



REPUBLIC OF SOUTH AFRICA

Not reportable

**THE LABOUR COURT OF SOUTH AFRICA,
IN PORT ELIZABETH**

Case no: P 30/2011

In the matter between:

**SPITZBAK (PTY) LTD T/A KOELKOR
MEAT WORLD**

Applicant

and

**COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

FLOORS BRAND N.O.

Second Respondent

**FOOD AND ALLIED WORKERS
UNION obo MEMBERS**

Third Respondent

Heard: 03 February 2012

Delivered: 26 June 2013

Summary: (Review – demarcation dispute – test of review of demarcation determinations- determination set aside).

JUDGMENT

LAGRANGE, J

Introduction

- [1] The applicant in this matter has applied to review and set aside a demarcation ruling by the second respondent, a CCMA Commissioner. The Commissioner found that the applicant was engaged in the Wholesale and Retail Sector and that the provisions of Sectoral Determination 9 are applicable to its employees.

The arbitrator's determination

- [2] The arbitrator made the determination after hearing evidence from both parties. In reaching his conclusion he relied on the evidence given by the employer, which he found was essentially confirmed by the evidence of two employees of the applicant, who had testified for the interested union ('FAWU') and its members. For the sake of convenience, the arbitrator's summary of evidence is set out below. The arbitrator highlighted the following:

2.1 A shareholder of the company, Mr Rautenbach, testified that the main activity of the company was to buy livestock from farmers, slaughter it and then sell the meat in bulk to enterprises like Shoprite, Pick 'n Pay, Spar, other butcheries, *et cetera* and the general public. He conceded that "from time to time" it also bought carcasses, chicken and even fish from other vendor's which it sold to the enterprises mentioned and the public.

2.2 The company had a number of vehicles used to collect livestock and carcasses from suppliers and to deliver products to its clients in Humansdorp, Jeffreys Bay and Port Elizabeth. A smaller vehicle was used to sell meat products to the general public around Humansdorp, but this was a very small part of the applicant's business bringing in only approximately R60,000 per annum, whereas its gross annual turnover at the time of the hearing was R 42 million per annum.

2.3 The company also had its own premises in Port Elizabeth where meat was deboned and sold, and it had cold storage facilities at its premises in Port Elizabeth and Humansdorp.

[3] The company's legal representative at the hearing had argued that the main activity of the applicants business was slaughtering and therefore it was essentially an abattoir rather than a business in the wholesale and retail trade.

[4] The arbitrator summarised his evaluation of the evidence thus:

"14. Mr Rautenbach's evidence explains the operations of the respondent and his evidence is not disputed. From his own evidence it is clear that the respondent buys livestock, slaughter and stores it in its own cold room facilities for the sole purpose of selling it in bulk or in smaller quantities to cooperative enterprises and the general public. Furthermore, the respondent delivers the sold this products with its own delivery trucks to its clients. In my view the extent of the buying, storing, selling and distribution is of such a magnitude that it cannot be said to be ancillary to the slaughtering done by the respondent. Even if I accept that more than 50% of the respondent's staff is engaged in the slaughtering process, the slaughtering process is not separate from the other activities of the respondent. As I have said the procuring of livestock is for slaughtering and the slaughtering and storage for the purpose of selling it to any person, whether in bulk or not. The slaughtering process is, within the current operations of these respondent, only a link in the chain of events of the procurement and the ultimate selling and distribution of the meat products.

15. Another indication that the respondent is engaged in wholesale and retail business is, as conceded by Mr Rautenbach, that the Rautenbach, from time to time, even buys carcasses, chicken and fish from Venice for the purpose of selling it to other enterprises. Hence, I am of the view that the current operations of the respondent falls squarely within the definition of the Wholesale and Retail Sector as set out above."

(emphasis added)

- [5] Section 1 of the Wholesale And Retail Sectoral Determination defines the wholesale and retail sector of South Africa as:

"The sector in which employers and employees are mainly or wholly engaged or highly associated for the purposes of procuring products from any supplier or manufacturer for the purpose of sale to any person, whether on wholesale or retail basis; and, in addition, includes any other activities engaged in by an employer in the wholesale and retail sector including, but not limited to, merchandising, warehousing or distribution operations that are incidental to, supportive of the employer's enterprise ..."

Grounds of review

- [6] The applicant's first ground of review is that the arbitrator misconstrued section 1(2) of the sectoral determination in finding that the core business of the applicant was wholesale or retail in character. It further argues that the arbitrator's conclusion was unsupported by any evidence and was therefore unreasonable. In its supplementary grounds of review the applicant added an alternative approach to reviewing the determination according to the standard of reasonableness. The applicant contended that in making the determination the arbitrator was in fact making a jurisdictional ruling and, as such, the decision had not only to be reasonable but also correct.
- [7] Further supplementary grounds of review were that: the arbitrator failed to consider whether or not the business of the applicant involved the procuring of "products" from suppliers or manufacturers; the arbitrator failed to determine whether or not the business was only or mainly one that fell within the ambit of the sectoral determination; he failed to consider the various categories of employees described in the sectoral determination, and failed to determine the nature of the work performed by its employees. It further claims that the arbitrator went beyond his remit in

declaring that the employer was bound by the provisions of the sectoral determination.

Evaluation

Is the test of review a purely objective one?

- [8] Before considering other grounds of review, it is necessary to briefly address the contention that the arbitrator's determination ruling is one that must be correct and not merely reasonable because it allegedly entails a jurisdictional finding. It will often be the case that the consequence of a demarcation reading will directly or indirectly have the effect of determining the jurisdiction of a bargaining Council or the applicability of a sectoral determination or collective agreement. Demarcation disputes do not arise in the abstract, but are commonly the result of a dispute about whether or not an employer is obliged to comply with conditions of employment set out in one or other such instruments.
- [9] It is important to bear in mind however that demarcation rulings usually do not concern the jurisdiction of the CCMA itself to make such rulings. An arbitrator seized with determining a demarcation dispute, in the absence of other types of incidental jurisdictional challenge, such as a claim that another commissioner had already ruled on the same issue, is determining a question which the LRA has specifically assigned to the CCMA to determine, in the same way that a Commissioner is empowered to determine the fairness of a dismissal for specified reasons. Thus, section 62(1)(a) of the LRA specifically assigned to the CCMA the power to determine "*...whether any employee, employer, class of employees or class of employers, is or was employed or engaged in a sector or area...*" When determining the fairness of a dismissal or which sector and employer or employees engaged in, a Commissioner is determining an issue the statute has specifically empowered the Commissioner to deal with. Provided other jurisdictional preconditions have been met, the arbitrator's finding in a demarcation dispute has no bearing on that arbitrator's own jurisdiction to make the ruling. If the arbitrator had to first determine a dispute over whether or not jurisdictional pre-requisites for

exercising the power to make a demarcation brooding had been met, that would entail making a finding about the arbitrator's own jurisdiction. That is not a question which the arbitrator is empowered to decide, and will always be vulnerable to be set aside on the basis that the arbitrator acted outside of his or her jurisdiction.

- [10] Consequently, although it may seem paradoxical that the arbitrator is determining an issue that has jurisdictional consequences, that is an issue the statute has assigned to the CCMA to determine. The test of review applicable to such a ruling is no different from the test which applies to other decisions falling within the remit of an arbitrator's power in terms of the LRA. As a result, it is not necessary for an arbitrator's decision on a demarcation question under section 62 (1)(a) to be correct, but merely to be reasonable, and the applicant's ground of review based on the correctness of the decision must fail.

Other grounds of review

- [11] In determining the retail or wholesale character of the business, the arbitrator ought to have had regard to the job description of persons covered by Sectoral Determination 9: Wholesale and Retail Sector. The definitions of job descriptions in the determination are as follows:

*“**displayer**” means an employee who prepares window, promotional or sale display material, whether internally or externally;*

...

*“**driver**” means an employee who drives a motor vehicle for purposes of deliveries or to perform other activities on behalf of an employer and who holds the requisite licence;*

...

*“**fork-lift operator**” means an employee who operates a mobile power-driven hoist used in the loading, unloading, moving or stacking of products and who holds the requisite license;*

“general assistant” means an employee who is engaged in any one or more of the following duties –

- a) accompanying or assisting a driver or other employee who drives a vehicle, but not driving the vehicle;
- b) accompanying any employee who uses tools, but not using tools independently;
- c) affixing postage stamps or labels;
- d) assembling boxes by hand;
- e) breaking up scrap metal;
- f) carrying or moving goods, by means other than a power-driven device;
- g) changing wheels or repairing punctures;
- h) cleaning machinery, premises, vehicles, furniture, implements, tools, utensils or goods on the employer's premises;
- i) cleaning or plucking poultry;
- j) cleaning, cutting, filleting, scaling or slicing raw fish;
- k) collecting cash in the case of c.o.d. sales or accepting written orders;
- l) cutting by hand, paper, samples, linoleum, mats, curtain rods, netting wire, wire or other articles or commodities;
- m) cutting up scrap metal;
- n) delivering or conveying letters, parcels, messages or goods by means other than by a motor vehicle with an engine capacity exceeding 100 cm²;
- o) driving an animal-drawn vehicle;
- p) feeding into or drawing off from vats, tanks or other containers;
- q) feeding or taking off from automatic or semi-automatic machines, moving belts or platforms;
- r) filling bins or dump baskets with goods;
- s) filling, capping, corking or labeling bottles or other containers;
- t) folding or enveloping mail;
- u) grading eggs according to size;
- v) hanging clothing, packages or other goods on rails or hooks or in gondolas, racks or shelves;
- w) ironing;
- x) loading or unloading vehicles;
- y) making or maintaining fires or removing refuse or ash;
- z) making tea or similar beverages for, or serving tea or similar beverages to employees, the employer or guests;
- aa) marking, branding or stenciling goods by hand;
- bb) melting scrap lead
- cc) mending bags or sacks by hand or machine;
- dd) mending or altering second-hand clothing for sale;

- ee) mixing by hand the ingredients of animal or poultry foods the mass of which has been measured beforehand or otherwise predetermined;
- ff) nailing or repairing boxes or crates;
- gg) oiling or greasing machinery of vehicles, other than motor vehicles;
- hh) opening or closing doors, windows, bales boxes or other packages;
- ii) operating an addressograph, photostat, or a duplicating machine;
- jj) operating any power-driven machine not specifically mentioned elsewhere in this clause;
- kk) operating a portable pump;
- ll) packing goods for dispatch or delivery, including packing goods at point of payment;
- mm) packing, placing or stacking goods in cabinets or on counters, gondolas, racks or shelves;
- nn) repetitive marking of prices on goods by means of a rubber stamp or other marking device, under supervision;
- oo) repetitive mass-measuring or repetitive measuring; or mass measuring for stock;
- pp) setting up or dismantling corrugated or fibre board boxes or similar containers;
- qq) sorting goods;
- rr) strapping or wiring boxes;
- ss) tending, cleaning or feeding animals;
- tt) unpacking goods;
- uu) using rubber or other stamps, involving no discretion;
- vv) washing uniforms, overalls or protective clothing;
- wrapping parcels;

...

“manager” means an employee who is authorised by an employer to manage the activities of a business or part of a business or to manage the employees in a business or part of a business;

“merchandiser” means an employee who draws goods from a storage area, cleans shelving, unpacks and prices products and removes damaged or expired goods;

...

“sales assistant” means an employee who prepares products and services for sale, attends to customers’ enquiries, assembles products for customers and, with the authority of an employer, accepts payment for products or services sold;

“sales person” means an employee employed to perform the tasks of a sales assistant and who receives, in addition to the minimum wage mentioned in clause 3, commission payments in terms of clause 4;

“security guard” means an employee who guards, protects or patrols an employer’s establishment, buildings, property and goods;

“shop assistant” means an employee who packs, replenishes, marks, assembles or assists in the dispatching of products on instruction from a more senior employee;

“supervisor” means an employee who is authorised by an employer or manager to be responsible for the efficient performance and behaviour of other employees;..”

[12] It is clear from the definitions above, apart from a few very specific exceptions in the description of tasks and that a general worker might perform, that the functions performed by employees in the sector do not involve the transformation or processing of intermediate products into final products which are qualitatively different from the products supplied to the business. This is something that the arbitrator should have considered when deciding whether or not the applicant was engaged in the sector.

[13] Moreover, even though the arbitrator accepted that more than half the employees were engaged in the slaughtering operation, he decided that

this transformative process was simply incidental to the distribution of meat products. It is difficult to understand how the arbitrator could reasonably have come to this conclusion. With limited exceptions, the "products" which the business procured as supplies are in the form of livestock. The applicant is not running a business even similar to something like a feedlot in which the quality of livestock is merely improved until it is in a marketable condition for resale or slaughter. The applicant is engaged in turning livestock into consumable fresh meat products, which it then sells to retail providers of fresh meat or final consumers. It is not reselling the livestock but the meat products it extracts from its slaughtering operations using that supply of livestock. The nature of the products it procures and the products it sells are quite distinct even if the end product is wholly derived from the livestock supplied.

- [14] Further, the fact that it also delivers these end products to its customers and that it transports the livestock provided by suppliers to its processing operation is no different from a manufacturer of fertiliser using its own vehicles to collect raw materials and to deliver the end products to customers. Those logistical operations are incidental to its main operation as a manufacturer and not vice versa.
- [15] In the circumstances I am satisfied that the arbitrator failed to have regard to the primary character of the business which the applicant was engaged in. Had he done so, it would have been difficult for him to escape the conclusion that the sector in which the applicant was engaged was not the wholesale or retail sector, but in the slaughtering and sale of fresh meat.

Conclusion

- [16] In the light of the analysis above, I am satisfied that the arbitrator's demarcation ruling should be set aside. I believe there is also sufficient basis for substituting the determination of the arbitrator, with a finding that the applicant is not engaged in the Wholesale and Retail Sector as contemplated in Sectoral Determination 9.
- [17] Although the arbitrator claimed that Nedlac had been consulted about the award in terms of section 62(9) and 'supported the award', that process

has no bearing on the substantive validity of the determination. However, if indeed the arbitrator had shared his findings with Nedlac before issuing the award, that would have amounted to improper conduct on his part and would also have justified setting the determination aside on that ground alone.

Order

[18] The demarcation determination of the second respondent dated 26 October 2010 under case number ECPE 3219-10 is reviewed and set aside.

[19] The second respondent's determination is substituted with a determination that the applicant is not engaged in the wholesale and retail sector as contemplated by Sectoral Determination 9: Wholesale And Retail Sector (GG 24207,R 1600, dated 19 December 2002) as amended.

[20] As the matter is unopposed no order is made as to costs.



R LAGRANGE, J
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

J G Grogan instructed by S C Heystek Attorneys