REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 2977/07

In the matter between:

HENRED FRUEHAUF (PTY) LTD	**First Applicant**
HOUSE OF TRUCKS (PTY) LTD	**Second Applicant**
and	
MARCUS N.O.	**First Respondent**
CCMA	**Second Respondent**
NUMSA	**Third Respondent**
MEIBC	**Fourth Respondent**
MOTOR INDUSTRY BARGAINING COUNCIL	**Fifth Respondent**

Heard: **14 February 2014**
Delivered: **18 March 2014**
Summary: Review – demarcation – LRA ss 62, 145.

JUDGMENT

STEENKAMP J

Introduction

[1] When is a trailer not a trailer? When it weighs more than 27 273 kg, apparently. And is the manufacturing of axles part of the business of the manufacturing of trailers? Not always.

[2] These are the issues that the commissioner[1] had to grapple with in a demarcation dispute referred to him in terms of s 62 of the LRA.[2] He decided that the manufacture of trailers more than 27 273 kg (generally referred to as "20 tons") falls within the scope of the Metal and Engineering Industries Bargaining Council (MEIBC) and no the Motor Industries Bargaining Council (MIBCO). It is common cause that the manufacture of trailers that weigh less than 20 tons is a MIBCO activity.

[3] The commissioner also found that an axle factory operated by the applicants fell under the scope of the MEIBC and not of MIBCO.

[4] The applicants, Henred Fruehauf and House of Trucks, take issue with this demarcation and seek to review it. The third and fourth respondents, NUMSA[3] and the MEIBC[4] argue that the demarcation is a reasonable one and not open to review.

[5] A trailer is a trailer is a trailer, Mr *Snyman* argued. And it has been said that a rose by any other name smells as sweet.[5] Does it make a difference if that trailer weighs more than 20 tons? And what about its axles? Axl Rose may have seen some synergy between Guns 'n Roses, but the commissioner had to decide on the demarcation between axles and trailers in the heavy metal industry.

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[1] The first respondent, Adv MH Marcus, in his capacity as a commissioner of the second respondent, the CCMA.

[2] The Labour Relations Act 66 of 1995.

[3] The National Union of Metalworkers of South Africa.

[4] The Metal and Engineering Industries Bargaining Council.

[5] "What's in a name? that which we call a rose
By any other name would smell as sweet;" – William Shakespeare, *Romeo & Juliet* Act II Scene ii.

Background facts

[6] The first applicant (HFT) manufactures road freight trailers at its premises in Bellville (Western Cape) and Wadeville (Gauteng). The trailers are attached to trucks (or “ponies”) to transport goods by road. HFT also manufactures axles for trailers at its Wadeville premises.

[7] It is common cause that the manufacturing of trailers weighing less than 20 tons falls under the scope of the Motor Industry Bargaining Council (MIBCO). HFT argues that the same should hold for trailers weighing more than 20 tons (“large trailers”) and axles. NUMSA and the MEIBC contend that the manufacturing of large trailers and axles are MEIBC activities and fall under the scope of that Bargaining Council.

[8] HFT is bound by an earlier determination that tanker trailers fall under the scope of the MEIBC. It does not take issue with that finding of the arbitrator.

[9] HFT contends that the manufacture of large trailers is, like that of smaller trailers, a MIBCO activity. NUMSA and the MEIBC say it is not. The arbitrator found that the manufacturing of large trailers falls under the scope of the MEIBC.

[10] HFT also manufactures axles. It argues that it is an activity ancillary to its main business of trailer manufacture and should be demarcated under the scope of MIBCO. The arbitrator found that it fell under the scope of the MEIBC.

Evaluation / Analysis

[11] In short, then, HFT argues that trailer manufacturing should not be subject to a weight limitation; that its axle factory is ancillary to its main activity; and that all of this should be demarcated to fall under the scope of MIBCO. It seeks to review the findings of the arbitrator that the manufacture of large trailers and of axles, respectively, should be demarcated under the scope of the MEIBC.

The applicable legal principles

[12] In *Coin Security*[6] the approach to reviews of demarcation decisions was described thus:

> "The demarcation process is one entrusted to a specialist tribunal in terms of the provisions of the Act.[7] 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 judgement. 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 function 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."

[13] The same approach was followed in *National Bargaining Council for the Road Freight Industry v Marcus N.O.*[8] and *National Textile Bargaining Council v De Kock N.O.*[9] and confirmed by the Labour Appeal Court.[10]

Definitions

[14] The certificate of registration of the MEIBC determines that the "general engineering and manufacturing engineering" industries fall under its jurisdiction. Those industries are further defined as "...the industries concerned with the maintenance, fabrication, erection or assembly, construction, alteration, replacement or repair of any machine, vehicle (<u>other than a motor vehicle</u>[11]) or article consisting mainly of metal ... <u>but does not include the motor industry</u>".

[6] *Coin Security (Pty) Ltd v CCMA & Ors* [2005] 4 BLLR 672 (LC) para [63].

[7] See *Coin Security Group (Pty) Ltd v Minister of Labour* (2001) 22 *ILJ* 2399 (SCA) para [5].

[8] (2011) 32 *ILJ* 678 (LC); [2011] 2 BLLR 169 (LC) para [18].

[9] [2013] ZALCCT 37.

[10] *National Bargaining Council for the Road Freight Industry v Marcus NO & others* (2013) 34 *ILJ* 1458 (LAC) paras 21-22.

[11] My underlining throughout.

[15] The motor industry, in turn, is defined in both bargaining councils' certificates of registration as "the assembling, erecting, testing, remanufacturing, repairing, adjusting, overhauling, wiring, upholstering, spraying, painting and/or reconditioning carried on or in connection with ... chassis and/or bodies of motor vehicles ... and vehicle body building...".

[16] The definition of "motor vehicle" specifically excludes trailers designed to transport loads of more than 20 tons (or 27 273 kg).

[17] The MEIBC and MIBCO certificates define "vehicle body building" (falling in the scope of MIBCO) as, *inter alia*, "building of trailers, but not including the manufacture of wheels or axles therefor"; and "...all operations incidental to or consequent upon" the activities defined as "vehicle body building".

[18] The parties agree with the commissioner's finding that the activity of trailer manufacturing falls within the definition of "vehicle body building". But HFT takes issue with the finding that the weight limitation applies and should be read into the definition of "vehicle body building".

Trailers over 20 tons

[19] The commissioner found that the weight limitation on trailers in the definition of "motor vehicle" in the registration certificates of both bargaining councils should also be read into the definition of "vehicle body building" in the certificate and, therefore, that the manufacture of large trailers does not fall under the scope of the motor industry (i.e. MIBCO) but is a metal industry activity and thus falls under the scope of the MEIBC.

[20] Historically, both bargaining councils have interpreted the definition in that way, i.e. that the manufacturing of large trailers fell under the MEIBC and not MIBCO.[12]

[12] On 7 November 2013, long after this arbitration had been concluded, the Registrar of Labour promulgated an amendment to the MIBCO certificate of registration. The definition of "motor vehicle" does not contain the weight limitation anymore. But this court has to consider the interpretation of the definition that served before the arbitrator prior to its amendment.

[21] The concept of “vehicle body building” would be nonsensical if it did not include “motor vehicles”. And the definition of “motor vehicle”[13] specifically excludes large trailers.

[22] It does not seem to me that it was unreasonable to conclude that “vehicle body building” must also exclude large trailers, as the definition of “motor vehicle” does. It may seem anomalous; the reason for the distinction based on load carrying capacity is hard to fathom. But the distinction has been written into the definition of “motor vehicle” in both certificates of registration and cannot be wished away. The resultant difference in demarcation, in this case, for activities carried out on the same premises may seem to be unusual, but it was not unreasonable for the arbitrator to interpret the definition in the way that he did. As Landman J has held, employees of the same employer working on the same premises can fall under the scope of different industries and bargaining councils, depending on the work they perform.[14] In this case, the arbitrator had to give meaning to the definitions contained in the registration certificates of MIBCO and the MEIBC. The effect of his conclusion will not be that the same workers who build lighter or smaller trailers and who would fall under the scope of MIBCO, will fall under the scope of the MEIBC when they manufacture trailers with a carrying capacity of more than 20 tons. He determined that, depending on the dominant activity (i.e. manufacturing of light or heavy trailers), the whole enterprise would fall under either MIBCO or the MEIBC. The parties were invited to submit further evidence in that regard.

[23] In short, it is clear that the arbitrator carefully applied his mind to the evidence before him and to the relevant industry definitions. His interpretation of the relevant definitions and his resultant conclusion on the appropriate demarcation was a reasonable one. It is not open to review.

[13] As it then stood.

[14] *Golden Arrow Bus Services (Pty) Ltd v CCMA & Others* (2005) 26 *ILJ* 242 (LC).

The axle factory

[24] The commissioner found that HFT's axle manufacturing activity in Wadeville is of a sufficient dimension to justify a finding that it conducts business in two separate industries. The axle factory, he determined, should be demarcated within the scope of the MEIBC and not of MIBCO. He ordered HFT to register the axle factory and its employees with the MEIBC.

[25] The parties agreed that the axle factory would resort under the MEIBC if it operated as a separate and independent business. HFT's argument is that the axle factory exists primarily to make axles for its trailers and should be seen as incidental or ancillary to the business of (small) trailer manufacturing, and thus to be demarcated under the scope of MIBCO and not the MEIBC.

[26] The arbitrator took into account that some 20% of the axles made at Wadeville are produced for sale on the open market. More importantly, he referred to the express exclusion of the manufacture of axles from the definition of "vehicle body building" that includes trailer building, but not the manufacture of axles for trailers.

[27] Even if axle building is an ancillary activity, the arbitrator found, a separate demarcation of that activity would not be justified, given its dimensions. He referred in this regard to the judgment of Centlivres JA in *KWV v Industrial Council for the Building Industry.*[15] He properly applied the criteria set out in that decision to the evidence before him. His conclusion cannot be said to be so unreasonable that no other arbitrator could have come to the same conclusion.[16]

[15] 1949 (2) SA 600 (A) at 611.

[16] The parties agreed that the test in *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 28 *ILJ* 2405 (CC) applies. That review test was also used in a demarcation dispute in *NBCRFI v Marcus N.O. & Others* (2011) 32 *ILJ* 678 (LC) at para [15].

Conclusion

[28] I conclude that the conclusion reached by the arbitrator in his demarcation award is not so unreasonable that no other arbitrator could have come to the same conclusion. It is not open to review.

[29] With regard to costs, I take into account that there is an ongoing relationship between the parties. I also take into account that the definitions in the MIBCO certificate of registration have changed subsequent to the arbitrator's award. All of the parties – i.e. the applicants, NUMSA and the two bargaining councils – are continuously engaged in a collective bargaining process. A costs order in these circumstances is not appropriate, in law and fairness.

Order

[30] The review application is dismissed.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Sean Snyman (attorney).
THIRD AND FOURTH RESPONDENTS:	Hans van der Riet SC Instructed by Ruth Edmonds attorney.