THE LABOUR COURT OF SOUTH AFRICA, PORT ELIZABETH

Reportable

CASE NO: PR 3/18

In the matter between:

AUTO INDUSTRIAL GROUP (PTY) LTD	**First Applicant**
AUTO INDUSTRIAL FOUNDRY DIVISION	**Second Applicant**
AUTOCAST SOUTH AFRICA (PTY) LTD	**Third Applicant**
AUTOCAST SOUTH AFRICA (PTY) LTD ALUMINIUM	**Fourth Applicant**
BORBET SA (PTY) LTD	**Fifth Applicant**
DANA SPICER AXLE SOUTH AFRICA (PTY) LTD	**Sixth Applicant**
MW WHEELS SA (PTY) LTD	**Seventh Applicant**
SP METAL FORGINGS BOKSBURG (PTY) LTD	**Eighth Applicant**

SP METAL FORGINGS UITENHAGE (PTY) LTD	**Ninth Applicant**
TORRE AUTOMOTIVE (PTY) LTD	**Tenth Applicant**
ZF LEMFORDER SA (PTY) LTD	**Eleventh Applicant**
MALBEN ENGINEERING CC	**Twelfth Applicant**

and

CCMA	**First Respondent**
COMMISSIONER FEIZAL FATAAR, *N.O.*	**Second Respondent**
NUMSA	**Third Respondent**
SOLIDARITY	**Fourth Respondent**
UASA	**Fifth Respondent**
MEIBC	**Sixth Respondent**
MIBCO	**Seventh Respondent**
WIDNEY TRANSPORT COMPONENTS (PTY) LTD	**Eighth Respondent**
RAMSAY ENGINEERING (PTY) LTD	**Ninth Respondent**
EURO METAL FINISHES (PTY) LTD	**Tenth Respondent**

AUTO INDUSTRIAL MACHINING DIVISION **Eleventh Respondent**

ISANDO FOUNDRY DIVISION **Twelfth Respondent**

HUBCO FORGINGS DIVISION **Thirteenth Respondent**

and

Case No. PR 50/18

In the matter between:

MIBCO **Applicant**

and

CCMA **First Respondent**

FEIZAL FATAAR, *N.O.* **Second Respondent**

NUMSA **Third Respondent**

SOLIDARITY **Fourth Respondent**

UASA **Fifth Respondent**

MEIBC **Sixth Respondent**

SAACSA **Seventh Respondent**

AUTO INDUSTRIAL GROUP (PTY) LTD **Eighth Respondent**

AUTO INDUSTRIAL FOUNDRY DIVISION **Ninth Respondent**

AUTOCAST SA (PTY) LTD	**Tenth Respondent**
AUTO CAST SA (PTY) LTD ALUMINIUM	**Eleventh Respondent**
BORBET SA (PTY) LTD	**Twelfth Respondent**
DANA SPICER AXLE SOUTH AFRICA (PTY) LTD	**Thirteenth Respondent**
MW WHEELS SA (PTY) LTD	**Fourteenth Respondent**
SP METAL FORGINGS BOKSBURG (PTY) L	**Fifteenth Respondent**
SP METAL FORGINGS UITENHAGE (PTY) LTD	**Sixteenth Respondent**
TORRE AUTOMOTIVE (PTY) LTD	**Seventeenth Respondent**
ZF LEMFORDER SA (PTY) LTD	**Eighteenth Respondent**
MALBEN ENGINEERING CC	**Nineteenth Respondent**
WIDNEY TRANSPORT COMPONENTS (PTY) LTD	**Twentieth Respondent**
RAMSAY ENGINEERING (PTY) LTD	**Twenty-First Respondent**
EURO METAL FINISHES (PTY) LTD	**Twenty-Second Respondent**
AUTO INDUSTRIAL MACHINING DIVISION	**Twenty-Third Respondent**
ISANDO FOUNDRY DIVISION	**Twenty-Fourth Respondent**
HUBCO FORGINGS DIVISION	**Twenty-Fifth Respondent**

Date heard: 17 October 2018

Date of judgment: November 2018

JUDGMENT

VAN NIEKERK J

Introduction

[1] On 31 July 2017, the second respondent in each of the above applications ('the commissioner') issued an arbitration award in a dispute where he was required to determine whether vehicle component manufacturers fall within the scope of the Metal and Engineering Industries Bargaining Council (MEIBC), or the Motor Industries Bargaining Council (MIBCO). The result was mixed – the commissioner decided that the twelve applicants in matter PR3/18 ('the demarcation applicants') fell within the MEIBC's scope, where they were registered. Others, cited as the eighth to thirteenth respondents in the same matter, were held to be employers within MIBCO's scope.

[2] The arbitration award has generated three review applications. The first is the application filed by the demarcation applicants in case PR 3/18. They contest the finding that they are to remain demarcated within the MEIBC. Secondly, there is a review application by MIBCO (case PR 50/18), with essentially the same objectives as the application filed by the demarcation applicants in PR 3/18. The third is a review application filed by NUMSA, in which it seeks to review and set aside that part of the award that concludes that the eighth to thirteenth respondents in PR 3/18 fall within MIBCO's scope, coupled with a conditional cross-review aimed at broadening the basis on which the demarcation applicants are to be considered employers within the scope of the MEIBC. The parties agreed that the matters should be heard together and a single judgment delivered.

The regulatory framework and its history

[3] The current scope of registration of the MEIBC is the '*iron, steel, engineering and metallurgical industries*'. These industries are defined to mean, *inter alia*, '*[t]he general engineering and manufacturing engineering and metallurgical industries*'. These industries are defined expressly to exclude '*the motor industry*'.

[4] The '*motor industry*' is defined to mean:

> (aa) Assembling, erecting, testing, remanufacturing, repairing, adjusting, overhauling, wiring, upholstering, spraying, painting and/or reconditioning carried on in connection with –
>
> (i) chassis and/or bodies of motor vehicles;
>
> (ii) internal combustion engines and transmission components of motor vehicles;
>
> (iii) the electrical equipment connected with motor vehicles, including radios;
>
> (ab) automotive engineering;
>
> (ac) repairing, vulcanising and/or retreading tyres;
>
> (ad) repairing, servicing and reconditioning batteries for motor vehicles;
>
> (ae) the business of parking and/or storing motor vehicles;
>
> (af) the business conducted by filling and/or service stations;
>
> (ag) the business carried on mainly or exclusively for the sale of motor vehicles or motor vehicle parts and/or spares and/or accessories (whether new or used) pertaining thereto whether or not such sale is conducted from premises which are attached to a portion of an establishment wherein is conducted the assembly of or repairs to motor vehicles;
>
> (ah) the business of motor graveyards;
>
> (ai) the business of assembly establishments;

(aj) the business of manufacturing establishments wherein are fabricated motor vehicle parts and/or spares and/or accessories and/or components thereof;

(ak) vehicle body building. (Own emphasis.)

[5] The current scope of registration of the MIBCO contains the following preamble:

> "**Motor Industry**" or "**Industry**", without in any way limiting the ordinary meaning of the expression (own emphasis) and subject to the provisions of any demarcation determination made in terms of section 62 of the Labour Relations Act, 1995, includes –
>
> (a) …

Thereafter, the definition is cast in identical terms to the definition of 'motor industry' in the registered scope of the MEIBC, save for the addition of a sub-paragraph (l), which is of no consequence in these proceedings.

[6] Given the basis of the commissioner's findings, a brief overview of demarcations under the Industrial Conciliation Act, 28 of 1956 is necessary. That Act came into operation in 1957, with its long title having been changed in 1988 to the Labour Relations Act. I shall refer to this statute as 'the 1956 LRA. That statute inherited from its predecessor the model of a vertical rather than horizontal system of wage regulation. In effect, wage regulating measures had application on an industry basis i.e. they had application in a particular industry as defined in the measure. Whether an employer and its employees were associated together in a particular industry was (and remains) a matter of some importance.[1] As far back as 1926, in *R v Seligson* 1926 TPD 27, the Supreme Court recognised the dual objective of demarcation - to protect employees from receiving lower wages than those laid down in wage regulating measures applicable to the industry concerned, but also to protect other employers in the industry against competition on the basis of lower labour standards.

[1] A de Kock *Industrial Laws of South Africa* 1st ed., at p141

[7] Section 76 of the 1956 LRA dealt with the demarcation between undertakings, industries, trades and occupations. Subsection (1) provided that the minister may, if he deemed it expedient to do so, refer any demarcation question to the industrial court (previously the industrial tribunal) for determination. Subsection (6) empowered the industrial court to investigate the issue and make a determination. Subsection (7) provided, in turn, that if the minister was of the opinion that the determination was of sufficient importance, the determination would be published in the Gazette.

[8] What was then the Industrial Council for the Iron, Steel, Engineering and Metallurgical Industries (NICISEMI) had an industry scope that specifically excluded the manufacture of automotive components. MIBCO's predecessor, the National Industrial Council for the Motor Industry (NICMI), had a registered scope that specifically included the manufacture of those components, but for the manufacture of motor vehicle parts or components in establishments laid out for '*and normally producing metal and/or plastic goods of a different character on a substantial scale*'.

[9] The business of motor vehicle 'assembly establishments' was also excluded from the scope of both industrial councils. These were defined to mean:

> …an establishment or portion thereof wherein motor vehicles and/parties thereof are completely or partially assembled from new components on an assembly line or otherwise, and includes the manufacture and fabricating of any motor vehicle parts or components when carried on in such establishments.

[10] In summary then, prior to November 1962, motor vehicle assembly establishments were excluded from the scope of the iron, steel and engineering and motor industrial councils in respect of their activities, while the automotive component manufacturers fell within the motor industry, provided that they did not qualify as an assembly establishment and were not laid out for and did not produce metal and/or plastic components on a substantial scale.

[11] On 30 November 1962, the minister published a demarcation determination made by the then industrial tribunal under section 76 of the 1956 LRA (the 1962 determination). The 1962 determination assumed some significance during the proceedings under review, and is referred to in the award as 'Annexure K'. The 1962 demarcation reads as follows:

> (1) An employer who is associated with his employees for the purpose of manufacturing motor vehicle parts and/or spares and/or accessories and/or components of motor vehicles is subject to the provisions of sub-clause (2) in respect of such manufacturing activities engaged in the 'Motor Industry' as defined by Government Notice No. 596 of the 24 April, 1959. [This is the 1959 main agreement for the motor industry.]
>
> (2) An employer who is associated with his employees for the purpose of manufacturing –
>
> (a) motor vehicle parts and/or spares and/or accessories and/or components of motor vehicles –
>
> (i) by any casting process;
>
> (ii) from steel plate of one-eighth of an inch thickness or thicker in an establishment laid out for and normally engaged in the manufacturing and/or maintenance and/or repair of civil and/or mechanical engineering equipment on a scale which is substantial in comparison with the scale on which motor vehicle parts and/or spares and/or accessories and/or components of motor vehicles are manufactured in such establishment;
>
> (iii) in an establishment laid out for and normally producing metal and/or plastic goods of a different character on a scale which is substantial in comparison with the scale on which motor vehicle parts and/or spares and/or accessories and/or components of motor vehicles are manufactured in such establishment;
>
> (iv) in an establishment laid out for and normally concerned with structural metal work on a scale which is substantial in comparison with the scale on which motor vehicle parts and/or

spares and/or accessories and/or components of motor vehicles are manufactured in such establishment;

(b) components or parts of the transmission system of a motor vehicle;

(c) motor vehicle wheels and/or axles and/or brake drums;

is in respect of such manufacturing activities engaged in the 'Iron, Steel, Engineering and Metallurgical Industries' as defined by Government Notice No. 2008 of the 9th December, 1960. [This is the 1960 main agreement for the aforesaid industry.]

[12] On 13 March 1964, a clarification notice was published in the Gazette in terms of which the industrial tribunal clarified the provisions of clause 3(2) (a) (i) of the determination quoted above as follows:

> Manufacturing of motor vehicle parts and/or spares and/or accessories and/or components of motor vehicles by any casting process includes any machining necessary for the completion of the article (own emphasis) so manufactured whether or not the casting and machining are done in the same establishment.

[13] At the time that the industrial tribunal made the 1962 determination, the scope of registration of the NICISEMI contained the same exclusionary definition of the '*motor industry*' as is contained in the current scope of registration of the MEIBC; and it accorded with the definition of the motor industry in the NICMI's scope of registration at the time, as it currently does.

[14] As appears from the heading,[2] the 1962 determination dealt with paragraph (j) of the exclusionary definition of motor industry, which excluded from the iron, steel, engineering and metallurgical industry (as it does today) '*the business of manufacturing establishments wherein are fabricated motor vehicle parts and/or spares and/or accessories and/or components thereof*'. In summary, the effect of the 1962 demarcation was to establish that these businesses were engaged in

[2] 'Determination – demarcation: manufacturing of motor vehicle parts and/or spares and/or accessories and/or components of motor vehicles'

the motor industry, with the exception being, *inter alia*, businesses involved in the manufacturing of:

(i) motor vehicle components by way of a casting process;

(ii) components of a transmission system; and

(iii) wheels, axles or brake drums.

[15] At the arbitration hearing, only two witnesses testified. The first was a Mr Ken Manners, who is the owner of the eighth and ninth applicants in PR 3/18. He explained the nature and extent of the changes to the motor industry over the last few decades. He stated:

> The process by which motor vehicles are built, globally, has evolved over the last 20 to 30 years very extensively. Such that the OEMs, the original equipment manufacturers, actually make very few components. They are fundamentally assemblers of motor vehicles.

[16] Manners testified further that the component manufacturing industry was consequently no longer dominated by the OEM 'assembly establishments' who had historically been organised beyond the scope of the MIBCO and MEIBC. He continued:

> What that means is that by implication they [the OEMs] will purchase body parts and subassemblies from what we call first tier suppliers and first-tier suppliers evolved very dramatically and massively so around the globe into organisations if I could drop names like Bosch, for instance, or large companies which are often bigger than the OEMs themselves.
>
> And who specialize in manufacturing sub-assemblies and assemblies which are then supplied on what is known as a JIT, Just-In-Time basis, to the OEMs for assembly on a continuous production line. Now those first tier suppliers obviously

> then are sourcing the components for their assemblies and sub-assemblies in a lower tier, which is commonly referred to as the second tier.
>
> The second tier is really where the automotive component industry lies. Inasmuch as that its membership or the participant of the component sector are predominantly manufacturers of components as opposed to assemblies or sub-assemblies …. What's so important is that the auto industry is defined as a value chain or supply value chain. So regardless of where a participant is placed in the value chain, they are all nevertheless vital to the entire process.

And further, under cross-examination, Manners described how he had changed the nature of the business after he purchased it in 1993, from a fastener manufacturer to a manufacturer of tow bars and towing equipment:

> The automotive industry itself has also changed very dramatically. There are companies that in the 80's and 90's may have been supplying into the automotive sectors such as it was in those days but the sector at that time, bears very little resemblance to the sector as such today. It has become inextricably part of that global mechanism associated with all the motorcars and so those companies that found themselves in the MEIBC perhaps 10 years ago may have had some relevance to their specific manufacturing processes or reasons why they would have bargained under those structures. I think it's the fundamental point that we have to deal with in this matter. We are looking to align ourselves into an industry which is relevant today. Not 20 years ago and not in 1962.

[17] Manners expressed the view that the demarcation applicants found themselves in the MEIBC by dint of history. Further, he considered that the MEIBC was an entirely unsuitable collective bargaining forum for issues concerned with the motor industry. Automotive component manufacturers found themselves without a voice in the bargaining structures of the MEIBC. He cited the example of having to bargain with MEIBC employers who manufacture wheelbarrows, hand tools and taps.

[18] An official from the MIBCO, Mr Pauw, testified that he had conducted inspections of the applicants in the arbitration proceedings. His view was that the end product was more relevant than the process by which a component was manufactured, that the applicants manufactured motor vehicle components and that they all ought to resort within the scope of the MEIBC.

[19] Manners and Mr Pauw, were the only witnesses who testified. There is no evidence of any cross-examination of either witness regarding Annexure K (the 1962 determination), nor was any evidence led on it.

[20] Also before the commissioner was a copy of an email, to which he makes reference in his award, addressed to a Mr. Chaplin at MIBCO from a Mr. Horn, regional manager of the MEIBC. The email is dated 13 July 2015 and attaches a copy of the 1962 determination. The email records that the 1962 determination '*served as the basis on which the applicant companies were found to result under and be registered with MEIBC'*.

The arbitration award

[21] What the dispute before the commissioner boiled down to was whether the businesses of the 17 applicant component manufacturers fell within the motor industry definition. If they did, then they fell outside the scope of the MEIBC, and into the MIBCO. What this required was a determination whether, without limiting the ordinary meaning of the expression 'motor industry', the businesses of the applicant component manufacturers included '*the business of manufacturing establishments wherein are fabricated motor vehicle parts and/or spares and/or accessories and/or components thereof…*'.

[22] This determination was required to be made in respect of an undisputed set of facts, including the common cause fact that all of the applicants are involved in the manufacture of motor vehicle components of various types. It was also not disputed that they supply original equipment manufacturers (described as OEMs)

directly and/or supply those who supply them. In this sense, the applicants are part of what was referred to as the motor vehicle value chain, or supply value chain. The OEMs set the exact specifications for the components, including the materials that should be used and their strength. While some of the applicants are also involved in the manufacture of non-motor components, this involvement is minuscule. Insofar as bargaining structures are concerned, the MEIBC does not have a separate negotiating chamber for component manufacturers. By way of contrast, the MIBCO is structured to provide for separate negotiations for component manufacturing establishments, referred to in the MIBCO main agreement as 'Chapter III establishments'.

[23] The main findings made by the commissioner are reflected in the following extract from his award:

> 40. With regards to Annexure K, in hindsight and given that Annexure K is a determination published in a government Gazette by direction of the then Minister of Labour, section 5(2) of the Civil Proceedings Act is applicable and that there was no need to lead evidence on the said document. Annexure K is therefore admissible.
>
> 41. As to the emails between Horn and Chaplin, even though it was only given at the argument stage, it is my view that such emails are accepted as relevant and admissible. Mr Pauw did not dispute the content thereof [in his own words]. The content of these emails gives clarity to Annexure K in terms that it existed, and that the fourth and fifth respondents have been applying the determination to the state. In the interests of fairness and justice, I have given credence to remarks of Steenkamp J in the *National Textile Bargaining Council v De Kock* at para 25: "the commissioner, as a specialist decision maker entrusted with the weighty decision of social relations policy greatly 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)."

42. In my view, when we have to determine whether an employer/employers fall within the scope of the bargaining council, consideration must be taken of the history of collective bargaining in either of the bargaining councils, any determinations already made in respect to the issue at hand and more importantly, how the parties to the bargaining council have interpreted the issue at hand.

43. From Annexure K and the emails, we can gather the following:

27.1 a determination was made and the Gazette exists which regulates the issue at hand for the 10 applicant companies mentioned above;

27.2 there is no evidence before me to conclude that such determination has been repealed and/or done away with. There is nothing in the Labour Relations Act 66 of 1995 that reflects that the determination is or was repealed. An enactment of legislation does not automatically repeal previous determinations and judgements unless it specifically states that it does. In this case, there is nothing;

27.3 from 1963 up until today, it has always been the understanding that companies business activities that fall within the scope of the determination, will reside at the fourth respondent…

27.4 what is of relevance is that the councils in this case have interpreted the business activities of companies that fall within the scope of the determination to reside at the fourth respondent.

44. From the above, it is my view that we are bound by the determination in Annexure K (sic).

[24] Regarding the argument that the competitors of the ten applicants bound by the determination do not currently fall within the scope of the MEIBC, the commissioner held that "*there was no substantial evidence placed before me as to how these competitors are not residing at the [MEIBC]*". As for Mr Pauw's evidence about a competitor having been demarcated from the MEIBC to MIBCO, the commissioner held that "*[t]here was no evidence led to determine what the facts of the case was and the reasons for the argument*". Furthermore, "*in the absence of contrary demarcation rulings having been made in respect of such competitors, the fact that they have escaped the [MEIBC's] regulatory oversight to date, does not mean that they do not fall within its jurisdiction*".

[25] Turning next to the submission that the nature of the applicants' businesses are determined by their end products (i.e. motor components) and that they fall within the motor component value chain, the commissioner came to the following conclusion:

> 47. In my view, the activities of a company are not determined by the end product it manufactures but 'by the nature of the enterprise in which employees and employer are associated for a common purpose'. … I might add here, that the nature of the enterprise is one determined by the process whereby an end product is made. If the process leading up to the end product is one of engineering, it cannot be argued that because the end product is a motor component and together with other motor components not using an engineering process, fall within the motor component value chain, that a company should reside at the [MIBCO].
>
> 48. As I have already concluded that <u>we are bound by</u> the determination in annexure K, which effectively means that the ten applicants' business activities are engineering. It is my conclusion, that said applicants have no position in the value chain of motor components for purpose of determination.

> 49. Given the above, the ten applicants mentioned supra should reside within the scope and ambit of the [MEIBC].

[26] Dealing separately with Torre Automotive (the tenth applicant in these proceedings) the commissioner held that its business activities fell squarely within the scope of the MEIBC.

[27] In the result, the commissioner demarcated the ten applicants he had referred to as covered by the 1962 determination (as well as Torre Automotive), as falling within the scope of the MEIBC, and the remaining six applicants as falling within the scope of the MIBCO.

NEDLAC'S objections

[28] In terms of s 62 (9), NEDLAC is involved in the initial demarcation of bargaining councils, and must be consulted by commissioners in respect of demarcation disputes. The factors that NEDLAC ought to take into account were described by the 1996 Commission to Investigate the Development of a Comprehensive Labour Market Policy. These are also obviously relevant to any demarcation made by a commissioner, and to NEDLAC's consultation with commissioners when demarcation awards are discussed. In its report, the Commission said the following, at paragraph 170:

> 170. The new labour law envisages a role for NEDLAC and the social partners in demarcating industries… This imposes an obligation to discuss the type of industry-level bargaining arrangements envisaged. The Commission believes a number of principles should inform a rational approach to demarcation. First, the aim should be to bring together in one bargaining forum broadly similar producers or service providers. The product market must be assessed to ensure that the industry scope is neither too broad nor too narrow. Second, it is particularly important to take into account the labour-intensity of the component parts of the industry to ensure that the same minimum conditions do not automatically apply to vastly different situations, possibly acting to discourage job

creation. Third, account should be taken of the actual or planned structure of training arrangements in the industry concerned. Fourth, the number of employees covered should be sufficiently large to allow economies of scale in relation to, for example, benefit funds, while not being too large such that sub-sectors with little in common are bunched together.

[29] Section 62 (9) of the LRA contemplates that NEDLAC, the decision-maker which initially demarcated the sector, should furnish the commissioner with its views concerning any demarcation decision. (See *SA Municipal Workers Union v Syntell (Pty) Ltd & others* (2014) 35 *ILJ* 3059 (LAC) at paragraphs 19, 25 and 27.) In that matter, the LAC reviewed the nature of proceedings in terms of s 62 at some length. In short, the court held that a s 62 process contemplated more than a conventional arbitration contest between interested parties, and presupposed a 'broader investigative role'[3] The LAC referred to two decisions by this court[4] where the court had held that in demarcation disputes, there is likely to be a broad range of approaches and outcomes, and that the court ought to adopt a deferential approach, recognising the expertise of commissioners engaged in demarcations, and intervening only if the boundary of reasonableness is crossed.

[30] In the present matter, NEDLAC addressed a letter to the CCMA on 21 November 2017, noting that it had received the award under review, which was the subject of a meeting held with the commissioner on 7 September 2017. The standing committee expressed the view that it could not support the award since the commissioner had failed satisfactorily to address key areas of concern. These included what were referred to as

i. an overwhelming reliance on the 1962 determination in arriving at the final determination;

ii. a complete rejection of the value chain argument presented by the applicants;

[3] At paragraph [22].

[4] *Coin Security (Pty) Ltd v CCMA & others* (2005) 26 *ILJ* 849 (LC) and *National Bargaining Council for the Road Freight Industry v Marcus NO & others* (2011) 32 *ILJ* 678 (LC),

iii. inappropriate and unnecessary weight being attached to the history and different collective bargaining practices and structures as between the two bargaining councils;

iv. a rejection of the argument that a company's product is relevant to determining its industry and not necessarily the nature of the enterprise in which employees and the employer are associated for a common purpose; and

v. inconsistency in the final demarcation of the 18 applicants 'even on the basis of the arbitrator's own reasoning and rationale'.

[31] But for the demarcation in respect of Torre Automotive (the tenth applicant in PR 03/18), NEDLAC's standing committee expressed the unanimous view that the demarcation was '*unconvincing, inconsistent and in all likelihood open to challenge*' and that it could not support the award. These observations obviously impact on the assessment of the award under review, having regard to the grounds for review raised by both the demarcation applicants and MIBCO.

The grounds for review

[32] The demarcation applicants raise six grounds of review. The first is that the commissioner committed a material error by regarding himself as bound by the 1962 determination, and that the error amounted to a material mistake of law, a gross irregularity in the proceedings, administrative action that fell foul of the principle of legality and resulted in the award being unreasonable in its result. Secondly, the applicants contend that the commissioner's rejection of the applicants' value chain argument (which it contends points ineluctably to the conclusion that the applicants' enterprises fell in the motor industry and thus MIBCO's scope) constitutes a gross irregularity. Thirdly, the applicants contend that inappropriate, incorrect and/or unnecessary weight was attached to the history and different bargaining practices and structures as between the MEIBC and MIBCO. Fourthly, the demarcation applicants submit that the commissioner erred in concluding, as he did, that the relevant enterprises were not to be determined by or with reference to the value chain argument and their end

products, compared with the registered scope of the MEIBC and the MIBCO, but instead with reference to the fact that engineering processes were required to produce the metal automotive components produced by the applicants, and that the applicants thus fell within the MEIBC's scope. Put another way, the demarcation applicants contend that the commissioner's view that the nature of the industry is determined by the manufacturing process (in this case, engineering) and not the end product (in this case, a motor vehicle component), is entirely misconceived. Fifthly, the demarcation applicants contend that the commission was inconsistent in the final demarcation, even on the basis of his own reasoning and that he thus acted irrationally. Finally, the applicants raise certain flaws in relation to the delays occasioned and procedure followed by the commissioner.[5]

[33] MIBCO raises three main grounds – a material error of law in regard to the status of the 1962 demarcation, the contention that the commissioner attached inappropriate and unnecessary weight to the evidence of the history and different collective bargaining practices and structures of the MIBCO and MEIBC, and that the demarcation is inconsistent and contradictory.

[34] In summary, the primary grounds for review that emerged from the argument presented at the hearing relate first to the status of the 1962 demarcation; secondly, the commissioner's assessment of the collective bargaining history and structures; and thirdly, his rejection of the significance to be attached first to the value chain of which the demarcation applicants are an integral part and secondly, the outcome of a production process as opposed to the nature of that process. I deal with each of these after a consideration of the applicable law.

Relevant legal principles

[35] The applicants refer to the most recently decided case by the LAC on demarcation reviews, *SBV Services (Pty) Ltd v National Bargaining Council for the Road Freight and Logistics Industry & others* (2017) 38 ILJ 1978 (LAC). In

[5] This ground for review was not seriously pursued at the hearing.

that case, the LAC referred to *NUMSA v Assign Services* [2017] 10 BLLR 1008 (LAC), where the same court had said the following:

> 26. An incorrect interpretation of the law by a commissioner is, logically, a material error of law which will result in both an incorrect and unreasonable award. Such an award can be either attacked on the basis of its correctness or for being unreasonable.

[36] That a demarcation award can be set aside on the basis of correctness is not a principle that until *SBV* had been expressly acknowledged as a ground for review in demarcation disputes.[6] The basis for the review of a demarcation award has historically been one of reasonableness.[7] A correctness test recognises that a demarcation dispute admits a single correct answer and the enquiry on review is limited to whether the commissioner's conclusion was right or wrong. A reasonableness test on the other hand presupposes that there will inevitably be no single correct judgment, but a wide range of approaches and outcomes to which reasonable decision-makers could come.

[37] There is a line of judgments by the LAC that establish that an arbitration award may be set aside as constituting a gross irregularity when a commissioner commits an error of law, provided the error of law was material, in the sense that it materially affected the commissioner's ultimate decision.[8] Put in the negative, an error of law is not material if the commissioner would have reached the same decision on the facts, despite the error of law.[9]

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[6] Perhaps what the LAC sought to affirm in *SBV* (when it indicated that an applicant in a demarcation review had the options of correctness or reasonableness as the basis for review), was that a decision that is obviously wrong is substantively unreasonable. In other words, the threshold for unreasonableness is set at the obviously wrong award.

[7] See *National Bargaining Council for the Road Freight Industry v Marcus NO & others* (2011) 32 *ILJ* 678 (LC), referring to *Coin Security (Pty) Ltd. v Commission for Conciliation, Mediation and Arbitration & others* (2005) 26 ILJ 849 (LC) and upheld on appeal in *National Bargaining Council for the Road Freight Industry v Marcus NO & others* (2013) 34 ILJ 1438 (LAC).

[8] See, for example, *Motor Industry Staff Association & another v Silverton Spraypainters & Panelbeaters (Pty) Ltd & others* (2013) 34 *ILJ* 1440 at para 42.

[9] *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* 2010 (6) SA 182 (CC).

[38] The prevailing authority on the effect of an error of law in review proceedings under s 145 of LRA remains Head of the Department of Education v *Mofokeng & others (2015) 36 ILJ 2802 (LAC)*, where Murphy AJA said the following:

> [30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in *Herholdt v Nedbank Ltd* and this court in *Goldfields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v CCMA and others* have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome…
>
> [32] …Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived inquiry or a decision which no reasonable decision-maker could reach on all the material that was before him or her.
>
> [33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the inquiry. <u>In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the inquiry, the delimitation of the issues to be determined and the ultimate outcome.</u> (Own emphasis.) If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of

> this order would point to at least a *prima facie* unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.

Analysis

[39] Mr Euijen SC, who represented NUMSA, conceded that the commissioner had committed a material error of law, to the extent that he regarded Annexure K as binding on him. This is obviously so. I fail to appreciate how it can be said that a determination made by the industrial tribunal under the 1956 LRA retains binding effect notwithstanding the repeal of the 1956 LRA. Under the LRA, NEDLAC demarcated the registered scope of bargaining councils afresh. In that process, the terms of the 1962 determination were not incorporated into the MEIBC's scope of registration, nor that of the MIBCO. Further, s 76 (6) of the 1956 LRA made clear, demarcation decisions were dependent on the circumstances of each case. This is fundamentally at odds with the notion that the 1962 determination constituted a binding precedent either in respect of any subsequent demarcation proceedings under the 1956 LRA or for the purposes of the present case. In any event, Annexure K, being a determination of the industrial tribunal, was always capable of variation by the tribunal in term s of s 76 (6) of the 1956 LRA. That being so, there is no basis on which it remained

binding on a commissioner performing the function of a demarcation in terms of s 62 of the LRA.

[40] The status of a demarcation determination similar to that under consideration in the present instance was dealt with extensively by commissioner Marcus in *National Union of Metalworkers of SA & another v Henfred Fruehaf Trailers & others* (2008) 29 *ILJ* 468 (CCMA). In his award, the learned commissioner rejected a submission to the effect that he was bound to follow a determination issued by the industrial tribunal in 1977, issued in terms of s 76(3) of the 1956 LRA. Commissioner Marcus went on to say (at p 471):

> Even if I were to accept Mr van der Riet's submission that the form of the determination adopted by the tribunal which is expressed in general terms to apply to the class of work/employer activities concerned with the manufacture of tankers and trailers, renders it res judicata on these issues which would preclude me from determining same otherwise than in accordance with the ruling, I believe I cannot be barred from deciding these matters afresh in as much as such determinations are not seen by the empowering statute (the 1956 Act) as being cast in stone. Section 76 (8) some of that act envisages such determinations as being subject to variation by the tribunal when appropriate. Presumably this would apply where, for example, the facts and circumstances informing and underlying the determination had changed. If the tribunal was itself empowered by its empowering statute to very its previous rulings on these matters, surely the CCMA, an entirely new institution charged with performing demarcations under entirely new legislation in the form of the 1995 Act, informed by different terms of reference in the form of s 62 (1) and other relevant provisions thereof, cannot be precluded from doing so when appropriate. In the case of the 1977 ruling, it seems to be no limitation can or should be placed on the CCMA's powers to deviate from that reading inasmuch as the tribunal's reasoning informing its decision in the underlying facts and circumstances giving rise the two are unknown, a lacuna which renders it quite impossible for this forum to determine the continued appropriateness today (some 30 years down the line) are the general or, more relevantly, with reference to the enterprises engaged by the

second applicant and the first respondent in common purpose with their employees.[10]

[41] In short, the 1962 determination was never binding on the commissioner. At most, the 1962 determination is of historical interest, and perhaps serves to explain no more than why the demarcation applicants find themselves located within the scope of the MEIBC.

[42] For the above reasons, I am satisfied that in so far as the commissioner regarded the 1962 determination as having a binding effect, he committed an error of law. The error was obviously material since it was the primary basis on which he came to the result that he did. Indeed, the 1962 determination was the primary basis on which the demarcation was made.

[43] Mr Myburgh SC, who appeared on behalf of the demarcation applicants, submitted that in view of NUMSA's concession that the commissioner had committed an error of law when he regarded the 1962 determination as binding on him, it was not open to NUMSA to contend that the award was nonetheless capable of reasonable justification. In other words, a test of correctness applied – if the commissioner erred (as he did) it was not open to NUMSA to 'reverse into reasonableness' in defence of the award.

[44] There is merit in this submission, especially in a case (such as the present), where what is primarily at issue is the application of a definition of scope to an agreed set of facts. This is not one of those cases such as *S v Morningside Nursing Home (Pty) Ltd* (1989) 10 *ILJ* 1150, where the certificate of registration made reference to an industry in which '*employer and employee are associated for the purpose of …* [e.g. building, manufacturing footwear, and the like]. A determination of this nature obviously calls for an enquiry into duration and scale and often resolves itself into a question of degree - thus an assessment of the

[10] The award by commissioner Marcus was upheld on review (see *Hendred Freuhauf (Pty) Ltd & another v Marcus NO & others* (2014) 35 *ILJ* 3147 (LC)).

reasonableness of the commissioner's conclusion. In the present instance, given MIBCO's definition of scope, the commissioner was required to determine whether the demarcation applicants' businesses were manufacturing establishments in which motor vehicle parts, spares, accessories or components were fabricated. In other words, what was at issue was the application of a definition to an agreed set of facts, not unlike a jurisdictional dispute where a commissioner is required to determine whether an applicant is an 'employee' as defined, or whether he or she was dismissed.[11]

[45] Had the commissioner conducted the enquiry on that basis, he would have concluded that the definition of 'motor industry' in MIBCO's scope of registration clearly extends to the business of the demarcation applicants, since they conduct the business of manufacturing establishments 'wherein are fabricated motor vehicle parts and/or spares and/or accessories and/or components thereof'. The commissioner appears to have been alive to the inevitable outcome of the application of the definition to the undisputed facts. At paragraph 27 of the award, he says:

> On face value, if we compare the common cause facts relating to the applicants, as to their business activities and that they manufacture motor components, and if we apply a literal interpretation, with the Certificate of Registration of the [MEIBC] and [MIBCO], it may be possible to interpret that the applicants fall within the scope of the [MIBCO].

Quite why the commissioner did not choose to apply a literal interpretation (or the ordinary meaning) of the definition of scope and arrive at the foreshadowed result is not apparent from the award. Viewed thus, the commissioner's award was clearly wrong, and stands to be reviewed and set aside on that basis.

[11] See, for example, *SA Rugby Players' Association (SARPA) & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another* [2008] 9 BLLR 845 (LAC), which dealt with the existence of a 'dismissal' as defined by s 186 (1) of the LRA.

[46] In the present instance, even if I were to apply a threshold that acknowledged the possibility of an obviously wrong but reasonable decision,[12] in my view, the result would be no different. In terms of *Mofokeng*, the material error of law committed by the commissioner points to a result that is *prima facie* unreasonable. In other words, the commissioner's flawed reasoning aside, the court must nonetheless consider whether the result of the proceedings under review could nevertheless reasonably be reached in the light of the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA.

[47] Mr Euijen SC submitted that there are such residual reasons that underpin the award and which serve to locate it within the band of reasonableness. In particular, he referred to the bargaining history between the parties and the nature of the process undertaken to produce the end product in each case. These submissions raise the second and third substantive grounds for review, i.e. that the commissioner misdirected himself by attaching inappropriate and unnecessary weight to the evidence of the history and different collective bargaining structures and practices of the MIBCO and MEIBC, and that he committed a reviewable irregularity by rejecting the significance of the outcome of a production process as opposed to the nature of that process. I deal with these grounds for review *seriatim*.

[48] The commissioner's conclusion in relation to the history and different collective bargaining practices and structures as between the MEIBC and MIBCO was informed entirely by the exchange of emails between Chaplin and Horn, and the 1962 determination. The demarcation applicants do not dispute the relevance of bargaining history and structures, but contend that these are informed primarily by the 1962 determination, which no longer binds the parties. They submit further that they fall within the definition of 'motor industry' for the purposes of the

[12] In *Herholdt v Nedbank Ltd* [2012] 9 BLLR 857 (LAC), Murphy AJA suggested that '*few decisions that are wrong are unlikely to be upheld as reasonable*' (at para 55).

MIBCO's scope, and that changed circumstances in the motor manufacturing industry warrant their being located within that scope.

[49] NUMSA contends that the MEIBC and its predecessors have a long history as part of the South African industrial relations framework, going back as far as 1944, when the NICISEMI was formed. While the assembly of motor vehicles has historically been excluded from the scope of the MEIBC and its predecessors, the processing of metals has historically formed part of their registered scope. NUMSA makes the point that for decades, the demarcation applicants saw no contradiction between being engaged in the manufacture of automotive components, while being registered with the MEIBC. The current initiative to seek a re-demarcation of the applicants arises only out of dissatisfaction with bargaining processes in the MEIBC. The long-standing acceptance by employers that they fell within the scope of the MEIBC is explained both by the 1962 demarcation, and the fact that when an automotive component is manufactured in a forge or foundry by way of a typical metalworking operation, it should fall within the scope of the MEIBC and gives rise to no anomalies. On the contrary, all metalworkers in these circumstances could consistently be bargained for within a single and coherent framework.

[50] While it may be correct that the processing of metals (excluding the assembly of motor vehicles) has historically been included in the scope of the MEIBC and its predecessors, this is not a sufficient reason in itself to find that the demarcation applicants fall within that scope. The fact that the 1962 determination has regulated the position of the demarcation applicants for almost 60 years is similarly not in itself a basis to sustain a finding that even if the 1962 determination is not binding, its terms should prevail.

[51] In the present instance, Manners' evidence regarding changes to the motor vehicle manufacturing industry and the component manufacturing industry was uncontested. His evidence that component manufacturers found themselves, as products of history, sitting in the MEIBC bargaining alongside employers with whom they shared no common interest, was a matter entirely ignored by the

commissioner. Any demarcation ought properly to take into account the interest of the employer parties, if only because one of the principal purposes of bargaining at sectoral level, as I have indicated, is to minimise competition between employers on the basis of wages and other conditions of employment. For this reason, collective bargaining and collective agreements are excluded from the application of the Competition Act, 89 of 1998. What this necessarily entails in any demarcation is the allocation of like with like. The anti-competitive moment in the demarcation of sectors and the demarcation of businesses into defined sectors is lost when employers such as Manners and the other demarcation applicants, whose businesses manufacture automotive components, are required to bargain with employers who manufacture taps and wheelbarrows.

[52] In regard to the third ground for review, it should be recalled that the commissioner (at paragraph 47 of the award) held:

> I might add here, that the nature of the enterprise is one determined by the process whereby an end product is made. If the process leading up to the end product is one of engineering, it cannot be argued that because the end product is a motor component and together with other motor components not using an engineering process, fall within the motor component value chain, that a company should reside at the [the MIBCO].

[53] What the commissioner's reasoning amounts to is that the activities of an enterprise are not determined by the end product it manufactures, but only by the nature of the enterprise in which employees and the employer are associated for a common purpose, in circumstances where the nature of the enterprise is defined or determined by the process used to manufacture the end product.

[54] NUMSA similarly submits that the end product of a process is not definitive of the essential character of the operation. Rather, it contends that if an operation involves the processing or shaping of metal, then the operations are to be treated as part of the metal industry. If metalworking processes are absent, NUMSA submits that the character of the operations may in principle be something else,

and that the business may potentially fall within the ambit of the motor industry, provided that its operations fall within the definition of that industry. This approach would be consistent with the approach taken historically (as demonstrated by the 1962 demarcation) - it allows for metalworkers to be treated uniformly within a single centralised bargaining structure, it is consistent with the approach taken in prior decisions[13] and it avoids the anomalies associated with employers switching industries when switching production as between automotive and non-automotive products.

[55] What this approach ignores is the definition of scope of the MEIBC and the MIBCO respectively. Excluded from the jurisdiction of the MEIBC is the motor industry, defined in paragraph (j) as '*the business of manufacturing establishments wherein are fabricated motor vehicle parts and/or spares and/or accessories and/or components thereof*'. The definition makes no reference to the form of the manufacturing process – it is confined specifically to outcomes in the form of parts, spares, accessories and components, regardless of the mode of manufacture, engineering or otherwise. For the commissioner to disregard the outcomes of the manufacturing process in favour of a determination based solely on the nature of the process, constituted a disregard for the applicable definition and contributed to an unreasonable result.

[56] A related issue is that of the significance of the value chain of which the demarcation applicants form part. The definition of scope aside, the demarcation applicants contend, as I have mentioned above, that the commissioner committed a gross irregularity and came to an unreasonable conclusion when he rejected the applicant's value chain argument. In essence, that argument is that but for the eighth and twelfth applicants, the percentage of each demarcation applicant's business that relates to the manufacture and supply of automotive components exceeds 90%. In the case of the eighth applicant that figure is 80%, and 86% in respect of the twelfth applicant. It follows, so say the demarcation applicants, that for all intents and purposes the entire business enterprise of each

[13] *CWIU v Smith & Nephew Limited* [1997] 9 BLLR 1240 (CCMA).

applicant is dedicated to the value chain relevant to the motor industry. Further, the automotive components engineered or manufactured must meet automotive industry specific specifications. They are not intended or made for use in other industries. None of the applicants' enterprises have discrete portions dedicated to the manufacturer engineering of nonautomotive components will. Put another way, of the more than 3800 employees engaged by the demarcation applicants, less than 1% are engaged in work activities not related to the production of automotive components. The demarcation applicants contend that to the extent that the commissioner failed to acknowledge these facts and ignored the nature of the end product in making his demarcation, he committed a reviewable irregularity.

[57] There is considerable merit in this argument, for it is one that aligns the business activities of the demarcation applicants with the sector as a whole. The demarcation applicants are an integral link in the chain or value system between the conception and delivery of a motor vehicle. Manners' evidence that the value chain or system is the mode in which production is conceptualised and actualised in the motor assembly industry was not challenged. The existence of a value chain or system locates the demarcation applicants within a set of activities in the motor industry in which they receive raw materials, add value through the manufacturing process and sell the finished product to the customer located in the next highest tier. To ignore this evidence had the result of an unreasonable award.

[58] In summary: the factors disclosed by the evidence indicate that the demarcation applicants fall within the scope of MIBCO's registration, the history of collective bargaining in the motor and metal industries is based principally on a determination that is some 60 years old and no longer binding, and the definition of scope emphasises the outcome of the manufacturing process rather than the nature of that process. All of these factors, cumulatively considered, indicate that the only reasonable outcome of the proceedings under review is a conclusion

that all of the demarcation applicants fall outside of the MEIBC's scope and within the registered scope of the MIBCO.

[59] For the above reasons, the commissioner's decision to place the demarcation applicants within the scope of the MEIBC falls outside of a band of decisions to which a reasonable decision-maker could come on the available evidence. The award accordingly stands to be reviewed and set aside. The essence of NUMSA's cross-review was that the commissioner committed a reviewable irregularity in demarcating six of the component manufacturer into the MIBCO and ought instead to have demarcated them into the MEIBC. This contention is based on the commissioner's process/product finding. For the reasons recorded above, there is no merit in the commissioner's process/product finding. The cross-review stands to be dismissed. Further, the conditional cross- review, to the extent that it relies on the submission that even if the commissioner committed a reviewable defect by relying on the 1962 demarcation his conclusion is nonetheless capable of reasonable justification, for the same reasons, stands to be dismissed.

[60] A court will ordinarily substitute the decision of a commissioner where all of the available evidence is before the court and little purpose would be served in a rehearing. The present case falls into that category, and the award stands to be substituted by an award to the effect that the applicants be demarcated into the MIBCO.

Costs

[61] Section 162 of the LRA affords this court a broad discretion to make orders for costs according to the requirements of the law and fairness. The present case is one where those interests are best satisfied by each party bearing its own costs. It is a matter of some significance to the parties and others active in their respective industries.

Order

I make the following order:

1. That part of the award issued by the second respondent on 31 July 2017 under case number ECPE 2470-15 in which he found that certain of the applicants in the proceedings under review fall within the scope of registration of the sixth respondent, is reviewed and set aside.
2. Paragraphs 59 and 61 of the award are substituted with a ruling that the applicants fall within the scope of the Motor Industry Bargaining Council, and are so demarcated.
3. The cross-review and conditional cross-review are dismissed.
4. There is no order as to costs.

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André van Niekerk

Judge

Representation

For the applicants: Adv. AT Myburgh SC

Instructed by: Van Zyl Attorneys

For MIBCO: Adv. J Partington

Instructed by: Van Zyl Attorneys

For NUMSA: Adv. M Eujen SC, with him Adv. F le Roux

Instructed by: Gray Moodliar