CCMA

DEMARCATION ARBITRATION AWARD

Commissioner: **D. I. K. Wilson**
Case No.: WECT 10871-14
Date of Award: 16 January 2015

In the arbitration between:

CHARTER INTERNATIONAL FREIGHT (PTY) LTD T/A PIONEER FREIGHT — Applicant

and

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY — Respondent

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DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing was held at the Cape Town offices of the CCMA at 09h00 on 10 October 2014. The Applicant, Charter International Freight (Pty) Limited trading as Pioneer Freight, was represented by Mr A. Smith of the employers' organisation NEASA. The Respondent, the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI), was represented by Ms Madelein van der Watt, Senior agent, and Mr Paul Box, Designated Agent.

ISSUE IN DISPUTE:

2. The issue in dispute is one of demarcation. Respondent issued a Compliance Order in November 2010 and an Enforcement Arbitration Award on 30 August 2012 in terms of which the Applicant was ordered to register with the Council. Applicant has now referred a demarcation dispute in which it alleges that it does not fall within the registered scope of the Council. This is opposed by the Respondent.

BACKGROUND TO THE DISPUTE:

3. Applicant operates as customs clearing and forwarding agent for international imports and exports, and to a lesser degree also handles domestic freight. The company acknowledged that it had a fleet of nine vehicles nationally which were on occasion used to make pick-ups from and deliveries to clients, but alleged that this was an insignificant part of its business which was purely ancillary to its main business.

4. The Applicant employs around 30 employees, the bulk of whom are based at its Cape Town head office. There are smaller branches in Johannesburg and Durban. The arbitration award issued in 2012 came about after a Johannesburg employee referred a dispute to the Council, alleging that the Applicant was involved in the road freight industry. Applicant was represented at the arbitration hearing by its Johannesburg Branch Manager, but claimed that it had never received the arbitration award. It referred the demarcation dispute to the CCMA after receiving a writ of execution for monies owed to the Council.

SUMMARY OF EVIDENCE AND ARGUMENT:

5. **Mr Raymond Burgess** testified that he was the Managing Director of the Applicant. Its main business was to act as a customs clearing and forwarding agent for international imports and exports. It handled the clearing of freight through customs and payment of duty, and used a third party contractor to deliver the containers to their warehouse or directly to the client. Where the goods were delivered to the company warehouse, third party contractors were generally used to deliver the goods to the clients. With exports the

same happened in reverse. The client loaded the container and the company arranged for it to be collected by a transporter and taken to the shipping line.

6. Clients were charged a flat fee which included transport costs, customs clearing and duty. The company negotiated rates with shipping lines and airlines and marked these up. The company was not a road freight company and did not fall within the definition of the industry in the council's registration certificate. The company used third party contractors to undertake any road freight required; for example when goods received had to be delivered to a client outside of Cape Town. He referred to a list of contractors used in the last financial year, to who a total of over R1,5 million had been paid.

7. Every now and then, in exceptional circumstances, the company used its own vehicles to pick up goods from or deliver goods to a client. There were five vehicles in Cape Town which were largely used for visiting customs, picking up documents from shipping lines, making payments, etc. The vehicles were small being four one-tonners and a four-tonner.

8. There was one client (Augustine's) which dealt in medical equipment. 90 % of the time containers of imported equipment were delivered directly to their premises by a contractor. They would unpack the container and deliver the goods to hospitals. On occasion they needed to send goods to Johannesburg and Durban, in which event the Applicant would use one of its vehicles to pick up the goods and take them to the airline for airfreight. This was part of their clearing and forwarding function. When goods arrived in Johannesburg they would be collected by a courier (Airwing) and taken to the destination. The charge for this to the customer was included in the clearing and forwarding fee. There was no separate transport fee charged; the client paid a fixed-rate whether they picked up the goods themselves or used a contractor, or if the client delivered the goods to their premises. Approximately 20 % of the goods being airfreighted locally were picked up or delivered. None of the goods being sent by sea were picked up or delivered by the Applicant in its own vehicles. Pick-ups and deliveries were only done locally, between the client's premises and the company's warehouse.

9. Mr Burgess referred to the company's sales figures for the period from February to June 2014. These showed that just over 1 % of the Applicant's turnover came from domestic freight, with the vast bulk coming from international imports and exports. In respect of the domestic freight, only about 10 % of the goods were picked up or delivered in the Applicant's own vehicles. This was an added service which was purely ancillary to the Applicant's main business of customs clearing and forwarding. Although the company's website and brochure referred to a "door to door service" they did not do this personally, but used 3rd party transporters.

10. Mr Burgess referred to the company's standard terms and conditions, which were adopted from the SA Association of Freight Forwarders (of which the company was a member). The Association was not a

member of the Council and its members were generally not registered with the Council, with the few exceptions being companies that had divisions that transported containers. The terms and conditions gave the company the right to enter into third party transport arrangements on behalf of customers.

11. He had started the company 23 years earlier and had never considered the company to be part of the road freight industry. When he received enquiries for local road freight he referred the enquirer to other companies.

12. There were approximately nine employees who drove the vehicles from time to time. Their main function was clerical and they had many functions other than driving. The Applicant did not employ dedicated drivers.

13. Mr Burgess stated that the Applicant was approached by Mr Ben van Rooyen of the Council in 2004. He had done a site inspection and discussed what the company did. He had then informed them that they did not fall under the jurisdiction of the Council. Nothing further happened until 2010. The business of the company had not changed in the interim, except that it had grown in size. He stated that it would be a major problem if the nine employees who drove vehicles were required to join the Council, as this would give rise to different conditions of employment within the company, and this would cause unhappiness. The employees who drove were an integral part of the company.

14. In response to my question Mr Burgess stated that it was hard to say how much of his time a driver would spend transporting goods. It could be 50 %. Under cross-examination he stated that the company had not applied for registration in the past, and if the Branch Manager had stated this in the Council's arbitration hearing he was mistaken. The employee who had gone to the Council had first gone to the CCMA, but had then gone to the Council and claimed that the company was in fact a road transport company. This was not true.

15. Mr Burgess was asked about Buffalo Freight, who it appeared had registered with the Council. He stated that they used to do similar business to the Applicant but they had been sold a few years earlier and the business might have changed. With regard to Augustine's, Mr Burgess stated that he did them a favour as a long-standing client by picking up goods from them occasionally. He was referred to a list of vehicles on the Applicant's website, which included much larger vehicles. Mr Burgess stated that this was an old list that included third party vehicles. Apart from the 5 vehicles in Cape Town there was a van in Durban and a two-tonner and two one-tonners in Johannesburg. The Applicant had never owned trucks.

16. **Mr Graham North** testified that he was the Applicant's Chief Financial Officer. He stated that the company vehicles were used predominantly for administrative purposes. When vehicles were used to pick up or deliver goods, there was no extra charge, and the company did not make a profit out of using its own vehicles. It was incidental to the service offered. There were no dedicated drivers, only General Assistants

who drove vehicles occasionally. This was not their main function; they had multiple other duties. The vehicle fleet was an operating expense, not a profit-maker. The domestic freight was a tiny part of the Applicant's revenue.

17. Under cross-examination Mr North stated that the Applicant was not geared up to do major transportation; this was not part of their business.

18. This completed the evidence for the Applicant. The Respondent chose not to lead evidence.

19. In closing Mr Smith referred to the case law and stated that the character of a business was determined by the nature of the enterprise. In the case of *Coin Security (Pty) Ltd v CCMA & Others* [2005] 7 BLLR 672 (LC) it was stated that once the character of the industry was determined, all the employees in the business were employed in that industry. The Applicant's main business was freight clearing and forwarding, using mainly third-party contractors. The use of its own vehicles was insignificant, incidental and ancillary to the main business.

20. The activities of the company had to be compared to the definition of the industry in the council's registered scope, to determine whether the company's activities predominantly fall within the definition. In the case of the Applicant, more than 98 % of its business was international business, where the company did no pick-ups or deliveries, and this fell outside the scope of the Council. The pick-ups and deliveries were purely ancillary.

21. The second part of the definition of the industry, which dealt with the storage, receiving, opening, unpacking, packing, dispatching and clearing of goods was only applicable if these activities were incidental to the transportation of goods by motor transport.

22. Mr Smith argued that in terms of the case of *Greatex Knitwear (Pty) Ltd v Viljoen and others* 1960 (3) SA 338 (T), the transporting activities of the Applicant were ancillary to the main function and did not constitute a separate business. The driving of vehicles was not a separate function that could be separately demarcated. The pick-ups and deliveries were purely local and there was no inter-town road freight conducted by the Applicant. It would be inequitable to apply different terms and conditions of employment to different groups of employees.

23. The Council had not disputed the evidence that it had previously found, in 2004, that the Applicant did not fall under its jurisdiction. The business of the company had not changed since then.

24. Ms van der Watt argued that there was no mention in the definition of the industry how big a part of the employer's business the road transport element should be. The Applicant had not denied that it did a certain amount of road transport. When NEASA had applied to join the Council it had put forward a list of its members who were involved in the road freight industry, and the Applicant's name had been on that list.

25. Drivers and office staff were different and should be treated differently. She argued that the Council did have jurisdiction. There was no demarcation ruling in 2004 and a lot could have changed since then. Mr Burgess stated that Buffalo Freight did the same type of work as the Applicant and it appeared that they had registered with the Council. It was not right for competitors in the same business to be on unequal terms.

26. In reply Mr Smith stated that there was no information as to why Buffalo Freight had registered with the Council. The Council had not presented any evidence that the Applicant undertook road transport for reward.

ANALYSIS OF EVIDENCE AND ARGUMENT:

27. At the outset, a brief review of the relevant case law relating to demarcations may be useful. In the matter of *Greatex Knitwear (Pty) Ltd v Viljoen and others* 1960 (3) SA 338 (T) the court dealt with the method to be used to determine whether an employer was engaged in a particular industry. The court stated that the meaning of "industry" had to be determined, and that the definition thereof was often restrictively interpreted; the activities of the employer had to be determined; and the activities of the employer had to be compared with the definition, as interpreted. If none of the activities of the employer fell within the definition, the enquiry stops there. If some of the activities of the employer fell within the definition, the next question was whether those activities were separate from or ancillary to its other activities. If they were separate activities, then the employer was engaged in the industry (unless the activities were casual or insignificant), but if they were ancillary to its other activities, the employer was not engaged in the industry (unless they were of such magnitude that it could be said to be so engaged). The court stated that it was inherent in this approach that an employer might be engaged in more than one industry.

28. In the Demarcation Award in the matter of *Platinum Budget Office (Pty) Ltd v MEIBC and another* (CCMA Case No. ECEL 1558-09) the commissioner stated that it was necessary to determine the true character of the enterprise, which was not determined by the occupation of the employees in the employer's business, but by the nature of the enterprise in which the employer was engaged.

29. In the case of *CWIU and others v Smith & Nephew Ltd* [1997] 9 BLLR 1240 (CCMA) it was stated that one must look at the overall impression of the business, "*taking into account raw materials, processes used, the kind of equipment and the number of employees allocated work tasks*".

30. In the case of *Coin Security (Pty) Ltd v CCMA & Others* [2005] 7 BLLR 672 (LC) Francis J stated as follows: "*Once the character of the industry is determined, all employees are engaged in that industry. The precise work that each person does is not significant*". This followed the reasoning in the case of *Rex v Sidersky* (1928) TPD 109, in which the Court held that the character of a business was determined not by

the kind of occupation in which the employees were engaged, but by the nature of the enterprise in which the employer and the employees were associated for a common purpose. This was a question of fact.

31. The definition of the industry contained in the Respondent's Certificate of Registration is as follows:

"the sector in which employers and employees are associated for carrying on one or more of the following activities for hire or reward:

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

(b) The storage of goods, including the receiving, opening, unpacking, packing, dispatching and clearing, or accounting for, of goods if these activities are ancillary or incidental to paragraph (a);

(c) ... (not relevant)".

32. It was common cause that the Applicant did perform some degree of motor transportation using its own vehicles, but it was disputed that it did so for reward, since it did not charge an additional fee over and above the flat rate charged for airfreight. The rate remained the same whether the Applicant picked up and/or delivered the goods or not. It is debateable whether this is a valid argument; it could certainly be argued that the cost of transport by company vehicles or third parties is built in to the flat rate price. For the purposes of this award I will assume that the Applicant does transport goods by motor transport for reward, thus satisfying part (a) of the definition. Part (b) is, I believe, not relevant because while the Applicant does store goods in its warehouse, this is generally incidental to the transport of those goods by sea or airfreight or by third-party road transporters, and not to the transport of goods by the Applicant in its own vehicles.

33. Having decided that a portion of the Applicant's activities fall within the industry definition, in terms of the *Greatex Knitwear* case I must now decide whether these activities are ancillary to or separate from the Applicant's other business, being customs clearing and forwarding of goods using means of transport other than its own vehicles.

34. Applying the test set out in the *Smith & Nephew* case, the overall impression of the business from the evidence given by Mr Burgess and Mr North is that it is a customs clearing and forwarding agent, and not a road freight business. Respondent did not lead any evidence to rebut this impression. Applicant does not employ dedicated drivers, and the employees who drive vehicles do so in addition to numerous other duties. In terms of the *Coin Security* case *(supra)*, once the character of the enterprise is determined, the precise work done by each individual is not significant. I find that the character of the enterprise in which the Applicant is engaged is that of a customs clearing and forwarding agent, and that the activities of the Applicant in picking up from and delivering goods to clients locally are ancillary to, and not separate from, the Applicant's main activity.

35. In terms of the *Greatex Knitwear* case *(supra)* I also need to determine whether the extent of the ancillary activities are of such a magnitude that the Applicant can be said to be engaged in the road freight and

logistics industry. Respondent argued that there was no mention in the definition of the industry of how much of the employer's business should fall within the definition. This may be so, but the principles enunciated in the *Greatex Knitwear* case are nevertheless applicable. It is clear from the figures submitted by the Applicant (which were not disputed by the Respondent) that the collection and delivery of goods forms a miniscule portion of the Applicant's business. Since domestic freight only represents between 1,1 and 1,24 % of the Applicant's turnover, and goods are only picked up or delivered in approximately 50 % of the instances where domestic freight is required, it is clear that the transport of goods in company vehicles would account for less on 0,6 % of the Applicant's turnover. Far less in fact, since the domestic freight turnover includes reimbursement of the cost of airfreight or third-party road freight, as well as the own-vehicle transport. On this basis I cannot find that the road transport activities of the Applicant are so significant that it is engaged in the road freight industry.

36. With regard to Buffalo Freight, I note that there was no evidence as to what their business methods were, other than Mr Burgess's evidence that they used to operate in a manner similar to the Applicant some years ago. There was also only incidental evidence of registration with the Council, in that since 2010 they had been involved in at least two arbitration hearings conducted by the Council. Whether this was as a party or a non-party to the Council is unknown. I cannot draw any conclusions from this. I can also not draw any conclusions from the fact that NEASA included the name of the Applicant as being amongst its members when applying to become a party to the Council. The Applicant cannot be bound or prejudiced by an action which may well have been taken by NEASA without its knowledge.

37. In the circumstances I find that the Applicant does not fall within the jurisdiction of the Respondent and is not required to register with the Council. In terms of the *Coin Security* case (*supra*) all of the Applicant's employees are employed in the customs clearing and freight forwarding industry, and not the road freight and logistics industry.

AWARD:

38. The operations of the Applicant, Charter International Freight (Pty) Ltd trading as Pioneer Freight, do not fall within the jurisdiction of the National Bargaining Council for the Road Freight and Logistics Industry.

D.I.K. Wilson
CCMA Senior Commissioner