour in terms of s 29(9) read with s 39(3) of the LRA.

[19] As discussed above, Basic Trim produces washing-instruction labels, which are sewn into garments and become a constituent part thereof. Its operations could potentially fall into the textile, garment manufacture or printing industries. This Court has previously held that employees can fall within more than one industry, depending on the work they perform;[5] however, in the case before me, the applicant argues that the work performed by Basic Trim falls solely within its scope and not that of the printing council.

[20] Demarcation of an enterprise is a policy-laden decision with far-reaching consequences. Demarcation determines wages, working conditions and social security for workers and, by extension, regulates competition amongst employers.

[21] Our Labour Courts treat demarcation as an area of specialist decision-making entrusted to commissioners[6] and adopt an attitude of judicial deference, especially, in light of Nedlac's oversight role under section 62(9) of the LRA.[7]

[22] A demarcation decision is, accordingly, a weighty one, requiring careful, thoughtful consideration of facts, law and social and industrial-relations policy.[8]

[23] In *Coin Security (Pty) Ltd v CCMA and Others*[9] the court pointed out that the well-known approach in *Greatex Knitwear*[10] pre-dates the current labour relations dispensation with its emphasis on encouraging sectoral collective bargaining. Commissioners making demarcation decisions must now enquire, beyond mechanistic comparison of jobs, into the relevant collective bargaining practices and structures.[11]

[24] Expanding on this point, the court held that:

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[5] *Golden Arrow Bus Services (Pty) Ltd v CCMA and Others* (2005) 26 *ILJ* 242 (LC).
[6] *Coin Security (Pty) Ltd v CCMA and Others* (2005) 26 *ILJ* 849 (LC) ('Coin') at para 63.
[7] *Coin* at para 64; *NBCRFI v Marcus NO* [2011] 2 BLLR 169 (LC).
[8] *Coin* paras 56 and 63; *NBCRFI v Marcus NO and Others* [2011] 2 BLLR 169 (LC) at para 18.
[9] *Coin* at para 57.
[10] *Greatex Knitwear (Pty) Ltd v Viljoen and Others* 1960 (3) SA 338 (T) at 344H-345D, in terms of which the decision-maker restrictively interprets the registered scope, determines the employer's activities, and compares the two, bearing in mind that some activities may be ancillary and that an employer may be engaged in more than one industry at a time.
[11] *Coin* at para 59.

> 'The socio-economic intentions and effects of a demarcation accordingly range far beyond a mechanical comparison of jobs, as mere reliance on pre-1996 authorities would suggest. There are two phases under the Act to a demarcation: the first phase is the mechanistic stage (comparison of jobs); and the second phase involves a consideration of collective bargaining practices and structures and socio-economic considerations.'[12]

[25] The commissioner, as a specialist decision-maker entrusted with a weighty decision of social relations policy gravely affecting the rights and prospects of the parties, can be expected to have taken into account something more than the registered scope of the competing industries. The social purpose of demarcation is to promote the objectives of the LRA (which do not encompass narrow interests of bargaining councils themselves).

[26] The commissioner was required to make a wider enquiry than that which he undertook. He can be expected to have considered, amongst other considerations:

a. the history of the enterprise: whether it grew out of a printing-based or textile-based approach;

b. whether the skills of the employees are as printers or as textile workers, in which industry might they have the appropriate skills for career mobility?

c. the location of the enterprise in the value chain; its commercial or trading links to other enterprises;

d. who the enterprise's competitors are;

e. the material effect of locating the enterprise under one or the other jurisdiction; the potential impact on its economic security and the concomitant impact on job security;

[12] *Coin* at para 62.

f. whether the employees belong or wish to belong, to any trade union and the sector in which that trade union is equipped to organise and bargain; and

g. whether the enterprise might fall under any other industry[13] - notably whether, given that it produces a 'part' used in garment manufacture, it might fall under the clothing industry.

Evaluation

[27] Ms *Harvey* argued that the commissioner did not discharge his functions properly and came to an unreasonable conclusion. In the light of the following facts, I must agree:

a. The commissioner did not properly evaluate Basic Trim's enterprise in the light of the applicant's registered scope. In treating the question of manufacturing as decisive, the commissioner failed to consider or to decide whether:

i. Basic Trim's process – printing and cutting – amounts to making up and finishing a textile (clause 1.3 of its constitution, read with the Main Agreement); or whether

ii. Basic Trim's product – clothing labels – is a 'trim' falling within the scope of clause 2(g) of its constitution;

b. He did not undertake the 'second phase' of the enquiry, requiring him to acquire an understanding of collective bargaining structures and socio-economic factors;

c. He failed to consider whether Basic Trim might fall into another industry or under another bargaining council. Given the difficulty of the decision and the very different nature of the possible contending industries – textiles, printing, garment manufacture - he ought to have recognised that the matter was of 'substantial importance', requiring him to cause

[13] *Golden Arrow* (supra) at 252D.

the commission to exercise its discretion to invite public input in terms of section 62(7) of the LRA; and

d. He unreasonably refused to listen to the applicant's witness. It is unfair to disallow a party the right to call a witness. The witness was a relevant one who could have given the commissioner valuable evidence or information concerning the nature of the industry.

[28] In summary, the commissioner failed overall to conduct the proper enquiry.[14] In failing to discharge his duty under the LRA to engage in the 'second phase' of the enquiry, he underestimated the importance and gravity of the matter.

[29] In the circumstances, there is no basis for deference by this court. The decision should be taken afresh by a different specialist CCMA commissioner in light of all the relevant facts and circumstances.

Ruling

[30] The demarcation award is reviewed and set aside and remitted to the CCMA for consideration afresh by a commissioner other than the first respondent.

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Anton Steenkamp

Judge of the Labour Court of South Africa

Appearances

Applicant: Suzanna Harvey

Instructed by: Adam Pickering of Cheadle Thompson & Haysom.

[14] *Herholdt* (supra)para 25.