REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case number: D230/13

In the matter between:

SERVWORX (PROPRIETARY) LIMITED **Appellant**

and

REGISTRAR OF LABOUR RELATIONS **First Respondent**

BARGAINING COUNCIL FOR THE LAUNDRY, CLEANING,

DYEING INDUSTRY (NATAL) **Second Respondent**

Heard: 27 February 2014

Delivered: 16 April 2014

Summary: Appeal - An appeal contemplated in Section 111 (3) of the Act is an appeal in the wide sense, in that it is a complete rehearing and adjudication of the merits with or without additional evidence or information - no objection was lodged to the notice published by the first respondent in terms of Section 29 (3) of the Act, and accordingly the first respondent was not obliged to comply with the procedure prescribed by Section 29 in determining the application for variation – appeal dismissed.

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CELE J

Introduction

[1] The matter is of appeal in terms of Section 111 of the Labour Relations Act,[1] ("the Act"), in which the appellant seeks an order setting aside the first respondent's extension of both the scope and jurisdiction of the second respondent. The first respondent concluded that the second respondent was sufficiently representative both in the sector and in the province of KwaZulu-Natal to justify an extension of its scope, as contemplated in Section 58 (1) of the Act. The first respondent has opposed the appeal, but the second respondent has not.

Factual Background

[2] The appellant is a private company with limited liability, with its principal place of business at 21 Barnsley Road, Pietermaritzburg, which operates in the laundry, dry cleaning and garment rental industry, and which provides a commercial garment rental and laundry service. The first respondent is the Registrar of Labour Relations, the Registrar, in Pretoria. The Registrar is appointed in terms of section 108 of the Act, and exercises powers and performs functions in terms of *inter alia* sections 29, 58 and 111 of the Act. The second respondent is the Bargaining Council for the Laundry, Cleaning and Dyeing Industry, Natal, (the "Council"), in Durban.

[3] The Council was registered as a bargaining council, in terms of section 29 of the Act, with effect from 11 November 1996, under reference number LR 2/6/6/45. The registered scope of the Council at that time was in relation to the:

> 'Laundry, Cleaning and Dyeing Industry" (as defined) "in the Magisterial Districts of Durban, Pinetown and Inanda, excluding the areas falling outside a 15 miles radius from the General Post Office, Durban". The term "Laundry, Cleaning and Dyeing Industry" was, in turn, defined as meaning "the industry carried on in establishments where articles are laundered, cleaned or dyed to

[1] Number 66 of 1995.

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the order of customers and shall include depots and/or vehicles where such articles are received in order to be laundered, cleaned or dyed to the order of customers'.

[4] As to the representativity of the second respondent prior to the variation application, on 2 April 2012, the first respondent certified that there were 916 employees employed within the scope of the collective agreement applicable to the second respondent. Of these, 478 employees were members of the trade union party and 722 employees were employed by members of the employers' organisation. The second respondent operated only within the Magisterial Districts of Durban, Chatsworth, Pinetown and Inanda, to the exclusion of areas falling outside a radius of fifteen miles of the General Post Office at Durban. It might be that the employer's party represented 65 employers prior to the variation being granted.

[5] In September 2012, the Council, and apparently unbeknown to the appellant, applied to vary its registered scope in terms of section 58(1) of the Act. That application was published in Government Notice 755 of 2012, in Government Gazette No. 35690 of 21 September 2012, "the application notice", in terms of section 58(2), read with section 29(3), of the Act. The appellant contended that it was unaware of the Council's application, as well as the publication thereof in the Government Gazette. The appellant's attorneys were however able to locate a copy of the application notice. As is apparent from the application notice:

1. the Council's application was lodged on 3 September 2012;

2. the registered scope of the Council at the time of the application was as set out in the aforementioned certificate of registration, both as regards the relevant sector and the area;

3. in terms of the application, the Council sought to expand the area in respect of which it was registered to cover "the Province of Kwa-Zulu Natal";

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4. in terms of the application, the Council also sought to expand the sector to which it related, by having the definition of "Laundry, Cleaning and Dyeing Industry" amended to mean "the industry carried on in establishments, Laundromats/laundrette, in-house laundries within commercial sites where articles are laundered, cleaned or dyed to the order of customers, and shall include depots and/or vehicles where such articles are received in order to be laundered, cleaned or dyed to the customers", with the term "Laundromats/Laundrette", in turn, being defined as "an establishment engaged in the washing, drying and ironing of primary domestic laundry, through con/token operated automatic machines, using no steam from fuel fired boilers, and available for public use", and the term "In-house laundries" being defined as meaning "laundries that are based within commercial sites that do commercial work for those establishments where articles are laundered, cleaned or dyed";

5. the intention of the application was thus "to extend the scope [of the Council] to cover the whole Provincial area of KwaZulu-Natal and to cover in-house laundries that are doing commercial work that are based within commercial sites i.e. hotels, hospitals and Bed and Breakfast establishments";

6. the Council submitted, with regard to its representativeness, that:

   the total number of employees falling within the new scope of the Council who belong to the trade unions which are party to the Council is 1400;

   the total number of employers falling within the new scope of the Council who belong to the employers' organisations which are party to the Council is 65;

   the total number of the employers within the new scope of the Council is 215;

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the total number of employees employed within the new scope of the Council by the employers who belong to the employers' organisation which is a party to the Council is 2,100;and

the total number of the employees employed within the new scope of the Council is 3,500.

[6] The Registrar approved the application. The Registrar's decision to vary the scope of the Council, made in terms of section 58 of the Act, was published in Government Notice 1024 of 2012, in Government Gazette No. 35957, on 14 December 2012, "the decision notice", in terms of section 109(2) of the Act. The decision notice indicated that the Council was registered within the expanded area and within the broader sector specified in the application with effect from 3 December 2012.

[7] The Registrar subsequently gave reasons for his decision in a letter addressed to the Appellant's attorneys, dated 22 January 2013. In essence, the reasons provided by the Registrar indicated that:

1. the purpose of the Council's application was "to extend the registered scope of the Council to cover the whole Provincial area of Kwa-Zulu Natal and to cover in-house laundries that are doing commercial work that are based within commercial sites i.e. hotels, hospitals and Bed & Breakfast establishments";

2. no objections were apparently received in response to the publication in the Government Gazette of the Application Notice;

3. the Registrar accordingly proceeded to determine whether: the application complied with the provisions of the Act; the parties to the Council are sufficiently representative in the sector and the area; and there is any other council registered for the sector and the area in respect of which the application is made;

4. the Registrar, "upon considering all the information at his disposal", was satisfied that: (i) the application complied with the provisions of the Act;

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(ii) there was no other council registered for the sector and area in respect of which the Council applied; and (iii) the parties to the Council were sufficiently representative in the sector and area of which the application was made;

5. when making a determination that the Council was sufficiently representative in the sector and area of which the application was made, the Registrar took into account the fact that section 49(1) provides that

> 'when considering the representativeness of the parties to a council or parties seeking the registration of a council, the registrar, having regard to the nature of the sector and the situation of the area in respect of which registration is sought, may regard the parties to a council as representative in respect of the whole area, even if a trade union or employers' organisation that is a party to the council has no members in part of the area'.

[8] The Collective Agreement concluded in the Council was, in terms of section 32(2) of the Act, extended to, and made binding upon, the other employers and employees in the "Industry", as defined in the Collective Agreement, from 12 November 2012, pursuant to a decision by the Minister of Labour, which was published in Government Notice R 882, in Government Gazette No. 35832 of 2 November 2012.

Grounds of appeal

[9] The appellant outlined its grounds of appeal as that:

1. the Council is not sufficiently representative in the area and sector in respect of which the application was made (and thus in relation to the intended expanded scope of the Council) – and more particularly is not sufficiently representative of employers in the relevant industry, as a result of the employers' association (the National Laundry, Cleaners' and Dyers' Association) not being sufficiently representative of employers in the industry;

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2. the Registrar was, in any event, unable to conclude on the facts before him that the Council would be sufficiently representative if the scope of the Council was expanded in terms of sector and area pursuant to the Council's application, and also erred in apparently relying on section 49(1) of the Act in this context;

3. it was not appropriate for the registered scope of the Council to be expanded to cover the sector and area referred to in the application;

4. it was not rational or reasonable for the Registrar to expand the registered scope of the Council as sought in the application, given the highly detrimental effects of such an expansion, and the Registrar was accordingly constitutionally precluded from granting the application.

[10] In support of the appeal grounds the appellant submitted that:

> Prior to the variation being granted, there were at least 159 employers employing 2022 employees, as well as "unknown" employers representing 1478 employees, who were "unregistered companies out of the scope" of the second respondent. At the time of the second respondent's application, there were 916 employees who were employed within the scope of the Agreement and 3,500 employees who were outside the scope of the Agreement, a total of 4416 employees, and likewise there were 65 employers who were members of the employers' organisation and at least 160 employers who were not.
>
> The second respondent covered 20.7% of employees, that is, 916 employees out of 4416. The trade union represented 12% of employees in the sector, that is, 478 members in the scope, and 60 outside it, out of 4416 employees. The employers' organization represented at most 29% of employers, that is, 65 employers out of a total of 225. This excludes the "unknown" employers who employed 1478 employees. On its own figures, neither the second respondent nor the parties to it were representative of the sector or the area within

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which the second respondent sought to operate, and the first respondent erred in concluding otherwise.

In this regard, the first respondent materially misdirected himself in recording that the second respondent had submitted a list of 145 companies in "the new scope" which employed "1729 employees". 1729 employees are reflected on page 30 of the record only, and this excluded the 1771 employees appearing on pages 26 to 29 of the record. This also excludes 15 employers, as well as the "unknowns".

Likewise, the first respondent erred in determining that the trade union represented 1400 employees" within the applied scope". It did not. It represented 538 employees, that is, 478 as per the certificate and 60 outside the scope, representing 12% of employees, not 40%. It is telling that the second respondent has failed to oppose the appeal in circumstances where:

1. it is the only party who has or should have original and supporting documentation that underpinned its application to the first respondent and substantiated the apparent numbers upon which it relied.

2. the appellant has identified 198 specialist laundries and drycleaners in the Province, casting significant doubt on the second respondent's allegation that the total number of employers within the new scope would be only 215, further diluting the second respondent's representativity.

3. it has been alleged that the second respondent is not representative and is badly managed, a factor that should have been considered by the first respondent.

[11] It was further contended that the first respondent simply accepted the second respondent's assertion that 215 employers fell within the new scope of the Council. In its written submissions, the first respondent failed to:-

1 deal with the list of 198 specialist laundries and dry-cleaners provided by the appellant, which would mean that there would be only 17 in-

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house laundries in the whole province, which is entirely unrealistic given that there are 42 hotels and B&Bs reflected on the second respondent's schedule alone.

2 recognize that, out of 297 KZN members of the Federated Hospitality Association of SA, (FEDHSA), there must be more than 17 hotels and B&B's (5%) which provided in-house laundry services.

3 acknowledge that, on the second respondent's own figures, there were 225 employers within the new scope, 65 already in the scope and 160 outside, excluding the "unknown" employers who alone employed 1478 employees or 33% of the employees in the sector.

4 explain the obvious discrepancy between the number of "small enterprises" within the registered scope of the second respondent prior to its application for variation, and the stated number of employers in the new scope of the Council.

5. Perforce, the second respondent's unsubstantiated estimate of employers was inaccurate, and the number of employers must be significantly higher than 215.

6. The effect of this is not only to further dilute the representativity of both the parties to the Council, as well as the Second Respondent itself but to demonstrate that the First Respondent failed properly to "satisfy" itself that the information provided to it was correct.

[12] The first respondent was said to have misdirected himself in various ways in determining that the scope of the second respondent was to be varied in that:

1. Apart from a completed form, the first respondent was presented with a brief explanation from the second respondent, justifying its application.

2. It is submitted that there was neither information nor corroboration in respect of the allegations made in the unsigned Memorandum, nor an explanation as to why it was necessary to expand the second respondent's scope so significantly.

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3. Neither the first nor the second respondents considered the difference between an employer who carried on business as a laundry and one who undertook some laundry as part of a different business, that is, a hotel with an in-house laundry that would fall within the hospitality sector, or the effect that such a significant extension of scope would have.

4. Further, the stated reasons for the variation contradict the email sent by the second respondent to the first respondent on 21 November 2012.

5. In the circumstances, there is no evidence that the first respondent took any steps to evaluate the information provided, or to satisfy him that the information was correct, or to satisfy him that a variation was appropriate.

Opposition grounds

[13] The second respondent has opposed the appeal by submitting, inter alia, that the figures quoted by the appellant with reference to the persons employed in the sector are merely intended to demonstrate that the second respondent is not sufficiently representative. To the extent that this is not the test, it is not necessary to deal with such figures other than to make the following comments:

(a) The appellant is confined to the facts applicable to its own organisation given that it does not represent any other party.

(b) To the extent that the appellant contends that the first respondent's reliance upon the number of its employees is incorrect, it fails to point out that although it employs 85 employees, the scope of the second respondent does not include employees employed in the commercial garment rental service part of the business.

(c) Accordingly, the number of employees who fall within the scope of the council is accurately reflected in the records which served before the

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first respondent.

(d) Where the appellant seeks to rely upon the membership of FEDHASA to make its point, it fails to distinguish between those establishments which have their own in-house laundry facilities and those which outsource such facility. Once again it is only those who have in-house laundry facilities who would fall within the scope of the second respondent.

[14] The first respondent averred that the appellant also sought to conflate those parties that fell within the scope of the collective agreement with the representativeness of the council. There was a crucial distinction between the two in that, whilst the collective agreement may exclude certain categories of employees, such employees are included for the purpose of determining whether a council is sufficiently representative or representative as the case may be. Accordingly, the litany of statistics which the appellant sought to rely upon was said to have no factual basis, had been misconstrued and/or incorrectly applied.

[15] As regards the third ground of appeal relating to the first respondent's alleged inability to deal with an extended scope, the contention was that this allegation was speculative, unsubstantiated and unjustified in that:

(a) This ground of appeal also fell to be dismissed as there was no evidence to substantiate the allegation that the appellant's operations would be rendered unviable.

(b) The first respondent's decision to vary the scope had no financial implications for the appellant or any other establishment listed in annexure "G".

(c) The decision of the first respondent did not have the effect of extending the collective agreement as this could only be done by the Minister in terms of Section 32 of the Act.

(d) Any affected parties including the appellant would be afforded an

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opportunity to object to such a process at the appropriate time and accordingly it is not a valid basis upon which to challenge the first respondent's decision.

Evaluation

[16] An appeal contemplated in Section 111 (3) is an appeal in the wide sense, in that it is a complete rehearing and adjudication of the merits with or without additional evidence or information. This is distinct from an appeal in the "ordinary narrow and technical sense" which refers to a rehearing on the merits, but one that is limited to the evidence on which the decision appealed against was given and in which the only issue to determine is whether that decision was right or wrong, see Staff *Association for the Motor and Related Industries v Motor Industry Staff Association and Another*[2]

[17] In terms of Section 58 (1) of the Act the first respondent was entitled to vary the registered scope of the second respondent if he was "satisfied that the sector and area within which the second respondent was representative did not coincide with the registered scope of the Council. Accordingly, the first respondent was obliged to satisfy himself that the second respondent was representative both in the sector and area prior to varying its scope. In this matter, and as already alluded to, no objection was lodged to the notice published by the first respondent in terms of Section 29 (3), and accordingly the first respondent was not obliged to comply with the procedure prescribed by Section 29 in determining the application for variation. To the extent relevant section 58 (3) (iii) of the Act reads:

> 'Despite subsection (2), if within the stipulated period no material objection is lodged to any notice published by the registrar in terms of 29 (3), the registrar-
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> (iii) need (sic) not comply with procedure prescribed by section 29'.

[2] (1999) 20 ILJ 2552 (LAC) at para 18, and para 24.

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[18] The applicant has contended that, considering the effect of such a variation, the first respondent nevertheless should have assessed the application in light of the requirements of Section 29 (11) (b) (iv) of the Act, and should have satisfied himself that the parties to the second respondent were sufficiently representative of the sector and area. According to the applicant, if nothing else, the first respondent was obliged to satisfy himself that the variation was justified, it being a duty that extended past simply accepting the unsubstantiated information provided by the second respondent. The further submission was that the first respondent's reliance on Section 49 (1) of the Act was misplaced in that the first respondent had made a determination in terms of Section 49 (2) of the Act in April 2012 but that very determination demonstrated the lack of representativity of the second respondent in both the sector and area contemplated in the variation. Further still, it was said that the first respondent's determination in terms of Section 49 applied to the "old" area of the second respondent's jurisdiction and could not be construed as a determination that applied to or affected the province of KwaZulu-Natal.

[19] The powers of the first respondent to vary the scope and jurisdiction of the second respondent are circumscribed by the Act. The Council's application to vary its scope and jurisdiction was published as required in terms of the Act but no objections were received in response thereto. In terms of section 58 (3) (ii) of the Act, there is a legal consequence flowing from the absence of objections, namely that the first respondent does not have to comply with procedure prescribed by section 29. What is pertinently clear about section 58 (3) is that the first respondent is not accorded discretion to decide whether the provisions of section 29 are to be applied. Therefore where a registrar nevertheless attempts, as in the present matter, to apply the provisions of section 29, such attempt is not a prerequisite for the consideration of the application.

[20] The appellant's contention that the first respondent should nevertheless have assessed the application in light of the requirements of section 29 (11) (b) (iv) and should have satisfied himself that the parties to the second respondent were "sufficiently representative of the sector in the area" is therefore devoid

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of any merits and justification, no wonder no authority for the proposition was advanced.

[21] As correctly submitted by Ms Naidoo for the first respondent, in terms of section 58(1) the first respondent merely has to satisfy himself that the sector and area within which a council is representative does not coincide with the registered scope of the council. In seeking to define what is meant by the term "representative", regard must be had to the provisions of section 49(1) which provides that the first respondent may regard the parties to a council as representative in respect of the whole area even if a trade union or employees organisation that is a party to the council has no members in part of that area. Accordingly, the contention that the first respondent needs to apply the test of "sufficient representative" is misguided and devoid of any legal basis.

[22] In contending that the first respondent had to apply the term "sufficiently representative", the appellant fails to define what is meant thereby. The term "sufficiently representative" only arises in Section 29 although it is not defined. It is in any event not a consideration in the present matter in that there was no objection to the variation application. Accordingly, there is no statutory obligation on the part of the first respondent to assess whether the parties were sufficiently representative before granting the variation.

[23] In respect of the submission that the first respondent misdirected himself in various ways in determining that the scope of the second respondent was to be varied, it needs to be pointed out that the first respondent's decision to vary the scope had no financial implications for the appellant or any other establishment listed in annexure "G". The decision of the first respondent did not have the effect of extending the collective agreement as this could only be done by the Minister in terms of Section 32 of the Act. Any affected parties including the appellant would be afforded an opportunity to object to such a process at the appropriate time and accordingly it is not a valid basis upon which to challenge the first respondent's decision.

[24] In the circumstances, the appeal has no merits and the following order, taking into the submissions of the parties on the costs order, will issue:

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1. The appeal is dismissed.
2. The appellant to pay the costs thereof.

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Cele, J

Judge of the Labour Court of South Africa.

APPREANCES

For the Applicant:Adv.W Shapiro instructed by Redfern and Findlay Attorneys

For the Respondent:Adv.L Naidoo instructed by State Attorney

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