

SOUTH AFRICA / JUDGMENT

**Bargaining Council for the Civil Engineering Industry
v Commission for Conciliation, Mediation and
Arbitration and Others (JA 119/2021) [2022] ZALAC
108; (2022) 43 ILJ 2702 (LAC) (8 September 2022)**
[2022] ZALAC 108

COURT

Labour Appeal Court

BEFORE

Sutherland, Kathree-Setiloane, Tokota

CASE / FILE NUMBER

JA 119/2021

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IN

THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case

no: JA 119/2021

In

the matter between:

BARGAINING
COUNCIL FOR THE CIVIL ENGINEERING
INDUSTRY
Appellant
(2nd
Respondent a quo)
and
THE
COMMISSION FOR CONCILIATION, MEDIATION
AND
ARBITRATION
First Respondent
INTASOL
TAILING (PROPRIETARY) LIMITED
Second Respondent
(Applicant
a quo)
WERNER
PAUL KRUGER N.O
Third Respondent
ASSOCIATION

OF MINEWORKERS AND CONSTRUCTION
UNION
Fourth Respondent
NATIONAL
UNION OF METALWORKERS OF SOUTH
AFRICA
Fifth Respondent
NATIONAL
UNION OF MINEWORKERS
Sixth Respondent
MINERALS
COUNCIL OF SOUTH AFRICA
Seventh Respondent
THE
DIRECTOR GENERAL OF THE DEPARTMENT OF
MINERAL
RESOURCES
Eighth Respondent
SOUTH
AFRICAN FORUM OF CIVIL ENGINEERING
CONTRACTORS
Ninth Respondent

Heard: 16 August 2022
Judgment: 8
September 2022
Coram: Sutherland JA,
Kathree-Setiloane AJA and Tokota AJA

JUDGMENT

SUTHERLAND JA

- [1] This case is about ‘tailings dams’ and ‘tailings storage facilities’ (TSF), perhaps better known to most South Africans as slimes dams and mine dumps. The business of the second respondent, Intasol Tailings (Pty) Ltd (Intasol) involves working with these things. The appellant, the Bargaining Council for the Civil Engineering Industry (the BC) believes that the business of Intasol falls within its jurisdiction. A dispute about that question was referred to a commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of section 62 of the Labour Relations Act^[1] (LRA) to render a demarcation award. The commissioner concluded that Intasol was indeed in the civil engineering industry. When that decision was reviewed in the Labour Court, Van Niekerk J set it aside, and having been asked by the parties not to remit the issue, thereupon declared that the business of Intasol was not within the jurisdiction of the BC. The appeal before this Court, at the instance of the BC, is against the order of Van Niekerk J.

[2] The law on how demarcation disputes are to be decided is well established. The leading authorities below set out the approach.

[3] *Greatex Knitwear (Pty) Ltd v Viljoen and others*[2]:

‘When the tribunal is called upon to determine whether a class of employers is engaged in a particular industry it is faced with a problem similar to that with which the Courts have often been faced, viz. to decide whether a particular employer is one of those other employers, not being parties to an agreement, engaged in a particular industry, upon which the Minister has declared an agreement to be binding (cf. sec. 48 (2) of the 1937 Act; sec. 48 (1) (b) of the 1956 Act). The cases seem to show that the matter is approached along the following lines:

- (a) The meaning of 'industry', as used in the agreement, is determined. This usually requires the interpretation of some definition appearing in the agreement. It seems that a restrictive interpretation is often applied, cutting down the scope of the general words used in the definition. Although not specifically invoked, the mode of interpretation appears to be that applied in *Venter v R.*, 1907 T.S. 915 (cf. *Rex v Scapszak and Others*, 1929 T.P.D. 980; *Rex v Ngcobo*, 1936 NPD 408; *R v Goss*, 1957
- (2) SA 107 (T) at p. 110).
- (b) The activities of the employer (personal and by means of his employees) are determined.
- (c) The activities and the definition (as interpreted) are now compared. If none of the activities fall under the definition, *caedit quaestio*; if some of the activities fall under the definition, a further question arises: are they separate from or ancillary to his other activities? If they are separate he is engaged in the industry (unless these activities are merely casual or insignificant
- *Rex v C. T.C. Bazaars (S.A.) Ltd.*, 1943 CPD 334); if they are ancillary to his other activities, he is not engaged in the industry (unless these ancillary activities are of such magnitude that it can fairly be said that he is engaged in the industry within the meaning of the definition (*A.G. Tvl v Moores (S.A.) (Pty.) Ltd.*, 1957 (1) SA 190 (AD)).

Inherent in this approach is the possibility that an employer may be such in more than one industry (*Rex v Giesker and Giesker*, 1947 (4) SA 561 (AD) at

p. 566), despite the difficulties that may arise from such a situation (cf. *Rex v Auto-Parts (Pty.) Ltd. and Another*, 1948

(3) SA 641 (T) at p. 648).

If the foregoing is a correct reflection of the manner in which the Courts have approached the problem whether an employer is engaged in a particular industry, it is plain that the problem is only resolved by reference *inter alia* to the activities of the employer. Whether one uses the word 'activities' or 'work' seems merely a question of preference of language. As in the case of an individual it cannot be determined whether he is engaged in a particular industry without

reference to his work, so also it cannot be determined in the case of a class of persons whether it is engaged in a particular industry without reference to the work it does. Whether that work is to be called merely 'work' or a class of work seems, again, to depend on linguistic preference or the degree of circumscription.'^[3]

[4] SA Municipal Workers Union v Syntell (Pty) Ltd and others^[4]:

'[21] In the main, arbitrations under the LRA are those which address disputes of right and are adjudicative proceedings proper. In s 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 s 62.

[22] The s 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 s 62 process was commented on by Francis J in Coin Security (Pty) Ltd v CCMA & others (2005) 26 ILJ 849 (LC) at paras 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 added.)

[24] More recently, Van Niekerk J affirmed this perspective in National Bargaining Council for the Road Freight Industry v Marcus NO & others (2011) 32 ILJ 678 (LC) at para 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.”

- [5] National Union of Metalworkers of SA v Commission for Conciliation, Mediation and Arbitration and others[5]:
- [12] The notion that, for the practical purposes of regulating employment conditions in economic activities, by assigning some enterprises to one or other bargaining council, proceeds from the foundational idea that 'grouping' like with more or less alike is a sensible pragmatic approach. Central thereto is the attempt, by the use of words, to describe the supposedly distinguishable economic activities in definitions which are almost always complex, wordy and often hair-splitting. The task aims at describing the characteristics or attributes of industrial activities. Then the characteristics or attributes of a business enterprise are described and the two are compared. Just as it is not objectively possible to determine when night ends and day begins, and a practical answer depends on what you want to pinpoint that moment for, so it is with demarcation of so-called distinct 'industries'.
- [13] Another dimension of the exercise that warrants acknowledgement is that the exercise is as much one of creation as of adjudication. The meaning of words of the defined scope of a bargaining council can indeed be adjudicated, but that is not always enough. The management of the reality that economic activities within the invented sectors, sometimes differently described, often overlap and, cannot therefore, in logic, be truly separated, means that a pragmatic policy decision to locate a given enterprise on one or other side of an imaginary fence is an inescapable aspect of the task of demarcation. It resembles, in some respects, an interest arbitration. What is sought is what may usefully be called the 'best fit' – an idea that defies precision and is axiomatically fact specific.'
- [6] The award of the commissioner was held by Van Niekerk J to be vitiated by irregularities. In our view, this was a correct finding. In the appeal, counsel for the BC was rightly constrained to defend the award, arguing that the critical question ought not to be the fumbling of the commissioner, but whether he produced a reasonable answer to the question.[6] Reasonableness in a demarcation enquiry is of a particular kind because of the 'creative potential' in such disputes

involving the policy choices and balancing aspects of the evaluation. The thoroughness of the enquiry including a proper analysis of the relevant material, can colour the choices made. Where the exercise is ineptly carried out, the outcome is tarnished too.

[7] The irregularities evidenced in the award were held to be:

- (1) A failure to interpret the definition of civil engineering industry properly.
- (2) A failure to ask the proper questions necessary to analyse the facts which illustrate the character of the civil engineering industry and compare that to the business of Intasol.
- (3) A failure to engage with the body of evidence.

[8] In our view, these criticisms were correct and were amply substantiated.

[9] The thesis of the grounds of appeal, as advanced, criticise the

judgment

for straying from the proper review test, for according to the commissioner the appropriate degree of deference in the policy choice made by the commissioner, in whom the primary responsibility to demarcate was vested, and for improperly re-trying the question.

These criticisms of the judgment are misplaced. The last mentioned criticism can be dismissed out of hand because the Labour Court was asked by the parties, should the review be upheld, not to remit the matter for a re-hearing; in such circumstances, the traverse of the body of evidence and the articulation of an analysis (two features distinctly absent from the award) undertaken by Van Niekerk J in the judgment, is precisely what the parties asked the judge to do.

[10] The interpretation of the definition of civil engineering industry is the place to begin the analysis. The relevant portion reads:

‘2.1 The Civil Engineering Industry means the industry in which employers (other than local authorities) and employees that are associated for the purposes of carrying out work of a civil engineering character normally associated with the civil engineering industry and includes such work in connection with any one or more of the following activities:

...

- (b) Excavation and bulk earthworks; bush clearing and de-stumping; topsoil stripping; drilling and blasting; preparation of pension areas, drilling pre-split holes and blast holes blasting and/or cast blasting; secondary blasting; loading; hauling and dumping of mineralised and/or waste material to waste dumps or processing plant feed (ROM Pad) stockpiles; production dosing of topsoil, inter-burden or waste material; pumping and dewatering of storm and/or contaminated water, construction and maintenance of; access and haul roads, ramps; waste and processing plant feed (ROM Pad) areas; safety beams; high wall; benches; storm water systems; catch drains, bund walls, surge dams, trimming, scaling or chain dragging of batters, heap – leach pads, tailing dams, dust suppression of loading areas, haul roads and

dumping areas; rehabilitation of work areas or waste dumps; topsoil spreading, hydro-seeding and watering; ...

(f) ... but excluding;

(iv) The Mining Industry which is defined as an industry where employers and employees are associated for the purpose directly or indirectly, for the winning, extracting, processing and refining of the material

in, on or under the water or from any residue stockpile all residue deposit.” (Underling added)

[11] This text is poorly drafted. Several aspects are severely problematic. The incoherent punctuation in (b) is what immediately mesmerises the reader. Moreover, in a list of ‘activities’, the logical pattern would be a series of verbs. What appears instead is a patchwork of activities and references to things. Plainly, the text has not been properly edited, a fate which, not infrequently, is evidence of a committee being the drafting agent, worn down by the effort to accommodate disparate sensitivities of those at the table. Accordingly, it is necessary to adopt a charitable approach to what the drafter tried to express.

[12] However, the principal headache is with the core circular articulation of what is civil engineering for the purposes of the BC: ‘work of a civil engineering character normally associated with the civil engineering industry’. The core of this mantra is one that was established in the ministerial sectoral determinations prior to the invention of the BC. It then read simply: ‘work of a civil engineering character’. No evidence was adduced of the background facts which might illuminate why such an anodyne formulation was selected. Ultimately the definition falls to be interpreted in accordance with the usual tests as set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[7].

[13] Some evidence of the evolution of the definition, as it at present reads, was adduced from Dr Geldenhuys, an industrial psychologist and sometime administrative official of the SA Forum of Civil Engineering Contractors and the interim general secretary of the BC, at the time of its inception. What she provided in evidence was of little real value, mainly because instead of confining herself to contributing a factual account backed up with substantiation, she endeavoured in

essence, to be an opinion witness on an interpretation of the definition, an issue upon which she was not competent to express a view.

[14] The material evidence she tendered was to explain the genesis of amendments inserted by NEDLAC to cater for the dynamics of open cast mining in which specialist civil engineering contractors were involved and who did not want to fall into the trap of their business being construed to be in the mining industry on a mining site, but the civil engineering industry when on a different kind of site. Two important additions were introduced. One was the mining industry exclusion in sub-clause (iv), but by far the most important one was the phrase: ‘normally associated with the civil engineering industry’ to the ancient mantra,

producing the circular statement.

- [15] In regard to the present controversy, Dr Geldenhuys purported to declare that the inclusion of the phrase ‘tailings dams’ meant that anything to do with such activity was ipso facto civil engineering in nature, a plainly misconceived statement and in any event unsubstantiated by any evidence to that effect other than her say-so.
- [16] What did the commissioner do with the definition to try to reveal what it was that characterised the civil engineering industry? He offered a recitation of the standard approach to demarcations, cited the definition, cited case law on interpretation of statutes, and then in paras [31] – [33] of the award, stated this:
- ‘[31] [Intasol] argued that the scope must be read in the context of the activities of trimming, scaling or chain dragging. The [BC] argued that the word ‘tailings dam’ can be seen as a stand-alone activity. The interpretation of the [BC] is more probable. In the first place Dr [Geldenhuys] testified at these proceedings and she gave an indication of what the intention of the drafters were. She testified about what was presented at NEDLAC and about the outcome. She understood the scope to mean that if a company was engaged in tailings it fell under the scope of the [BC].
- [33] Mr Cooper testified that the placing of tailings is an on-going construction process. The tailings dam is constructed and maintained through the deposition of tailings. As the operator placed the tailings the structure would grow, it became bigger and that is work of a civil engineering nature...’
- [17] Whatever this passage encapsulates, it does not engage with the text of the definition. The slavish capitulation to the evidence of Dr Geldenhuys is plainly wrong in principle but also is an incorrect grasp of the import of her evidence, and, no less, of its dubious value, which could never be dispositive of the meaning of the definition. Attributing meaning to the definition and resolving the rival interpretations of the text was the commissioner’s job. He did not do it. This failure demonstrated a lack of appreciation for the genuine difficulties which afflict the definition.
- [18] By contrast, Van Niekerk J dealt with this issue thus[8]:

‘[32] What the arbitrator's award does, as I have indicated, is simply to prefer, without giving reasons, the evidence of Cooper (thus rejecting the evidence by Gotz and Brink) and conclude that the applicant is engaged in what he found to be an 'ongoing construction process' and secondly, that the applicant is not engaged in 'actual mining'. Based on these conclusions, the arbitrator regarded the applicant's business as one that falls within the registered scope of the bargaining council.

- [33] The award discloses no meaningful attempt to define the applicant's activities. While it is correct that the definition of 'civil engineering industry' contains an exclusion of the mining industry as defined, the first enquiry that the arbitrator was obliged to conduct was whether the applicant's activities are such that the applicant and its employees can be said to be 'associated for the purposes of carrying out work of a civil engineering character normally

associated with the civil engineering sector.' The definition is poorly drafted, but what follows the preamble are six subparagraphs, being descriptions of 'such work' (ie work of a civil engineering character normally associated with the civil engineering sector). In other words, what subparagraphs (a) to (f) describe is work that is 'normally associated' with the civil engineering sector in connection with the activity described. In other words, the threshold is not engagement in the activity described in subparagraphs

(a) to

(f) - for work to fall into the civil engineering industry, it must be work of a civil engineering character normally associated with the sector. This formulation leaves it open to an employer (such as the applicant) to contend (as the applicant does) that it is associated with its employees for a purpose other than carrying out activities or work normally associated with the civil engineering sector. The arbitrator failed to appreciate this nuance and in doing so, asked the wrong question. He assumed that the reference to 'tailings dams' in paragraph (b) and the applicant's engagement with tailings dams to be definitive of the applicant's engagement in the civil engineering industry. Put another way, his assumption was that any work connected with tailings dams is work of a civil engineering character, normally associated with the sector. This led the arbitrator to ignore the real issue that he was required to determine, ie the purpose for which the applicant and its employees are associated. The arbitrator's failure to deal with this issue constitutes a reviewable irregularity.' (underlined emphasis added)

[19] In our view, the construction placed on the definition by Van Niekerk J is manifestly correct and the criticism of the commissioner's treatment is entirely appropriate. Upon that premise, the conclusions reached by the commissioner are based on a wrong understanding of the issues. Plainly, the award could not stand.

[20] What exactly does Intasol do in its business? The evidence of Mr Gotz, its CEO was un rebutted; the only dimension of challenge was in the characterisation of what he testified Intasol undertook to conduct its business. The extensive account in the Judgment of Van Niekerk J does not require repetition in this judgment. What we address here are the critical points of controversy which distinguish Intasol's business from 'work of a civil engineering character normally associated with the civil engineering industry'.

[21] Intasol describes itself as an operator. It performs two functions and consults about these functions too. The first function is to 'operate' tailings dams. The second is what it calls 'hydro-mining' and is the major dimension of the business. Intasol's role is one phase in the chain of activities which involves the mining of gold-bearing ore, extraction of the gold and dealing with the residue.

[22] 'Operating' a tailings dam is the first stage of a perpetual dynamic process in which ultimately, a tailings dam becomes a TSF. What Intasol does in this regard (after the ore has been extracted from underground, been pulverised in the reduction works and then chemically processed to leach out the gold) is to receive the residual crushed ore in a slurry

form, which is pumped into the earthen tailings dam which has already been built by a civil engineering business. The primary objective of Intasol during this phase is to extract the water used to mix the slurry and to deposit the damp ore residue to dry out on the perimeter of the dam. As the residue is dumped a mine dump or TSF rises over several years. Eventually, no tailings are dumped there and the TSF is now a mature mine dump.

- [23] The second function of Intasol is to destroy the TSF or mine dump by a process using high-pressure water cannons which, in a complex process, the ore is mixed once again into a slurry which is pumped to the metallurgical works to again extract gold. This phase is not a simple grunt operation of hosing down the material and moving it.[9] Rather, it is a sophisticated mining operation identifying grades of gold bearing-ore in the TSF and strategically removing unwanted

segments, and adding lime before pumping the mix to the metallurgical plant. This operation requires a mining plan to be approved. The Department of Minerals Resources oversees these happenings. This process cannot cogently be described as a 'haulage and dump' process, typically carried out by a civil engineering business.

- [24] The use of the word 'operate' is important to distinguish its role from the initial construction of the tailings dam, a task, as alluded to, carried out by another business, which it is common cause is indeed a civil engineering enterprise. The fact that Intasol comes onto the site of a tailings dam only once the thing has been constructed is significant. This distinction was not properly appreciated by the commissioner. Further, he failed to appreciate the scale and distinctiveness of the hydro-mining dimension of Intasol's business, still less to appreciate that the business of Intasol had to be assessed as a whole. Instead, he slavishly accepted the glib characterisation by Dr Geldenhuys and by Mr Cooper, an engineer, of the tailings dam operations as an ongoing 'construction' of a geo-technical structure, ergo, of a civil engineering nature. Similarly, he thought that the hydro-mining work was mere haulage and removal of material. On this vacuous premise, toddlers building sand castles on the beach could be accused of engaging in the civil engineering industry.

- [25] What the commissioner lost sight of altogether, was to ask how the business of Intasol could be thought of as an example of a business that is 'of a civil engineering character normally associated with the civil engineering industry'. He ignored the need to do so in the face of the evidence of Mr Brink, an engineer, that the business described was sui generis and is a facet of mining rather than of civil engineering, which evidence he ignored and offered no explanation to justify doing so. Mr Cooper's evidence was an opinion which did not rebut the factual evidence of Mr Brink that these activities were not undertaken by civil engineering businesses. There was no rational premise upon which to prefer Mr Cooper's opinion over Mr Brink's evidence of practice in the civil engineering industry.

- [26] The contemporary collective bargaining practises of Intasol should have been an important facet to weigh. The business was unionised, and plant-level bargaining was carried on. Such collective bargaining practices are typical in the mining industry, but not in the civil

engineering industry. Moreover, the trade rivals of Intasol are the Mining companies themselves, who either undertake the work that Intasol does or outsources it to businesses like Intasol. Instead, a tangential thesis about the remuneration method was thought to indicate that Intasol belonged in the civil engineering Industry because it was paid a fee for a service and did not assume risk in respect of the yield of gold from the ore. This factor is not indicative of the conclusion sought to be drawn.[10]

Conclusion

[27] Van Niekerk J held thus:

‘[43] In summary: the main activities or business of the applicant is the operation of a tailings dam facility, hydro-mining and the provision of consultancy services in respect of both. Those activities are not work of a civil engineering character normally associated with the civil engineering sector. Although subparagraph (b) of the definition contained in the main agreement makes reference to ‘tailings dams’, the activities in respect of tailings dams that fall within the civil engineering sector are limited to those normally associated with that sector, i.e. the design and construction of tailings storage facilities.’

[28] We agree. The order of Van Niekerk appropriately recognises that to place Intasol in the civil engineering sector would not be to locate ‘like with more or less like’ and that it could not be construed to be the ‘best fit’.

Costs

[29] Among the issues addressed in the heads of argument of the appellant, but not ventilated in the hearing, was the contention that Van Niekerk J was in error to have awarded costs. In this, heavy reliance was placed on the decision in *Zungu v Premier of the Province of KwaZulu-Natal and others*[11] (*Zungu*). The law as declared in that decision is, in short, that in a Labour Law case, more than mere victory warrants a costs order. This derives, at source, from section 162(1) of the LRA which provides that: “[t]he Labour Court may make an order for the payment of costs, according to the requirements of law and fairness”.

[30] This does not mean that the victor cannot ever get a costs order. What it does mean is that if it is fair that the victor gets a costs order then it is appropriate to make such an order. In *Zungu*, the earlier decision of Zondo JP (as he was then) in *Member of the Executive Council for Finance, KwaZulu-Natal & another v Dorkin NO and another*[12] (*Dorkin*) is cited, which expressed the policy position that to avoid inappropriate discouragement of litigation in which it is proper to

engage, where a costs order might have a chilling effect, such an order ought not to be granted. There is no circumscribed set of circumstances which dictate the outcomes; each case must be dealt with on its own facts. The submission on behalf of the appellant that there is a rule that a costs order shall not be granted is incorrect.

[31] Van Niekerk J was terse in the costs order, referring merely to the absence of the usual factors which would suggest a different costs order was appropriate. What is offered on appeal to suggest that those factors are indeed present? The rationale advanced is that the BC was bona fide and reasonable in opposing the review. However, by contrast, it is argued on behalf of Intasol that the BC in the review proceedings compelled Intasol to seek an order staying the award pending the outcome of the review and that the entire case was characterised by an adversarial tone. This is conduct which, among lawyers, is frequently labelled as hardball. It has consequences.

[32] More significantly, however, in our view, a relevant factor to weigh is whether there were plausible prospects of success in the review. The poverty of the award was recognised in the debate with counsel in this Court. The BC's advisers could not have been any the less alive to the vulnerability when the review papers were filed. True enough, a litigant may not be condemned for seeking to defend what it has won; but then, only when it can offer plausible resistance. A

mature reading of this award could not have instilled confidence in the BC. Although it is not illegitimate to have sought to defend it anyway, it is unconvincing to call foul when the price of a valiant rear-guard defence is an adverse costs order.

[33] No proper grounds exist to interfere with the costs order a quo. Similarly, in this Court, the challenge to the judgment a quo was without merit. An important factor is the effect of the scale of the costs on the successful party who has had to bear substantial

costs to establish nothing more than to be left alone. In this case, there were the costs of an 11-day hearing before the commissioner,

and two court hearings; an expensive exercise to achieve nothing more than to stand still.

[34] In line with the policy norms articulated by Zondo JP in *Dorkin*, a balance must be struck between institutional litigants with substantial resources for whom litigation is an occupational hazard

and businesses or individuals for whom litigation is a major distraction and an erosion of the bottom line. This case is an example of a BC seeking to expand its empire in order to broaden its tax base. It has from inception been a commercially oriented venture.

In our view, cost orders are appropriate.

[35] In the result, the following order is made:

Order

1. The appeal is dismissed with costs.

Sutherland JA

Kathree-Setiloane AJA and Tokota AJA concur.

APPEARANCES:

FOR THE APPELLANT: A Redding SC, with him, P Maharaj-Pillay

Instructed by H Pienaar of Cliffe Dekker Hofmeyr

FOR THE RESPONDENT: A Snider SC

Instructed by F Leppan of Cliffe Dekker Hofmeyr

[1] Act 61 of 1995, as amended.

[2] 1960

(3) SA 338 (T) at 344G -345F.

[3] A curious aspect of this venerable authority is that it appears from the dissenting judgment in the case. It has been approved over and over and applied uniformly.

[4] (2014) 35 ILJ 3059 (LAC) at paras [21] - [24].

[5] (2020) 41 ILJ 1629 (LAC) at paras [12] - [13].

[6] See: SBV Services (Pty) Ltd v National Bargaining Council for the Road Freight and Logistics Industry and others (2016) 37 ILJ 708 (LC) at paras [29] – [31] per Steenkamp J: '[29] In National Bargaining Council for the Road Freight Industry v Marcus NO & others it was held that due deference ought to be paid to a commissioner making a demarcation award. In demarcation disputes there will be, more often than not, no single correct judgment and a wide range of approaches and outcomes is inevitable. A reviewing court should therefore interfere only in cases where the boundary of reasonableness is crossed. This approach was followed

in Dewdev, National Textile Bargaining Council v De Kock and Henred Fruehauf. That approach was confirmed by the LAC in National Bargaining Council for the Road Freight Industry v Marcus NO & others. [30] The LAC in that case also noted that, under the LRA, demarcations need to be seen in the context of the system of bargaining councils aimed at achieving the primary objects of the Act, including the promotion of orderly collective bargaining and collective

bargaining at a sectoral level: 'These statutory imperatives require the demarcating tribunal to enquire, beyond mechanistic

comparison of jobs, into the relevant collective bargaining practices and structures.' [31] It will be clear from these findings of the LAC that the reasonableness test for review will be particularly difficult to meet in the case of a demarcation award. In this case, as will appear from discussion below, the applicant has not been able to show that the conclusion of the commissioner was so unreasonable that no reasonable decision maker could have come to the same conclusion.'

[6] See: SBV Services (Pty) Ltd v National Bargaining Council for the Road Freight and Logistics Industry and others (2016) 37 ILJ 708 (LC) at paras [29] – [31] per Steenkamp J:

[29] In *National Bargaining Council for the Road Freight Industry v Marcus NO & others* it was held that due deference ought to be paid to a commissioner making a demarcation award. In demarcation disputes there will be, more often than not, no single correct judgment and a wide range of approaches and outcomes is inevitable. A reviewing court should therefore interfere only in cases where the boundary of reasonableness is crossed. This approach was followed

in *Dewdev, National Textile Bargaining Council v De Kock and Henred Fruehauf*. That approach was confirmed by the LAC in *National Bargaining Council for the Road Freight Industry v Marcus NO & others*.

[30] The LAC in that case also noted that, under the LRA, demarcations need to be seen in the context of the system of bargaining councils aimed at achieving the primary objects of the Act, including the promotion of orderly collective bargaining and collective

bargaining at a sectoral level: 'These statutory imperatives require the demarcating tribunal to enquire, beyond mechanistic

comparison of jobs, into the relevant collective bargaining practices and structures.'

[31] It will be clear from these findings of the LAC that the reasonableness test for review will be particularly difficult to meet in the case of a demarcation award. In this case, as will appear from discussion below, the applicant has not been able to show that the conclusion of the commissioner was so unreasonable that no reasonable decision maker could have come to the same conclusion.'

[7] 2012

(4) SA 593 (SCA) at para [18].

[8] *Intasol Tailings (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and others* (2021) 42 ILJ 2204 (LC) at paras [32] – [33].

[9] An argument was advanced that the decision in *National Union of Metalworkers of SA v Commission for Conciliation, Mediation and Arbitration and Others* (2021) 42 ILJ 2276 (LC) was on all fours with this case. In that matter Van Niekerk J held that the company was in the civil engineering

industry based on the fact that it hauled and dumped waste material. However, that fact was common cause, whereas here that characterisation is inapposite.

[10] A similar argument in a dispute over whether a sub-contractor to a mine could not be in the mining industry because it earned a fee rather than derived a profit from the gold yield failed in a tax case: *Benhaus Mining (Pty) Ltd v Commissioner, South African Revenue Service* 2020

(3) SA 325 (SCA).

[11] (2018) 39 ILJ 523 (CC).

[12] (2008) 29 ILJ 1707 (LAC).

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