IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: D236/2020

In the matter between:

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY	**Applicant**
and	
COMMISSIONER A DEYZEL N. O	**First Respondent**
THE CCMA	**Second Respondent**
INTERMODAL CARGO SOLUTIONS (PTY) LTD	**Third Respondent**

Heard: **30 August 2023**

Delivered: **31 August 2023**

Summary: Application to review and set aside a demarcation arbitration award. The present application turns on two issues; viz (a) interpretation of a certificate of registration of the bargaining council; and (b) the alleged excess of power – failure to consult with NEDLAC before making an arbitration award. A declaratory relief is also sought by the applicant. It is not the duty of a Court to deal with academic matters in order to give parties legal advice.

The arbitrator correctly interpreted the provisions of the certificate. The consultation with NEDLAC is required in instances where there has been publication to receive written representations from other parties. Although the parties referred to the dispute as a demarcation dispute, in truth this is a dispute akin to a section 24 of the LRA dispute seeking to interpret a collective agreement. The dispute does not seek to alter the terms of registration nor the scope of registration of the bargaining council. As such, NEDLAC has no interest in disputes involving interpretation of documents already approved at the time of registration. Held: [1] The application for review is dismissed. Held: [2] The declaratory relief is refused. Held: [3] There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an application for review brought by the applicant, the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI) in terms of the provisions of section 145 of the Labour Relations Act (LRA). In the amended notice of motion, NBCRFLI also sought a declaration to the effect that an employer and its employees associated for carrying on storage of goods ancillary or incidental to the transportation of goods by means of road transport fall under the NBCRFLI's registered scope irrespective of whether transportation of goods is conducted by that employer or third party. The application is opposed by the third respondent, Intermodal Cargo Solutions (Pty) Ltd (Intermodal).

Background Facts

[2] The arbitration proceedings in this dispute were conducted by way of a stated case. Given the issues that arise in the present review application, it is unnecessary to regurgitate in this judgment the contents of the stated case. It suffices to mention that NBCRFLI is a registered bargaining council in terms of the provisions of the Labour Relations Act (LRA)[1]. What led to the dispute was that NBCRFLI had formed a view that Intermodal fell under its scope of registration. Intermodal disagreed with that view. In order to resolve that dispute around falling under the registered scope, a dispute was referred to the Commission for Conciliation, Mediation and Arbitration (CCMA) in terms of section 62 (1) (a) of the LRA. The issue to be determined by Commissioner Deyzel (Deyzel) based on the agreed facts was whether Intermodal and its employees were or are employed and/engaged in the road freight and logistics industry. It was an agreed fact that Intermodal does not perform the transportation of goods by road transport.

[3] The certificate of registration of NBCRFLI defined its industry as follows:

> "**Road Freight and Logistics Industry** or "industry" means the industry in which employers and 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 or accounting for of goods where these activities are ancillary or incidental to paragraph (i); and
>
> (iii) …"

[4] In order to determine whether Intermodal and or its employees were employed and or engaged in the industry, Deyzel had to place an interpretation on the above quoted provisions of the registration certificate. Deyzel emerged with an interpretation which concludes that Intermodal and its employees were/are not engaged or employed in the road freight and logistics sector as such the main agreement and collective agreements of NBCRFLI were/are not binding on Intermodal and its employees.

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[1] Act 66 of 1995 as amended.

[5] *Ex facie* the arbitration award, it was made on 19 May 2019. On 29 May 2019, the national director of the CCMA received correspondence from the acting executive director of National Economic Development and Labour Council (NEDLAC) recording that NEDLAC is in support of the award issued by Deyzel.

[6] Disenchanted by the award, the NBCRFLI launched the present application outside the prescribed time period and sought condonation for the late filing of the application. I pause to mention that based on the agreement between the parties, condonation for the late filing of the application was granted together with condonation for non-compliances with the timeframes with regard to affidavits.

Grounds for review.

[7] In short, because Deyzel incorrectly interpreted the provisions of the certificate, he committed a material error of law which results in both an incorrect and unreasonable decision so it is contended by the NBCRFLI. Further, because Deyzel failed to consult with NEDLAC as required by section 62 (9) of the LRA, the award must be set aside on the basis that there was excess of power.

Evaluation

[8] The first issue to be tackled in this judgment is the declaratory relief ask. The duty of a Court is to resolve concrete disputes and not to deal with academic matters or give legal advice. The legal position is clear, if there is a dispute about demarcation between sectors and areas, such disputes ought to be referred to the CCMA. The NBCRFLI has already done that and the only task of this Court legislatively is to review and not advice parties on abstract and academic issues. For these brief reasons, this Court declines to exercise its discretionary declaratory powers.

[9] I now turn to the issue of the alleged material error of law. Deyzel reached the following interpretation:

> "23 On my interpretation the purpose of the definition is to indicate that under certain specified conditions an employer providing a storage service would be regarded as also providing a motor transport service i.e. such an employer would only be regarded as providing a motor transport service, if storage service provided by the employer is ancillary or incidental to the motor transport service provided by the employer."

[10] After reaching the above interpretation, Deyzel concluded as follows:

> "32 I have considered the argument advanced on behalf of the council to the effect that the definition means that an employer performing a logistics function for a client is operating in the road freight and logistics industry. Such a meaning can only be ascribed to the definition if the logistics function is part of the storage function referred to in the definition and is ancillary or incidental to a motor transport activity carried on by the employer and its employees."

[11] When it comes to interpretation of any document, the approach approved by the Constitutional Court is one that symbiotically takes into account the text, context and purpose of the provisions to be interpreted. This Court takes a view that on application of the approved approach, the interpretation arrived at by Deyzel is correct. This Court would have reached the same interpretation. The word ancillary grammatically means providing the necessary support to the primary activities. Incidental as a noun means happening as a minor accompaniment to something else. The process of interpretation is there to establish the meaning of the words employed in a document, with a view to establish the intention of the employers of those words. The submission that storage of goods is an activity on its own is inconsistent with the clear meaning of the wording employed in clause (ii) of the certificate. The storage of goods is an activity which provides support or an accompaniment to the activity of the transportation of goods by means of motor transport. The word including, means containing as part of the whole. So, the activities listed after the storage of goods are part of the storage of goods all of which are the necessary support

of the transportation of goods by means of motor transport activity. Deyzel was correct in his conclusion that since intermodal was not involved in the transportation of goods, its storage of goods in not an activity to support the transportation of goods activity. In the Court's view, Deyzel did not commit any material error of law which taints the outcome that Intermodal does not fall within the registered scope of the NBCRFLI. Thus, the first ground of review must fail.

Section 62 (9) alleged breach.

[12] Now turning to the issue of the alleged contravention of section 62 (9) of the LRA. This section compels an arbitrator to consider any written representation and consult the NEDLAC before making an award. In *casu*, the Commission and the parties involved did not hold a believe that the question raised in the demarcation dispute referred is of substantial importance. It is for that reason that the Commission did not publish a notice in the Gazette stating the period within which the written representations may be made. Since there was no call for written representations, there was nothing to consider before making an award. In my view, the duty to consult the NEDLAC only arise if written representations were called for in line with section 62 (7). The contention that in every demarcation dispute consultation with the NEDLAC is required before issuing an award is absurd. In *casu,* the parties were in dispute about a proper interpretation of a certificate already issued in 2010. Clearly, the dispute of these parties although raised as determination in terms of section 62 (1) (a) is effectively akin to a section 24 dispute. It is about the interpretation of a certificate which may equate interpretation of a collective agreement. Point being made is that NEDLAC has no interest in a dispute involving interpretation of a document already issued after the registration process. NEDLAC is a statutory body established in terms of the NEDLAC Act.[2] In terms of section 28 (9) of the LRA one of the obligations of NEDLAC is to consider the appropriateness of the sector and area in respect of which the application for registration is made. It must follow that when the terms of the registration certificate were couched in the manner in which they are couched, NEDLAC

[2] Act 35 of 1994.

had exercised its statutory obligations. The parties were not seeking to alter the terms or scope of registration. A consultation with NEDLAC must be purposive and meaningful. On an interpretation issue, NEDLAC has little or nothing to contribute. Interpretation being an elastic process, all NEDLAC would do in case of a dispute would be what they did – agree with the interpretation. Given the statutory obligations of NEDLAC, it could not have been the intention of the legislature in inserting subsection (9) to add unnecessary obligations and functions for NEDLAC. Therefore, it is not always automatic that in every demarcation dispute NEDLAC must be consulted. It will be absurd to think so. In fortification of this view, the legislature opted to use the word '*and'* after the compulsion to consider written representation. Grammatically, when the word '*and*' is employed in a sentence, it is employed to connect words of the same part of sentences that are to be taken jointly. Thinking about it, what purpose will be achieved for a commissioner to consult NEDLAC when deciding an issue which is not of substantial importance and which could have been published for the purposes of written representations. If the legislature intended a disjuncture between the consideration of written representations and consultation duty, the legislature could have used the word "or", which would have the consideration of written representations and consultation with NEDLAC as alternatives. In *casu*, this Court fails to understand the purpose of consulting a statutory body like the NEDLAC when a wider publication did not happen. As correctly pointed out in *Coin Security*[3] the role of the NEDLAC at demarcation disputes is *ad hoc* in nature. It only happens as and when necessary or needed. In this current dispute, consultation with NEDLAC was not required.

[13] Mr. Beckenstrater who appeared for the NBCRFLI submitted that the failure to consult amounts to excess of power. I do not agree. Section 145 (2) (a) (iii) of the LRA is clear, it is a defect in any arbitration proceedings if the commissioner exceeds his or her powers. In terms of section 138 (7) the power to issue an arbitration award in any arbitration proceedings resides with the

[3] See *Coin Security (Pty) Ltd v CCMA and Others (Coin Security)* [2005] 26 ILJ 849 (LC); *MEC of the Western Cape Provincial Government Health Department v Coetzee and Others* (C276/17) [2017] ZALCCT 67 (30 November 2017) and *MEC for Health Western Cape v Coetzee and Others* 2020 (6) BCLR 674 (CC). *Coin Security* Page 864 B

arbitrating commissioner. As held and approved by the Constitutional Court[4], the Labour Appeal Court (LAC) in *SAMWU v Syntell (Pty) Ltd*[5] concluded that the decision from first to last is that of the commissioner.

[14] In law excess of power is manifested when the vestee of authority, the holder of a position with power to decide, exceeds the limit of his or her mandate. Making an arbitration award is a power belonging to the commissioner and not both the commissioner and the NEDLAC. If nullity of the award was contemplated by failure to consult, the legislature would have said so. Accordingly, this Court rejects the argument of excess of power in this regard.

[15] Equally, this Court does not accept the argument of Mr. Hansjee appearing for Intermodal that before making the award as employed in section 62 (9) of the LRA means before serving the award on the parties. Section 138 (7) (b) of the LRA refers to serve a copy, which serve is defined to mean sending by electronic mail, registered post, telegram, telex or delivery by hand. If making meant serve, the legislature would have used the word since it has already given it a technical meaning. Making means the process of making or producing something. Thus the requirement to consult, if necessary, must happen before a final award is made. However, in *casu*, this Court has already reached a conclusion that, in the present instance, consultation in whatever form or shape is not required since the publication process contemplated in section 62 (7) which will produce written representations to be considered has not happened.

[16] For all the above reasons, the arbitration award by the learned Deyzel is correct and one that a reasonable decision maker may reach. Accordingly, the review application falls to be dismissed. Symbiotically, this Court refuses to issue the discretionary remedy of a declaratory. The application for a declaratory relief must also fail.

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[4] *Numsa v CCMA and others* (2022) 43 ILJ 530 (CC).

[5] (20140 35 ILJ 3059 (LAC)

Order

[17] In the results, I make the following order:

1. The application for review is dismissed.
2. The application for a declaratory relief is refused.
3. There is no costs order.

GN Moshoana

Judge of the Labour Court of South Africa.

Appearances

For the Applicant: Mr. Beckenstrater of Moodie and Robertson, Braamfontein

For Respondent: Mr. S Hansjee of Cox Yeats Attorneys, Durban.