

SOUTH AFRICA / JUDGMENT

National Union of Metalworkers v Commission For Conciliation (PR06/22) [2024] ZALCPE 23; [2024] 9 BLLR 991 (LC); (2024) 45 ILJ 2608 (LC) (10 June 2024)

[2024] ZALCPE 23

COURT

Labour Court Port Elizabeth

BEFORE

MZN Lallie

CASE / FILE NUMBER

PR06/22

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IN

THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Reportable

CASE

NO: PR06/22

In

the matter between:

NATIONAL
UNION OF METALWORKERS OF
SOUTH
AFRICA
Applicant
And
COMMISSION
FOR CONCILIATION
MEDIATION
AND ARBITRATION
First Respondent
FEIZEL
FATAAR
N.O
Second Respondent
SOUTH
AFRICAN TRANSPORT WORKERS UNION
Third Respondent
DHL
SUPPLY CHAIN (PTY) LTD

Fourth Respondent
NATIONAL
BARGAINING COUNCIL FOR THE
ROAD
FREIGHT AND LOGISTICS INDUSTRY
Fifth Respondent

Heard: 16 April 2024

Delivered: This judgment was handed down electronically by circulation to the Applicant's and Third Respondents' Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 14h00 on 10 June 2024.

JUDGMENT

LALLIE, J

- [1] The applicant launched this application seeking an order reviewing and setting aside an arbitration award of the second respondent (the commissioner). In the award the commissioner found that all the business operations performed by the fourth respondent at VW's Uitenhage plant (VW) fall within the registered scope of the fifth respondent. The application is opposed by the third, fourth and fifth respondents who will collectively be referred to as the respondents.
- [2] The applicant delayed by 10 days in bringing this application and filed a condonation application which is opposed by the fourth respondent. I have considered the condonation application. The delay is not excessive. It was occasioned by an error on the part of the applicant's attorneys. The applicant established prospects of success on review and the respondents were not prejudiced by the delay. Although the explanation for the delay is not convincing, all the other factors weighed in favour of the applicant. In the circumstances, I am satisfied that the applicant has shown good cause to have the delay condoned.
- [3] The facts relevant to this dispute are that logistics services to VW were rendered by Schenellecke South Africa Logistics (Pty) Ltd (SSA). With effect from 2 April 2019, the business of SSA at VW was transferred as a going concern as envisaged in section 197 of the Labour Relations Act[1] to the fourth respondent. The material facts regarding the fourth respondent's operations at VW are common cause. They are that the fourth respondent performs both external and internal logistics in terms of 2 service level agreements that were awarded in 2019. External logistics involve transportation of motor vehicles components from local suppliers to VW. The components are delivered by motor transport. Internal logistics entail moving the delivered components from the loadings bays from trucks by forklifts. The components are then stored and transported from the storage area

within the warehouse to the line supply on fully-fledged trucks, tow motors or on trolleys towed by special vehicles.

[4] At VW the fourth respondent employs 177 drivers and 392 material handlers for sorting and sequencing the components. After the components have been delivered at VW the fourth respondent returns packaging from the warehouse to suppliers, an exercise that involves internal and external operations. The fourth respondent's revenue for external logistics i.e., motor vehicle transport to VW for the period April to September 2019 was about 10,8% of its internal logistics operations. The service level agreement the SSA had with VW was terminated as a result of the transfer. On 18 April 2019, the third respondent acting in terms of section 62 of the LRA, referred a demarcation dispute to the CCMA. It sought an award declaring that the fourth respondent's operations at VW fall within the registered scope of the fifth respondent. The third respondent's claim was supported by the fourth and fifth respondent but opposed by the applicant. The demarcation dispute was arbitrated by the commissioner who, in an arbitration award dated 19 November 2021, found that all the fourth respondent's business operations at VW fall within the registered scope of the fifth respondent. In this application the applicant seeks to have the arbitration award reviewed and set aside.

[5] The applicant's main grounds for review are that the commissioner committed gross irregularities, alternatively,

misconduct and reached an unreasonable decision. The applicant also relied on an error of law the commissioner allegedly made in

interpreting the definition of the main agreement relevant to the demarcation dispute. It was submitted that the commissioner failed to properly apply his mind to the totality of the evidence. He disregarded and misconstrued evidence and reached an unreasonable decision.

[6] The dispute before the commissioner was whether the business operations performed by the fourth respondent at VW fall within the registered scope of the fifth respondent. In resolving the dispute, the commissioner considered the fifth respondent's scope of registration as it appears in its certificate of registration. The definition reads:

"Road Freight and Logistics Industry or "industry" means the industry in which employers and their employees are associated for carrying on one or more of the following activities for hire or reward:

(i) The transportation of goods by means of motor transport;

(ii) The storage of goods, including the receiving, opening, unpacking, packing, dispatching and clearing of, or accounting for of goods where these activities are ancillary or incidental to paragraph (i) hereof; and

(iii) The hiring out by temporary employment services of employees for activities or operations which ordinarily or naturally fall within the transportation or storage of goods as contemplated by paragraphs (i) and (ii) of this definition.”

- [7] The commissioner noted that only one of the two service level agreements the fourth respondent has with VW was in contention. He observed that all the parties agreed that the contentious services level agreement (SLA) dealt with logistics/warehousing. The point of disagreement between the applicant on one side and the respondents on the other was where the activities were ancillary or incidental to paragraph (i) of the scope of the fifth respondent as envisaged in its certificate of registration. The applicant’s approach was that the correct interpretation was that logistical business activities will only fall within the scope of the fifth respondent if they are ancillary to transportation of goods where the latter is the primary activity.
- [8] The respondents’ version was that the words used in the registration certificate should be given their ordinary meaning bearing in mind that collective agreements are sui generis and that demarcation disputes are a special class. They submitted that a purposive interpretation supported their contention that the fourth respondent’s logistics activities at VW constituted one of the activities referred to in paragraph (ii) of the fifth respondent’s certificate of registration.
- [9] The commissioner’s main reason for rejecting the applicant’s version was that its argument that storage of goods is ancillary or incidental to transportation of goods which must be the primary function in order to qualify for demarcation under the fifth respondent meant that both operations were necessary for qualification. He found the interpretation inconsistent with the specific wording of the fifth respondent’s certificate of registration which provides for one or more of the activities of transportation of goods and storage of goods. The commissioner concluded that the respondents’ interpretation that the fourth respondent’s business operations at VW fall within the registered scope of the fifth respondent was correct as it promoted collective bargaining.
- [10] The test for review of demarcation awards is expressed as follows in *Coin Security (Pty) Ltd v CCMA & Others*[2]:

“[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.”

- [11] It was argued on behalf of the applicant that the commissioner's interpretation of the fifth respondent's scope of registration that either the transportation of goods or warehousing function alone is sufficient for the operations to fall within the registered scope of the fifth respondent is wrong. It is at variance with the clear language of the definition as a whole, constitutes fragmented reading of clause (ii) of the fifth respondent's certificate of registration and leads to an absurd result which created inconsistency throughout the industry.
- [12] The essence of the applicant's attack on the commissioner's interpretation of the registered scope of the fifth respondent is that it does not accord with the clear wording of the certificate and ignores the express requirement for activities listed as comprising the "storage of goods" that they be ancillary or incidental to paragraph (i) thereof namely, the transportation of goods. It was further argued that the introductory phrase "one or more" of the activities listed in paragraphs (i) to (ii) of the certificate explains that the transportation of goods alone falls within the registered scope. The applicant adds that it is not clear why that applies to the storage of goods since clause (ii) of the certificate expressly requires the function to be ancillary to the transportation of goods. The phrase "one or more" does not assist, so it was argued, with the detachment of the storage of goods from the requirement. The applicant argued that the commissioner's approach of attaching the transportation requirement to the listed storage activities but not storage alone is arbitrary and absurd. The applicant expressed the view that the fourth respondent's operation at VW is manifestly "storage alone". It submitted that the commissioner failed to ascertain the work performed by the fourth respondent at VW and consequently misconceived his function fundamentally. It was argued that the commissioner's fragmented interpretation of the fifth respondent's scope of registration is not justified by the reasons he provided. It is arbitrary, incorrect and leads to unreasonable result.
- [13] The fourth and fifth respondent argued that the commissioner's approach of starting by giving the words used in the certificate of registration their literal meaning is correct. The fundamental difference between the applicant's and fourth and fifth respondent's versions is that the applicant submitted that the commissioner should have interpreted the "one or more" conjunctively while the fourth and fifth respondents argued that the commissioner correctly interpreted it disjunctively. The parties accepted the commissioner's approach of commencing the enquiry into the demarcation dispute by interpreting the fifth respondent's certificate of registration.
- [14] It is trite that the purpose of interpretation is to establish the intention of the parties to the document being interpreted. The legal position relating to interpretation of documents is expressed as follows in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3]:
- "[18] ...Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document,*

consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”

- [15] Based on the above authority and the absence of the possibility of more than one meaning of the text that was interpreted, I accept the respondents’ submissions that the commissioner interpreted the certificate of registration correctly. The commissioner gave the words used in the certificate of registration their ordinary meaning. The definition expressly refers to employers and their employees who carry on “one or more” of the activities listed in paragraph (i) and (ii) of the certificate. The phrase “one or more” has a disjunctive connotation. The storage of goods is an activity that appears in paragraph (ii) of the definition. The applicant gave no cogent reason for alleging that the interpretation is wrong. The commissioner correctly found that in order to fall under the fifth respondent employers and employees must carry on one or more of the following activities: transportation of goods, storage of goods or a combination of both.
- [16] The parties are in agreement that the phrase “where these activities are ancillary or incidental to paragraph (i)” was intended to extend the range of activities listed in the definition.
- [17] In addition to giving the words used in the registration certificate their ordinary meaning, the commissioner considered the purpose of the definition. He took into account the respondents’ unchallenged submissions that in 2010 the fifth respondent changed its name from National Bargaining Council for the Road Freight Industry to National Bargaining Council for the Road Freight and Logistics Industry. He added that the term “ancillary or incidental to” in paragraph (ii) of the certificate was added to distinguish if from ordinary warehousing where no transport is involved. By considering the change of the fifth respondent’s

name, the commissioner was dealing with the context and purpose of the text he was interpreting. I accept the fourth respondent’s

argument that in reaching his decision on the interpretation of the requirements for falling under the fifth respondent the commissioner

adopted both a literal and purposive interpretation. His decision that the correct interpretation of the impugned provision meant,

inter alia, that the fourth respondent could be engaged in transportation of goods solely, storage/warehousing solely or a combination of both cannot be faulted.

- [18] The approach followed in *Coin Security* (supra) is correct. It acknowledges that there is often no one absolute correct judgment on demarcation matters. It encourages a wide range of approaches and outcomes that would be in accordance with the behest of the LRA. It further warns the review court against usurping the function of the CCMA in exercising its powers in terms of section 62 of the LRA and recommends deference to the role and function of the CCMA. To pass muster, a demarcation award must be reasonable. In determining the reasonableness of the award it must be ascertained whether the commissioner followed the correct method in establishing whether the fourth respondent and its employees at VW are engaged in the road freight and logistics industry. The enquiry the commissioner was required to undertake entails defining the meaning of the industry as envisaged in the certificate of registration and the activities of the fourth respondent through its employees. The commissioner had then to compare the fourth respondent's activities and the definition. If the activities fall within the definition, a further enquiry must be conducted to determine whether they are separate or ancillary to the fourth respondent's other activities. If they are separate, the fourth respondent is engaged in the fifth respondent's industry[4].
- [19] Reviews of demarcation awards are brought in terms of section 145 of the LRA. In determining whether the applicant has made out a case I have considered the grounds it relied on. The applicant submitted that the commissioner misconstrued the dispute before him. The respondents proved it wrong because they demonstrated that the commissioner conducted the correct enquiry. He also conducted it correctly. He dealt with the dispute before him and relied on relevant authorities. I have taken into account the applicant's argument that the commissioner erred in accepting irrelevant similar fact evidence. The applicant, however, failed to prove that the error had a distorting effect which resulted in the commissioner reaching an unreasonable decision[5].
- [20] The reasonableness of an award is determined in the totality of the evidence that was properly placed before the commissioner. The commissioner accepted the unchallenged evidence on behalf of the fourth respondent that the movement of components to and from suppliers to the supply lines is a seamless operation. He concluded that the warehouse/storage supports the transport business at VW which is convenient to both logistical functions. The respondents argued, correctly, that the evidence led on behalf of the applicant did not refute their version. The applicant's argument that the commissioner disregarded relevant evidence is not supported by the record. The applicant's evidence was that the reason for its aversion to falling under the fifth respondent was that it enjoyed a good relationship with the fourth respondent and that the plant level bargaining system they have worked for the applicant. The witness added that should the applicant be party to the fifth respondent its voice may be drowned by the voices of other trade unions.
- [21] The commissioner took into account the provisions of section (1)(d) of the LRA which includes the promotion of orderly collective bargaining and collective bargaining at sectoral level. The applicant's witness testified that the bulk of the work at VW is done by logisticians and that logistics was the bigger activity. His evidence supported the respondent's version

and the basis of the commissioner's decision. The commissioner's decision is based on evidence that was properly placed before him. He considered facts and the law in reaching it. The decision is not absurd as the applicant alleged. It falls within the bounds of reasonableness. There are therefore no grounds for interfering within.

[22] In the premises, the following is made:

1. The application for condonation of the late filing of the application for review is granted.
2. The application for review is dismissed.
3. There is no order as to costs.

MZN Lallie

Judge of the Labour Court of South Africa

[1] Act 66 of 1995 (the LRA) as amended.

[2] [2005] 7 BLLR 672 (LC) at para 63.

[3] 2012

(4) SA 593 at page 603 F- 604 B.

[4] National Bargaining Council for the Road Freight Industry v Marcus No and Others (2013) 34 ILJ 458 (LAC).

[5] Mofokeng

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