REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JR 3103/12

In the matter between:

SBV SERVICES (PTY) LTD	**Applicant**
and	
NBCRFLI	**First Respondent**
CCMA	**Second Respondent**
FLOORS BRAND N.O.	**Third Respondent**
SASBO – THE FINANCE UNION	**Fourth Respondent**
PROTEA COIN GROUP (ASSETS IN TRANSIT AND ARMED REACTION) (PTY) LTD	**Fifth Respondent**

LABOUR COURT

Heard: **7 October 2015**

Delivered: **27 October 2015**

Summary: Review – demarcation -- LRA s 62. Interpretation of "goods" to include "money" in context of cash in transit. Whether s 145 or s 158(1)(g) applies in review of demarcation.

JUDGMENT

STEENKAMP J

Introduction

[1] Does the word "goods" include "money" in the context of cash in transit? That is the question that arose in a demarcation dispute before the CCMA. The commissioner found that it did. The applicant seeks to have that conclusion reviewed and set aside.

[2] This case addresses the question of demarcation of the relevant bargaining council; the reasoning and conclusion of the commissioner; and the question whether s 145 or s 158(1)(g) of the Labour Relations Act[1] applies to reviews of demarcation disputes.

Background facts

[3] The applicant, SBV Services (Pty) Ltd, is engaged in the cash in transit business. It transports large amounts of money (banknotes and coins) in armoured vehicles. The question that served in a demarcation dispute in terms of s 62 of the LRA before the CCMA (the second respondent) is whether that activity falls within the registered scope of the National Bargaining Council for the Road Freight and Logistics Industry. SBV says it does not; the Council says it does. The Commissioner, Mr Floors Brand (the third respondent) agreed with the Council.

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

LABOUR COURT

[4] More than eight years ago an employer engaged in the "assets in transit" (AIT) or "cash in transit" (CIT) business raised the argument that the items that it carried (cash and negotiable instruments) were not "goods" and that its activities fell outside the certificate of registration of the Council. The Council's scope of registration is set out in the certificate of registration as the "road freight and logistics industry", which is defined in part as:

> "…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, despatching and clearing of, or accounting for of goods where these activities are ancillary or incidental to paragraph (i) above."

[5] The employer in that case, as does the applicant in this one, contended that "money" does not constitute "goods" in the context of the Council's certificate. But it did not raise the point before the commissioner in the demarcation proceedings, nor in its founding papers on review, and the Court considered it impermissible for the employer in that case to raise it in argument and for the Court to deal with it.[2] The applicant in this case, SBV, does so now. It raised it squarely in the demarcation proceedings. The Commissioner ruled that the word "goods" in the certificate of registration includes money or cash transported by SBV. It seeks to have that *in limine* ruling reviewed and set aside.

[6] SBV is split into two divisions – cash in transit (CIT) and cash management (which is performed in the warehouses to which the cash is delivered). The CIT division employs more than 2000 employees. In 2010 it operated a fleet of 711 CIT armoured vehicles, travelling more than 32 million km per year. All cash, cheques and deposit slips are transported in bags; and at least in relation to ATM services, SBV's rates are calculated with reference to a cost per kilometre travelled.

[7] Since 1971 (43 years ago), CIT operations have been demarcated as falling within the registered scope of the Council or its predecessors.

[2] *Coin Security (Pty) Ltd v CCMA* (2005) 26 *ILJ* 849 (LC) para [37].

LABOUR COURT

Under the LRA, two demarcation awards have been issued by the CCMA[3] confirming it, both supported by NEDLAC. It is the Savage award that was dismissed by the Labour Court in *Coin Security*[4], albeit without dealing with the interpretation raised in these proceedings head-on.

[8] At present CIT is a recognised and distinct sub-sector within the Council. There are 73 CIT operators registered with the Council, employing some 4000 people. The Council's constitution and collective agreements recognise that CIT falls within its registered scope; and the Minister has extended the Council's main collective agreement to non-parties in terms of s 32 of the LRA. Those agreements expressly regulate terms and conditions of employment in the CIT subsector.

[9] Historically, SBV accepted that its CIT division fell within the scope of registration of the Council, but it applied for and was granted an exemption from the provisions of its collective agreements. More recently, in the face of opposition to its renewed application for exemption, it launched an application in terms of s 62 of the LRA to be demarcated outside the scope of registration of the Council.[5] There is no competing bargaining council dealing with the transportation of money in its registered scope. The Commissioner presided over the demarcation dispute that SBV had referred to the CCMA. In those proceedings, SBV raised the point *in limine* that money does not comprise "goods" under the Council's scope of registration. It is that ruling that SBV seeks to review.

<u>The commissioner's ruling</u>

[10] The commissioner (correctly) framed the question before him:

> "[T]he question therefore is whether the word 'goods' in the certificate of registration of the [Council] includes money or cash."

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[3] By commissioners Marcus and Savage (as she then was), respectively.

[4] *Supra.*

[5] Section 62(1)(a) provides: "(1) Any registered trade union, employer, employee, registered employers' organisation or council that has a direct or indirect interest in the application contemplated in this section may apply to the Commission in the prescribed form and manner for a determination as to—

(a) whether any employee, employer, class of employees or class of employers, is or was employed or engaged in a sector or area;".

LABOUR COURT

[11] He referred to the mostly trite principles of interpretation. These included that a word must be interpreted in context and, if it has more than one meaning, the interpreter should decide which meaning is to be attributed to it with reference to the context of the document being interpreted.

[12] With reference to dictionary definitions relied upon by SBV, the commissioner accepted that 'money' is not usually understood as constituting merchandise, wares or a commodity, and that generally 'money' is a means of exchange. He also accepted that, in more than one judgment, the courts have found that 'goods' does not include 'money'. However, he went on to find:

> "But that is of course one side of the proverbial coin – there are several authorities which suggest that 'goods' can include 'money'. Having read the authorities it seems to me the determinative question is whether the word 'goods' in the certificate of registration of the [Council] should be given a narrow or an extended meaning?"

[13] The commissioner plumped for the extended meaning in the context of the Council's registered scope. He relied on *The Noordam*[6], in which the Privy Council found that "goods" is a very general word of indefinite import; that it primarily derives its meaning from its context; and that it may sometimes be of the widest and sometimes of the narrowest import. He also relied on *Commander*[7], in which it was held that *prima facie* general words should be taken in their larger sense, unless one finds something in the context which shows that they are intended to be read in a more restrictive way.

[14] The commissioner also referred to three judgments in which "an extended meaning was attributed to the word 'goods' so as to include 'money'" – *Padyachi*[8], *Ganyu*[9], and *Behm*[10]. He also referred to *Stroud's Legal Dictionary* where it is stated that " 'coins' can be 'goods' … when it is not used as a means of exchange or in its normal function as money…".

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[6] *The Noordam (No 2) and Other Ships* 1920 AC 899 (Privy Council).

[7] *Ciommander v Collector of Customs* 1920 AD 510.

[8] *Padyachi v Rex* 1919 NPD 145.

[9] *S v Ganyu* 1977 (4) SA 810 (RA).

[10] *R v Behm* (1970) 12 DLR (3d) 260.

LABOUR COURT

[15] The full quotation from *Padyachi* relied upon by the Council and by the commissioner reads:[11]

> "I think it may be conceded that in many cases, perhaps in the ordinary case, the word 'goods' is not to be taken to comprehend current coin of the realm, although in the general sense it is wide enough to do so. But, as has been pointed out by *Maxwell* (Fourth Ed, 101): 'even where the usual meaning of the language falls short of the whole object of the legislator, a more extended meaning may be attributed to it, if fairly susceptible of it. If there are circumstances in the Act showing that words are used in the larger sense than their ordinary meaning, that sense must be given to them.' That 'goods' is fairly susceptible of the wider meaning which will include money I think is clear, and if authorities necessary for the proposition I may cite the passage from *Foster's Crown Law* which is set out in *Rex v John Radley* (Cox's Criminal Law Cases, 460 (Note A, p 461): 'But it hath been rightly holden that money is not with in the Act (10 and 11, Will, 3c, 23 etc) the words being 'goods, wares and merchandises'; for although the word goods may in a large sense take in money, and often doth, yet being connected with wares and merchandises, the safer construction of so penal a statute will be to confine it to goods *ejusdem generis*, goods exposed to sale.'
>
> Now here no question of the application of the rule of *ejusdem generis* arises… Even therefore if it be conceded that in its ordinary meaning the word 'goods' will not include money I see no reason why the more extended meaning of which it is susceptible should not be attributed to adhere because I think that the circumstances of the Act show that the word is used in that sense."

And further:[12]

> "There are few nouns in the English language which are not capable of both a restricted and an extended meaning. In construing a statute it is the duty of the court so to construe it as to suppress the mischief and advance the remedy. The word 'goods', like many other words, is capable of either a restricted or an extended meaning. If it is given its extended meaning, it is

[11] [per Dove-Wilson JP at 147-8]. In that matter, a regulation restricting the export of gold coins in wartime was found not to be *ultra vires* the Public Welfare and Moratorium Act, 1914, which empowered the Governor-General to make regulations restricting the export of "goods".

[12] {per Tatham J at 149}.

LABOUR COURT

capable of including gold in coins. When we look at the purpose of this particular legislation, examine the mischief struck at, and consider the remedy which the legislature desire to apply; and, when we do that, it becomes clear that the legislator had in view the prohibition of all goods which might reduce the capacity of the country to continue the war, while increasing that of the enemy if it found its way there. Taking that view we must hold that in the use of the word 'goods' the legislature intended the extended meaning…".

[16] The full quotation from *Ganyu*[13] relied upon by the Council and cited by the commissioner reads:

> "Bearing in mind the purpose of the legislation, there is no possible reason why section 14 should be construed to relate to some goods only and not to all goods, to some money but not all money. To the extent to which the section is held not to apply to certain goods, the legislation becomes *pro tanto* ineffective. Since the section is clearly intended to deal with theft generally, in my view the word 'goods' must of necessity be given a wide and unrestricted meaning sized embrace goods generally and not only some goods. Once it is decided that so construed the word includes money, there is no justifiable reason for including some types of money and excluding others. To do so would not only partially defeat the purpose of the legislation, but would also involve reading into the section words which are not there and cannot properly be implied."

[17] And the full quotation from *Behm*[14] relied on by the Council reads:

> "There are two aspects under which we can consider money: the instrument of exchange and the matter of which the instrument is constituted. As an instrument of exchange there is a great difference between a $1 bill and a $1000 bill. But as between the paper of these two bills, there is no difference in value, or at least no significant difference in value. Similarly, the instrument of exchange constituted by this $1 bill is worth four times the instrument of exchange which is constituted by a 25c

[13] At 812-3. The subject matter was s 14 of an Act which provided that: "Any person who is found in possession of any goods of any description in regard to which there is a reasonable suspicion that there have been stolen and is unable to give a satisfactory account of such possession shall be guilty of an offence and liable to the penalties which may be imposed on a conviction of theft."

[14] At 262-3. In this matter, the Québec Court of Appeal held that saw the coins constituted "goods" for the purpose of the Export and Import Permits Act.

LABOUR COURT

piece. But as between the substances which constitute these instruments of exchange, the value of the metal in the 25c piece is greater by far than that of the paper in the $1 bill.

I am led to think that if we are concerned with them as instruments of exchange, Behm is right in his submission that coins are not goods. Money is what we give a surprise for goods which we obtain. But if we are concerned with the substance of which money is constituted, it seems clear to me that this substance is a 'good'. The Nouveau Larousse dictionary… defines 'merchandises' (goods) as… (all that can be bought and sold). Metal and paper are objects which can be bought and sold.

We must therefore seek to find under which aspect the Governor in Council considers coins in the present order.… I conclude that [he] has regulated the export of silver as a metal and that this metal is a 'good' and an article within the meaning of the… Act."

[18] The Commissioner considered that "[t]he question of whether the word 'goods' should be given a wide meaning depends on the character, circumstances and purpose of the Council's registration".

[19] In this regard, the Commissioner made three findings.:

"Firstly it has to be noted that the word 'goods' stands alone in this case and there is no indication in the certificate that 'goods' should be construed to relate to some goods and not to all goods or for that matter that it should be given a restricted meaning. Clearly the word 'goods' in the Council's certificate is concerned with the substance of what is transported and should be given its ordinary meaning, which, in my view, includes all tangible and movable property".

Secondly:

"Furthermore, it must be accepted that the intention behind the registration of the Council is to afford the Council jurisdiction over employers and employees who associate for the purpose of carrying on the business of road transport generally. It would therefore be wrong to restrict the generality of the transportation business without any clear indication, which there is not in the certificate."

And thirdly:

LABOUR COURT

> "In the process of interpreting the certificate I have also had regard to the objectives of the LRA and to interpret it in a way that gives effect to such objectives. One of the objectives is of course collective bargaining (section 1 of the LRA) and the LRA achieves this purpose through the establishment and registration of bargaining councils in respect of sectors and areas. A narrow interpretation of the scope envisages [*sic*] by the certificate will defeat this purpose, particularly where there is no competing council… But, the fact of the matter is that if I find that 'goods' do not include money there will be no basis to argue that the [council] has jurisdiction over the CIT operations and thereby bring an end to collective bargaining in that sector, which will be at odds with one of the main purposes of the LRA. Therefore, if it is susceptible that an extended meaning can be attributed to [the] word 'goods' in the registration certificate…, which will achieve the object of the LRA, that meaning should be given to it."

[20] The Commissioner concluded that the word "goods" in the Council's certificate of registration should be given "a wide or extended meaning, which includes money". As Mr *Myburgh* pointed out, this was the first basis for the dismissal of SBV's point *in limine*.

[21] The second basis for the Commissioner rejecting SBV's point *in limine* was this:

> "Looking at the question from another angle, the question can be asked whether money, in the context that it is dealt with in the CIT division of SPV, constitutes 'goods'.
>
> The reason for the presence of money in the CIT division of is BV is clearly not to be used as a means of exchange or in its normal function as money. At the end of the day it is metal and paper which are placed in containers and bags for transportation from point A to point B as any other commodity. The mere fact that it is money does not change the reason for the presence of the money in the CIT division. Hence, I am of the view that from this point of view there is also every reason to say that money in the CIT operations context constitutes 'goods'."

[22] The Commissioner concluded: "The word 'goods' in the certificate of registration of the NBCRFLI includes money or cash".

LABOUR COURT

<u>The appropriate test on review: s 145 or s 158(1)(g)?</u>

[23] Our courts have not been consistent in the way in which reviews of demarcation awards are to be considered. In *Coin Security*[15] and in *Golden Arrow Bus Services (Pty) Ltd v CCMA*[16] the Labour Court assumed that it was regulated by s 158(1)(g) of the LRA and the review grounds found in the common law. On the other hand, the review grounds set out in s 145 were applied in *SAMWU v Syntell (Pty) Ltd*[17]*; NBCRFI v Marcus N.O.*[18]*; National Textile Bargaining Council v De Kock*[19]*; Dewdev (Pty) Ltd t/a Bulkbag Manufacturers v Bargaining Council for the Canvas Goods Industry, Witwatersrand & Pretoria*[20] and *Henred Freuehauf.*[21]

[24] Mr *Redding* argued that a demarcation is not an arbitration. It is a determination of whether particular activities fall within a particular industry. The question is decided by a CCMA commissioner after consulting with NEDLAC and considering written representations, not only by the parties to the original dispute, but also others who may have some interest in the issue. On the other hand, arbitration is an adjudicative process between contesting parties in which a dispute is defined and one or other of the parties will have the onus of establishing its case.[22] He submitted that the demarcation process is not an arbitration and the demarcation award is not an arbitration award. Therefore, he argued, demarcation proceedings are to be reviewed under s 158(1)(g) and not s 145; alternatively, it constitutes administrative action reviewable under PAJA.[23]

LABOUR COURT

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[15] *Supra* paras [40] – [41].

[16] (2005) 26 *ILJ* 242 (LC) at 244 B-C; 249 G; 256 B.

[17] [2013] 2 BLLR 207 (LC); (2014) 34 *ILJ* 1263 (LC) paras [23] – [24].

[18] [2011] 2 BLLR 169 (LC); (2011) 32 *ILJ* 678 (LC) para [15], upheld on appeal in *NBCRFI v Marcus N.O.* (2013) 34 *ILJ* 1458 (LAC).

[19] (2014) 35 *ILJ* 1017 (LC).

[20] (2014) 35 *ILJ* 1004 (LC).

[21] *Henred Freuehauf v Marcus NO* (2014) 35 *ILJ* 3147 (LC).

[22] Relying on *LAWSA* vol 1 para 406; *Halsbury's Laws of England* (4th ed, reissue) vol 2 para 601.

[23] The Promotion of Administrative Justice Act (Act 3 of 2000).

[25] I find myself unable to agree with this submission. As the learned authors in *Labour Relations Law: A Comprehensive Guide*[24] point out, demarcation disputes may be arbitrated either on application to the CCMA[25] or, if ancillary to some other dispute, by the Labour Court or in the context of those other proceedings.[26] The LRA itself refers to "arbitration" and "award" in in the following subsections of s 62: (3)(a)(i); (3A)(a)(i); (5)(a)(i); (8); (9); (10) and (11). And in terms of s 62(4), when the CCMA receives an application in terms of s 62(1), it must appoint a Commissioner to hear the application or determine the question, and the provisions of section 138 apply, read with the changes required by the context. Section 138 contains "general provisions for arbitration proceedings".

[26] I am persuaded that demarcation proceedings in terms of s 62 are akin to arbitration; that the general provisions for arbitration proceedings apply to those proceedings; and that a commissioner's award in a demarcation dispute is, in effect, an arbitration award finally disposing of the case; or, in the case of the commissioner's ruling on SBV's point *in limine*, finally disposing of a substantial and discrete part of its case. Therefore, the limited grounds of review set out in s 145 apply.

<u>Grounds of review</u>

[27] The applicant argued that the commissioner committed an error of law by erroneously interpreting the term "goods" to include "money". Mr *Redding* argued that the erroneous interpretation was material; that it constitutes a gross irregularity; or that it is an unlawful exercise of administrative power. Alternatively, he argued that the result was unreasonable.

<u>Evaluation / Analysis</u>

[28] Given my view that the review test in s 145 applies to a review of demarcation proceedings under s 62, I am in respectful disagreement with Mr *Redding* that an error of law in itself would be reviewable, as he argued

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[24] Du Toit et al, *Labour Relations Law: A Comprehensive Guide* (6ed 2015) p 124 fn 45.

[25] LRA s 62(1).

[26] LRA s 62(3).

LABOUR COURT

it would be in terms of s 158(1)(g) or PAJA. In my view, the review test in accordance with s 145 applies, suffused in the reasonableness test set out in *Sidumo*[27] and *Herholdt.*[28] I shall nevertheless consider each of the three review grounds advanced.

Unreasonabless

[29] In *NBCRFI v Marcus NO*[29] 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 Freuehauf.*[30] That approach was confirmed by the LAC in *NBCRFI v Marcus NO.*[31]

[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.

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[27] *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

[28] *Herholdt v Nedbank Ltd* [2013] 11 BLLR 1074 (SCA).

[29] [2011] 2 BLLR 169 (LC), with reference to *Coin Security (Pty) Ltd v CCMA* [2005] 7 BLLR 672 (LC).

[30] *Supra.*

[31] *Supra* para [22].

LABOUR COURT

Gross irregularity and errors of law

[32] Does an error of law constitute a gross irregularity?

[33] As Mr *Myburgh* pointed out in his argument, as a point of departure, the SCA confirmed in *Herholdt* that the grounds of review listed in s 145(2) [including a gross irregularity] bear the same meaning as they do in terms of section 33 of the Arbitration Act.[32]

[34] The most authoritative judgment on when an error of law will constitute a gross irregularity under section 33 of the Arbitration Act [and thus s 145(2) of the LRA] is the judgement of the SCA in *Telcordia.*[33] in that judgment, Harms JA relied on two earlier judgments: *Doyle*[34] and *Goldfields Investments.*[35] The *dictum* by Innes CJ in *Doyle*[36] on which the SCA relied in *Telcordia* is this:

> "Now a mere mistake of law in adjudicating upon a suit where the magistrate has jurisdiction to try cannot be called an irregularity in the proceedings. Otherwise a review would lie in every case in which the decision depends upon a legal issue, and the distinction between procedure by appeal and procedure by review, so carefully drawn by statute and observed in practice, would largely disappear. Yet in this case it is a mistake of law alone which is relied upon as constituting gross irregularity. There is neither allegation nor suggestion that the magistrate, his attention having been drawn to section 37, deliberately refused to apply his mind to it, or to consider it. The position, if the section means what the applicant contends, is that the magistrate either honestly misinterpreted or completely overlooked it. In either event it would not, I am afraid, be the first occasion on which a court of law has misread a statutory provision or overlooked one not brought to its notice at the trial. Whichever supposition were the correct one, the result would be (still assuming the correctness of the applicant's interpretation) an unfortunate error of law which, but for the special prohibition of the statute would afford good grounds for an appeal.

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[32] Act 62 of 1995.

[33] *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA).

[34] *Doyle v Shenker & Co Ltd* 1915 AD 233.

[35] *Goldfields Investment Ltd v City of Johannesburg* 1938 TPD 551.

[36] *Supra* 236 – 7, quoted at *Telcordia* para [87].

LABOUR COURT

But there would be no gross irregularity in the proceedings, and therefore no justification for a review."

[35] Harms JA then cited with approval the following *dictum* by Schreiner J in *Goldfields Investment*:[37]

> "The law, as stated in *Ellis v Morgan*[38] … Has been accepted in subsequent cases, and the passage which has been quoted from that case shows that it is not merely high-handed or arbitrary conduct which is described as a gross irregularity; behaviour which is perfectly well-intentioned and bona fide, though mistaken, may come under that description. The crucial question is whether it prevented a fair trial of the issues. If it did prevent a fair trial of the issues then it will amount to a gross irregularity. Many patent irregularities have this effect. And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the court's not merely missing or misunderstanding a point of law on the merits, but to its misconceiving the whole nature of the enquiry, or of its duties in connection with, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial. I agree that in the present case the facts fall within this latter class of case, and that the magistrate, owing to the erroneous view which you hold as to its functions, really never dealt with the matter before him in the manner which was contemplated by the section. That being so, there was a gross irregularity, and the proceedings should be set aside."

[37] *Supra* 560-561, quoted at *Telcordia* para [73] (Harms JA's emphasis).

[38] *Ellis v Morgan; Ellis v Desai* 1909 TS 576 at 581.

LABOUR COURT

[36] I agree with Mr *Myburgh*'s submission that, in summary, the *Goldfields Investment* principle is that an error of law on the part of the decision-maker will only constitute a gross irregularity if it results in him misconceiving the whole nature of the enquiry or his duties in connection therewith. The same point was made in *Herholdt*.

[37] Applying those principles to the facts in *Telcordia*[39], Harms JA held:

> "The fact that the arbitrator may have either misinterpreted the agreement, failed to apply South African law correctly, or had regard to inadmissible evidence does not mean that he misconceived the nature of the enquiry or his duties in connection therewith. It only means that he erred in the performance of his duties. An arbitrator 'has the right to be wrong' on the merits of the case, and it is a perversion of language and logic to label mistakes of this kind as a misconception of the nature of the enquiry – they may be misconceptions about meaning, law or the admissibility of evidence but that is a far cry from saying that they constitute a misconception of the nature of the enquiry. To adapt the quoted words of Hoexter JA:[40] it cannot be said that the wrong interpretation of the Integrated Agreement prevented the arbitrator from fulfilling his agreed function or from considering the matter left to him for decision. On the contrary, in interpreting the Integrated Agreement the arbitrator was actually fulfilling the function assigned to him by the parties, and it follows that the wrong interpretation of the Integrated Agreement could not afford any ground for review by a court.
>
> Likewise, it is a fallacy to label a wrong interpretation of a contract, a wrong perception or application of South African law, or an incorrect reliance on inadmissible evidence by the arbitrator as a transgression of the limits of his power. The power given to the arbitrator was to interpret the agreement, rightly or wrongly; to determine the applicable law, rightly or wrongly; and to determine what evidence was admissible, rightly or wrongly. Errors of the kind mentioned have nothing to do with him exceeding his powers; they are errors committed within the scope of his mandate. To illustrate, an arbitrator in a 'normal' local arbitration has to apply South African law but if he errs in his understanding or application of local law the parties have to live with it.

[39] *Supra* paras [85] – [86].

[40] In *Administrator, South West Africa v Jooste Lithium Myne (Edms) Bpk* 1955 (1) SA 557 (A) at 569 D-G.

> If such an error amounted to a transgression of his powers that would mean that all errors of law are reviewable, which is absurd."

[38] It is apparent from the SCA judgement in *Telcordia* that an error of law – giving rise to a wrong interpretation – does not constitute a gross irregularity, provided that the error is not of such a nature as to fall foul of the *Goldfields Investment* principle, i.e. that the arbitrator misconceived the whole nature of the enquiry. And in *Herholdt*, where the SCA dealt with the review of an arbitration award in terms of section 145 of the LRA – although it did not deal expressly with errors of law – it also concluded that, apart from producing an unreasonable award, a Commissioner only commits a gross irregularity if he misconceives the nature of the enquiry.

[39] As will be seen from the discussion below, it cannot be said that the arbitrator in this case misconceived the nature of the enquiry. He did exactly what he was meant to do, i.e. to interpret the use of the word "goods" in the context of the certificate of registration and the broader socio-economic context of the Bargaining Council. He did not commit a gross irregularity.

Unlawful exercise of administrative power

[40] Mr *Redding* also argued that the demarcation proceedings conducted by commissioners constitute administrative action and that it is reviewable in terms of PAJA. In his heads of argument, he said:

> "It is submitted that perhaps the applicability of the precise section [of the LRA] is unimportant since it is accepted that both sections [i.e. s 145 and s 158], in so far as they deal with decisions by CCMA Commissioners, the actions and decisions of whom constitute administrative action and are accordingly required to be lawful, reasonable and procedurally fair as set out in section 33 (1) of the Constitution."

[41] Again, I am respectfully unable to agree. It has been held in *Sidumo* and in *Herholdt* that PAJA does not apply to the review of CCMA awards. Instead, the legislature selected "the narrowest possible grounds of review

LABOUR COURT

as the basis for challenging arbitration"[41], i.e. the grounds set out in section 145.

First attack on the ruling: extended meaning given to the term "goods"

[42] SBV argued, firstly, that the Commissioner committed an error of law by giving the term "goods" an extended meaning. Its submission was that, if the ordinary rules for the establishment of the ordinary grammatical meaning of words are adopted, the inevitable conclusion is that the word "goods" has an ordinary meaning which excludes money or legal tender.

[43] The Commissioner did come to the conclusion that "goods" should be given a wide or extended meaning in the context that it is used in the certificate of registration. He did so for three reasons:

43.1 Firstly, the word "goods" stand alone in the certificate of registration and there is no indication why it should relate to some goods and not others, or be given a restricted meaning; and the word "goods" in the certificate is concerned with the substance of what is transported.

43.2 Secondly, the intention behind the registration of the Council was to give it jurisdiction over employers and employees who associate for the purpose of carrying on the business of road transport generally – thus it would be wrong to restrict the generality of the transportation business.

43.3 Thirdly, in circumstances where the word "goods" was susceptible to an extended meaning, it should be given that meaning, because it would serve the objects of the LRA, which include collective bargaining at sectoral level. That is consistent with the case law set out above.

[44] The Commissioner properly and reasonably took into account not only the dictionary definition of "goods", but also the context of the use of the word in the certificate; the intention behind the registration of the Council; and the objectives of the LRA. That is consistent, not only with the case law

[41] *Herholdt* para [9].

LABOUR COURT

discussed above, but also with the principle of interpretation set out by the SCA in *Natal Joint Municipal Pension Fund*:[42]

> "The present state of the law can be expressed as follows: 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. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[45] The Commissioner took into account the language of the certificate, read in context and having regard to its purpose, including the primary purpose of collective bargaining. That is an entirely reasonable approach and it does not evince a gross irregularity. There can be no question of the Commissioner having misconstrued the nature of the enquiry. And, in my view, it led to a reasonable conclusion.

[42] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para [18].

LABOUR COURT

Second attack on the ruling: irrational finding that money constitutes "goods"

[46] SBV's second ground of attack on the commissioner's finding is aimed at his conclusion that "the presence of money in the CIT division of SBV is clearly not to be used as a means of exchange or in its normal function as money". The Commissioner concluded:

> "At the end of the day it is metal and paper which are placed in containers and bags for transportation from point A to point B as any other commodity. The mere fact that it is money does not change the reason for the presence of the money in the CIT division. Hence, I am of the view that from this point of view there is also every reason to say that money in the CIT operations context constitutes 'goods'."

[47] Mr *Redding* argued that, on this reasoning, money becomes a commodity based upon the means used to carry at; and that this reasoning is illogical or irrational.

[48] But the Commissioner's reasoning is consistent with the facts before him. The money is packed in containers and bags for transportation, the same as any other commodity that is transported by entities that fall within the Bargaining Council's scope. And it is consistent with the reasoning in *Behm*[43] on which the Commissioner relied:

> "Money is what we give as the price for goods which we obtain. But if we are concerned with the substance of which money is constituted, it seems clear to me that this substance is a 'good'."

[49] The Commissioner's finding in this regard is supported by the evidence before him. It is not unreasonable, even if others may differ.

Conclusion

[50] The Commissioner did not misconceive the nature of the enquiry. He understood exactly what he was meant to do, and it did so after carefully applying its mind to the evidence before him and the relevant jurisprudence. His resultant conclusion is not so unreasonable that no reasonable decision-maker could have come to the same conclusion. His ruling is not open to review.

[43] *Supra* at 262-3.

LABOUR COURT

[51] With regard to costs, I take into account that there is an ongoing relationship between the parties. SBV remains a member of the Bargaining Council. And the dispute forming the basis of this application is a long-standing and contentious one that needed to be resolved. In law and fairness, each party should pay its own costs.

[52] Lastly, I am indebted to both counsel for their comprehensive heads of argument and their making available copies of old and foreign case law.

Order

The application for review is dismissed.

Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

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FIRST RESPONDENT:	Anton Myburgh SC Instructed by Bowman Gilfillan Inc.

LABOUR COURT