DEMARCATION ARBITRATION AWARD

Commissioner:	**D. I. K. Wilson**
Case No.:	WECT 19576-14
Date of Award:	23 March 2015

In the arbitration between:

J.H. KARSTEN trading as J.H. KARSTEN TRANSPORT — Applicant

and

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

Applicant's representative:	Mr J. Heyns GDP Employers' Organisation
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Respondent's representative:	Mr V. Jansen Bargaining Council Agent
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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 2 March 2015. The Applicant, Mr J.H. Karsten trading as J.H. Karsten Transport, was represented by Mr Johan Heyns of the GDP Employers' Organisation. The Respondent, the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI), was represented by Mr Vincent Jansen, an Agent, supported by Ms M. van der Watt (Senior Agent) and Mr M. Ismail (Agent). Proceedings were conducted in English and Afrikaans and were digitally recorded.

ISSUE IN DISPUTE:

2. The issue in dispute was one of demarcation. Applicant alleged that his business did not fall within the jurisdiction of the Respondent. Respondent opposed the application.

BACKGROUND TO THE DISPUTE:

3. Applicant operates a business involving the purchase and resale of (mainly) sand, stone, clay and fertilizer, which he then resells to clients. In terms of the pre-arbitration minute signed by the parties there was no dispute that this was the Applicant's main activity, and that this activity did not fall within the definition of the Road Freight Industry, since the Applicant was transporting his own goods rather than transporting goods for third parties for reward. However the Applicant acknowledged that he did on occasion transport goods on behalf of clients, but argued that this was an insignificant part of his business (being between 0,04% and 0,12% of the loads carried) and was ancillary to the main business. Respondent disputed this.
4. The parties handed in bundles of documents. Applicant's bundle, marked "A", consisted of 20 pages while Respondent's bundle, marked "B", numbered 200 pages.

SUMMARY OF EVIDENCE AND ARGUMENT:

5. This section is not intended to be an exhaustive reflection of the evidence, but rather a brief summary of the salient aspects of the respective cases of the parties.
6. **Mr J.H. Karsten** testified that he was the sole owner of the business which had been operating for 30 years. He owned 23 trucks of various sizes, which did on average 2 500 loads per month in total. He also

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had a separate business, JH Karsten Cartage CC, which was registered with the Respondent. That business had its own vehicle and driver.

7. He bought sand, stone and similar goods and sold these to his clients, and his vehicles were used for transporting these goods. On occasion a client would ask him to remove sand or stone from their premises, but this happened very occasionally and occurred once or twice a month. He stated that he could not turn his clients down.

8. With reference to a delivery note from Lafarge Industries, made out to Triangle Sand and Klip, and his own delivery notes to Youngman's roofing, Mr Karsten stated that he did not have an account with Lafarge; and had bought the stone through Triangle. He had then sold this stone to Portland Quarries and delivered it to Youngman's Roofing on their instructions. He referred to a statement from Triangle Sand & Klip in respect of the transactions concerned. He also referred to an invoice from Portland Quarries to Youngman's Roofing, showing that Youngman's Roofing was Portland Quarries' client. Youngman's Roofing was Portland Quarries' client, not his own, and this was the delivery address given to him.

9. Mr Karsten gave similar explanations in respect of various other delivery notes and invoices, involving Van Dyk Transport (a client of the Applicant), Brocsand, De Wet Bouers and Brights Hardware. He stated that his clients often asked him or his drivers to deliver goods to different delivery addresses, and he could not refuse such requests.

10. Under cross-examination Mr Karsten confirmed that his main income was derived from the sale of sand and stone to his own clients.

11. This completed the evidence for the Applicant.

12. **Mr Jurle Braaf**, a driver employed by the Applicant, testified on behalf of the Respondent. He stated that he had been employed for approximately three years and drove a tipper truck, transporting sand, stone, fertilizer and clay. He stated that the Applicant did transport goods on behalf of clients, and cited Van Dyk Transport and Craigmore (with whom the Applicant had a contract to transport fertilizer) as examples. He heard on the radio that drivers transported goods to Paarl and to Corobrik, sometimes three times a day. He also transported products from Portland Quarries to their clients. He had heard from other drivers that they were required to take loads of household rubbish and old meat to the dump site on the N7.

13. Under cross-examination Mr Braaf acknowledged that he was not involved in the administration of accounts and had no knowledge of contracts entered into, but he knew where the loads went and saw the documentation. He agreed that his evidence regarding what other drivers told him was hearsay, but stated that he also saw documentation indicating where goods were going to. It was put to Mr Braaf that the Applicant bought sand, stone and clay and sold this to Corobrik. Mr Braaf stated that he was not aware of this. With regard to Rocla, it was put to Mr Braaf that the Applicant bought stone from Portland Quarries

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and delivered it to Rocla on the instructions of his client, Mr van Dyk. Mr Braaf stated that he had no knowledge of that. He was told by the person who operated the scale that the Applicant was transporting goods for Mr van Dyk.

14. Mr Braaf stated that the meat was transported in a blue horse and trailer. It was put to Mr Braaf that this was Mr Karsten's son's truck, driven by his son's driver. He stated that it was the Applicant's truck, but agreed that it was driven by the son's driver.

15. It was put to Mr Braaf that he was making untrue claims based on hearsay evidence because he wanted the benefits offered by the Respondent. Mr Braaf stated that the employees of the Applicant received no benefits.

16. Under re-examination Mr Braaf stated that the drivers were sometimes instructed to bring goods to the Applicant's yard, and on other occasions they were instructed to deliver it immediately to a delivery address. Mr Braaf stated that the blue horse and trailer belonged to the Applicant, and the name J.H. Karsten appeared on the front of the truck.

17. This completed the evidence for the Respondent.

18. In closing Mr Heyns argued that the evidence of Mr Braaf was largely hearsay. No evidence had been presented by the Respondent regarding the contracts between the Applicant and his suppliers and clients. It was not in dispute that the Applicant's main business did not fall within the jurisdiction of the Respondent. The deliveries undertaken by the Applicant on behalf of others were minimal and incidental to the main business. With reference to the cases of *Coin Security (Pty) Ltd v CCMA & Others* (see citation below) and *National Bargaining Council for the Road Freight Industry v Richard's Rentals & others* (2013) 34 ILJ 1458 (LAC), he argued that the activities of the Applicant that fell within the scope of the Respondent were "casual and insignificant". In terms of the *Coin Security* case, where the employer's activities that fell within the scope of a Council were ancillary to its other activities, it was a question of degree in determining whether the employer was engaged in two separate industries. In this case the degree of ancillary activities was minimal. The 23 drivers were involved in deliveries on behalf of clients, on average, for not more than 6 hours per year each.

19. Mr Heyns argued that if the Applicant was required to register with the Council he would become uncompetitive within his industry.

20. Mr Jansen argued that the Council had established that there was third party transportation, and that this amounted to more than the one to three loads per month alleged by the Applicant. Mr Braaf had testified that two to three loads per day were carried, approximately three times per week. Applicant had not submitted any proof that the third-party loads only constituted 0,04 to 0,12 % of its business. The invoices

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and delivery notes submitted showed that there was third-party transportation more frequently than claimed.

21. There would be unfair competition if the Applicant was not required to register with the Council. The Council had a duty to ensure parity in the industry.

ANALYSIS OF EVIDENCE AND ARGUMENT:

22. The case of *Greatex Knitwear (Pty) Ltd v Viljoen and others* 1960 (3) SA 338 (T) sets out the approach to be taken in determining a demarcation dispute. 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 some of the activities of the employer fell under the definition, the next question was whether those activities were separate from or ancillary to his 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 his other activities, the employer was not engaged in the industry (unless they were of such magnitude that he 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.

23. 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.

24. The Road Freight and Logistics Industry is defined in the Collective Agreement and Registration Certificate of the Council 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]"

25. The important words in the above definition, in the context of this case, are "for hire or reward". It was not in dispute that the bulk of the Applicant's business involved transporting his own goods, purchased from a

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supplier, to a client. Applicant is therefore, in general, not transporting the goods of third parties for hire and reward, and these activities do not fall within the industry definition.

26. However the Applicant conceded that he did, on occasion, transport goods on behalf of clients when requested to do so. He alleged that this occurred one to three times a month, at most (zero in some months), and that this work constituted less than 0,12 % of his business. His 23 drivers would, on average, spend 6 hours or less per annum transporting goods on behalf of third parties.

27. Applicant argued that the transport of goods on behalf of clients was a service offered to clients and was ancillary to his main business. The volume of such work was so insignificant that it could not constitute engagement in a separate industry.

28. Respondent's witness alleged that the Applicant's involvement in third-party transportation was far greater than indicated by the Applicant. He conceded however that he had no knowledge of administration of accounts or contract details, and that his evidence was based to a large degree on what he was told by other drivers; in other words, hearsay evidence. The evidence of this witness was to a large degree speculation, and was insufficient to rebut the Applicant's evidence as to the volume of transportation on behalf of third parties. Respondent disputed the Applicant's evidence, but had no other evidence to indicate that the volume of such work was greater than claimed. The explanations given by the Applicant in respect of the various invoices and delivery notes submitted were cogent and credible, and I have no reason to reject these explanations.

29. In the circumstances I am inclined to accept the evidence of the Applicant as to the reasons for and volume of third-party transportation. On this basis it would appear that the third-party transportation is ancillary to the Applicant's main business, since it is done only on an *ad hoc* basis when requested by a client. The extent of these ancillary activities appears to be insignificant and cannot justify a finding that the Applicant is involved in the Road Freight Industry.

30. With regard to the issue of socio-economic considerations, in the *Coin Security* case (*supra*) it was pointed out that under the Labour Relations Act additional considerations need to be borne in mind by the person charged with making a demarcation award in light of the socio-economic objectives of the LRA and its objectives of establishing and promoting a centralized system of orderly collective bargaining at sectoral level. These considerations would require the arbitrator to extend the enquiry, where appropriate, to a second phase involving a consideration of collective bargaining practices and structures and socio-economic factors. The commissioner noted that this would particularly be so where there was no bargaining council registered for the sector under which the Applicant sought to be placed.

31. There is no bargaining council covering the main business of the Applicant, being the purchase and resale of base building materials and fertilizer. Mr Braaf noted that the employees of the Applicant "do not receive

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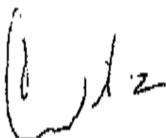
any benefits", without specifying what he meant by this. The employees would of course be entitled to all benefits stipulated by the Basic Conditions of Employment Act, such as sick leave, annual leave and overtime pay. In addition the employees are free to join a trade union which (if sufficiently representative of the employees) would be able to bargain on their behalf for improved benefits. I do not believe that there are any socio-economic factors in this case which would override the established demarcation principles as laid down in the decided cases cited above.

AWARD:

32. The operations of the Applicant, J.H. Karsten trading as J.H. Karsten Transport, do not fall within the jurisdiction of the Respondent, the National Bargaining Council for the Road Freight and Logistics Industry. The Applicant is accordingly not required to register with the Respondent council.



D.I.K. Wilson
CCMA Senior Commissioner

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