



DEMARCATIION ARBITRATION AWARD

Commissioner: Hilary Mofsowitz
 Case No.: WE CT 8996-15
 Date of Award: 10 September 2015

In the arbitration between:

Rocket Trading 117 CC

Union/Applicant

and

The National Bargaining Council for the Road Freight and Logistics Industry **Respondent**

Union/Applicant's representative: Danie Cronje/Rynard Swanepoel
Rocket Trading 117 CC
P O Box 1843
BRACKENFELL, 7561
 Telephone: 021 987 3633
 Telefax: 021 987 8811

First Respondent's representative: Madeleine van der Watt
 Respondent's address: NBCRFLL
Absa Building, 141 Voortrekker Road
PAROW, 7500
 Telephone: 021 930 7736
 Telefax: 021 930 6032

Details of hearing and representation

1. This is the award in the matter between Rocket Trading 117 CC ("the applicant") and the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI) ("the respondent").
2. Arbitration was held at the offices of the NBCRFLI in Parow on 17 August 2015. Written closing argument was received on 24 August 2015. An inspection at the applicant's premises was held on the same day.
3. Danie Cronje ("Cronje") an official of the South African Transport Employers Association represented the applicant.
4. Madeleine van der Watt ("van der Watt") the senior designated agent represented the respondent.
5. The matter was enrolled for a preliminary hearing at the CCMA on 17 July 2015. Both parties attended and all preliminary issues were recorded. It was agreed that there were no other interested parties to be joined to proceedings.
6. The proceedings were manually and digitally recorded. The documentation and written submissions form part of the record.

The issue to be determined

7. I have to decide whether the activities of the applicant fall within the ambit and scope of the respondent's certificate of registration/constitution/main collective agreement. The dispute was referred in terms of section 62 of the Labour Relations Act 66 of 1995 as amended ("the LRA"). The applicant seeks an order that it does not fall under the scope and registration of the respondent, the National Bargaining Council for the Road Freight and Logistics Industry. The respondent opposed the application.

Background to the dispute

8. The applicant, Rocket Trading 117 CC, is a multi faceted business. It manufactures a sand and stone product which is delivered and sold to customers. It rents/ hires containers, building huts and earth moving equipment. It manufactures containers and is involved in the demolition of buildings and the processing of products derived from this function. The respondent does not seek jurisdiction over these aspects of the business (as detailed above). The aspect of the business that the respondent claims falls

under its jurisdiction involves collection of rubble. The activities involved in the collection of rubble were not placed in dispute other than the demarcation thereof. The applicant business collects rubble from its clients by transporting v-bins or skips. The rubble is loaded onto the containers and transported away from the collection points. The rubble is processed and converted to a saleable product or the rubble is dumped. Where the rubble is converted to a final product it is delivered and sold to customers. It is undisputed that the collection of rubble is the major part of the business. The core of the dispute is that the applicant views these activities as renting of containers (bins and skips) and transporting its own goods in much the same way as a retail chain delivers its own products. The respondent maintains that the core of the applicant's business activities is involved in transporting its clients' goods (which in this case is rubble). It argued that the bins/skips used by the applicant could easily be replaced by other means of transport and therefore the business in essence emanates from the removal/transporting of rubble. The business employs approximately forty four employees of which eleven are drivers. It appears that the employees are used interchangeably in respect to the different areas of the business. It is undisputed that the applicant is not registered with any bargaining council and its employees do not belong to any trade union.

9. The demarcation dispute arose as a consequence of the respondent issuing the applicant with a compliance order (dated 6 May 2015) in order to compel the applicant to comply with its scope and jurisdiction. The applicant did not comply with the terms of the compliance order. The applicant seeks an order that it does not fall under the scope and definition of the NBCRFLI.
10. It was undisputed that the applicant was previously involved in transporting of goods for reward and therefore registered all its drivers with the NBCRFLI. This took place around 2006. Later the two parties agreed that it was not necessary to register all the drivers and thereafter approximately seven drivers were registered with the council. It appears to be common cause that this particular aspect of the business closed down and that one particular driver (at his own request) remained registered under the NBCRFLI. This particular driver has remained under the scope and registration of the council and the applicant has been complying with the provisions of the main collective (in respect to that driver only). The reason for the registration/compliance of that particular employee is disputed between the parties but the applicant does not seek to disturb this situation i.e. the registration with council of the one driver. It was undisputed that the applicant business is paying the full monthly contribution to the council inclusive of the employee's contribution. It is undisputed that the drivers employed by the applicant business earn the same (and possibly more) than the minimum as prescribed by the NBCRFLI main collective agreement and annual wage increments are awarded as per the provisions of the main agreement.

11. The inspection in loco revealed a vast area where different activities and equipment were seen. Specifically viewed was the mixing of different types of sand, recycling of product which was loaded onto containers and equipment (earth moving equipment, skips, v-bins and bobcats).
12. The respondent seeks an order that the operations of Rocket Trading 117 CC (in relation to the removal of rubble/garden refuse/other goods which are transported for gain) be defined in the context of its main collective agreement (Schedule 2: Definitions) and in particular seeks to rely on the definitions detailed below. The NBCRFLI referred to the definition as contained in Schedule 2: Definitions (of the main collective agreement) as detailed below:

"The Road Freight and Logistics Industry means the sector in which employers and employees are associated for carrying out on or more of the following activities for hire or reward:

a) Transportation of goods by means of motor transport.

The definition of goods is described as follows: *Goods means any movable property, including but not limited to any article, commodity or substance such as sand, soil, gravel, stone, coal, water or other liquid, gaseous or solid matter and includes containers or containerized goods".*

The applicant's evidence and argument

13. The applicant's representative referred me to the provisions of the main collective agreement (specifically the definition as detailed above). It was conceded that the business entity is involved in a vast number of activities and commodities that are produced and sold for gain. Within the applicant's activities, the use of motor vehicles is an inherent requirement to be able to render a service. However transportation is not sold or rented as a commodity. It is part of the service offered. It was specifically argued that where a business "handles" its own products, such a business would not fall under the scope and registration of the NBCRFLI. In this regard it was argued that the overall impression of the business is that the business is not involved in transportation for reward and is not involved in any activities as defined in the scope of the NBCRFLI. I was asked to grant a ruling that the applicant's business is exempt from falling under the scope of the NBCRFLI.
14. The member of the close corporation Rynard Swanepoel ("Swanepoel") testified. He confirmed that the business previously transported goods for gain but as this aspect of the business was closed down, there was no longer a requirement to be registered under the NBCRFLI. In this regard he referred to

correspondence from the NBCRFLI (dated 25 July 2006) in which the council confirmed that the business does not need to be registered under its scope and registration. In this correspondence, the council indicated that where an employer buys and sells its own sand and stone, it is not necessary to register under the scope of the NBCRFLI. The correspondence also reflects that in circumstances where an employer transports for gain, such an employer must register with the council.

15. Swanepoel testified and confirmed the activities of the business that form the subject of this dispute. This aspect of the business involves the collection of rubble using the vehicles of the business. The product that is collected is then processed and converted into a further product (subbage) which is sold to the applicant's customers or the rubble is dumped at external sites. The customers are primarily from the construction and building industry. The final product (after recycling) is transported to the applicant's customers. It was the evidence of Swanepoel that the renting out of containers (skips and v-bins) is the essence of the business. Swanepoel asked me to consider that transporting is not the dominant aspect of the activity of the business and the transportation costs are included in the overall price. It is the hiring of the containers that is regarded as the dominant aspect of the business. In this regard Swanepoel referred to a delivery slip and a quotation. Both documents form part of the record. It is the products of their own business that they transport, they do not transport for clients. Swanepoel confirmed that the business is described on the internet as "rubble removal" but it is merely a slogan to attract potential customers and it is not necessarily what the business does.
16. In summary, the activities of the business include transporting containers in order to collect rubble from customers. The containers are supplied by the applicant business. It is a rental arrangement in that the business rents out the bin to its customers. The manner in which the product is disposed has no bearing on the price. The rental fee is inclusive of transporting to clients and removing the rubble from clients. The weight of the rubble also influences the overall price. The goods that are transported are therefore the property of the applicant business and the rental arrangement between the applicant and its clients precludes it from falling under the council's jurisdiction. The collected rubble is transported back to the applicant's premises and sorted for recycling or alternatively the rubble is "dumped". Where the product is "recycled" it is resold to customers. The profit of the business therefore lies in the sale of the commodity and not the transportation. In essence, the applicant did not dispute that the activity of rubble removal falls under the jurisdiction of the respondent. However what has to be considered is that the applicant business is different. The applicant business is that of rental of bins and skips as per the contract or rental agreement (as can be seen on the delivery note/quotation). The content of the bin becomes the property of the applicant business once the content is removed from the client's site. The applicant decides on how the product will be processed.

The respondent's evidence and argument

17. The respondent's representative referred me to Schedule 2: Definitions as contained in the main collective agreement as detailed above. It was argued that the business can best be described as transporting of goods in that goods are collected from customers, placed in containers known as "skips" or "v-bins" and thereafter transported either to the applicant's premises or the goods are transported off site to sites known as "filling" or "landfill" sites. The business derives an income for the transportation of goods. In this regard, the main business activity of the applicant is rubble removal and removal of garden refuse and hence transportation for gain. This aspect of the business (as opposed to the other aspects of the business) is the basis of the demarcation dispute and the NBCRFLI seeks that this aspect of the business falls under its scope and definition. I shall therefore only refer to this section of the business for purposes of my award.
18. In summary the main aspect of the business is therefore viewed as transportation of goods. A motor vehicle transports a container known as a v-bin or skip to the client's premises and the container is picked up again by a motor vehicle. The v-bin is removed with the rubble in it. The v-bin simply adds convenience to the method by which transportation takes place.
19. Nicholas Johannes Huysamen ("Huysamen") testified in support of the respondent's submissions. He was employed as a driver with the applicant business for the period May 2014 to April 2015. During his period of employment, he was responsible for driving a vehicle to clients and left the containers on site or removed the containers from site. In this way, the rubble was removed from site. The loaded bin would be transported back to the applicant's business premises or to other sites such as landfill or tipping sites. Approximately five to seven bins were transported per day. All the drivers did the same work including the driver (James Gonya) who is currently registered with the NBCRFLI. At that time, there were approximately twelve drivers.

Analysis of evidence and argument

20. It is accepted that the provisions of a bargaining council's certificate of registration/constitution/main collective agreement determines the ambit and scope of that bargaining council. It was the applicant's argument that Rocket Trading 117 CC does not fall within the scope of registration and jurisdiction of the NBCRFLI and should not be registered accordingly. The application was opposed. The NBCRFLI argued that the applicant's business falls under its scope and jurisdiction and should be registered accordingly.

21. In essence the activities of Rocket Trading 117 CC were not placed in dispute. The issue to be determined is whether the activities of the business fall within the registered scope of the NBCRFLI (the respondent in the matter). Both parties attended arbitration, submitted evidence and argument including final argument which was submitted after arbitration. All these submissions have been considered and will have reference where necessary. It is specifically noted that the NBCRFLI does not seek jurisdiction over the applicant's activities that do not involve transportation of goods. It is therefore not necessary to detail these activities or to make a finding in relation to these activities. It is undisputed that these activities involve the supplying of sand/stone to customers, renting of containers, renting of earth moving equipment, manufacturing of steel containers and demolition of buildings. I have noted that the inspection in loco did not assist either party's case. Most of the activities seen on the day of the inspection were the activities that do not form the subject matter of this dispute or where skips and v-bins were stationary. In any event, it was the respondent's argument that the activities of the applicant's business over which it seeks jurisdiction, takes place away from the business premises.
22. The content of the main collective agreement was not placed in dispute. The relevant sections/definitions forms part of the record and have been highlighted above. In particular the definition of the Industry (as detailed in Schedule 2: Definitions) has reference.
23. For purposes of demarcation, it is necessary to determine the true nature of the business. The character of an industry is determined, not by the occupation of the employees engaged in the employer's business, but by the nature of the enterprise in which the employees and the employer are associated for a common purpose. (See *Coin Security (Pty) Ltd v CCMA & Others (2005) 7 BLLR 672 (LC)*). Once the character of an industry is determined, all the employees are deemed to be engaged in that industry.
24. In this case, I must compare the activities of Rocket Trading 117 CC against the definition of the road freight and logistics industry as contained in its main collective agreement/certificate of registration. I am required to interpret the main collective agreement in a manner which best accords with the purpose and primary objectives of the collective agreement and in this respect, I am required to compare the activities of the applicant with the definition of the industry.
25. Where some of the activities fall within the definition of a particular industry, it is a question of degree whether or not the enterprise as a whole should be found to fall within the definition of the industry. The ancillary activities should be ignored if they are casual or insignificant.
26. The activities of the applicant business are essentially common cause. The material dispute is whether the applicant is transporting its own goods (there was no dispute that rubble is classified as goods as per the

Industry definition) or whether it is transporting goods of its clients. The evidence supports the conclusion that once the goods (rubble) are collected, the client has no further (or certainly limited) interest in the goods. This is evident by the fact that it was undisputed that the applicant elects whether to dump the goods or process the goods (and then sells to its customers). In essence therefore, the applicant is transporting its own goods. The main profit of the business is not made from transporting goods. The main profit of the business is made from rental of containers and the selling of processed products. I have not found that the transportation of rubble is the core element of the applicant's business.

27. While it is clear that the rubble is collected, loaded onto containers and transported by means of motor transport, the transporting of goods is not the primary purpose of the business activity. I am persuaded that the primary activity of the business is the rental of containers. The containers are transported as a support function to the applicant's business. It stands to reason that a client would not contract with the applicant to have rubble removed, if the containers were not transported or were left on site. The applicant's quotation for business shows that the quoted business relates to hiring of containers. There is no specific quotation for transport costs. The price of the job is affected by the size/type of the container, the rental period and the rate for hiring the container. Transport costs are included in the overall price for the job.

28. In the judgment 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 concluded the following:

"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 the other activities. If the activities were ancillary to the employer's other activities, the employer was not engaged in the industry (unless the activities were of such magnitude that could be said to be so engaged)".

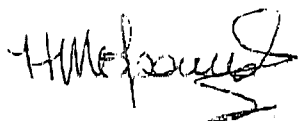
29. In applying the tests of the *Greatex Knitwear* judgment and the *Coin Security* judgment, I am satisfied that the activities of Rocket Trading 117 CC do not fall within the definition of the road freight and logistics industry. The overall impression of the business is that of rental of skips and v-bins and that transportation of the rubble is ancillary to this function. The applicant is in essence, transporting its own products once the rubble is collected. I have found that the applicant is not transporting goods for reward or gain as per the definition contained in the main agreement. There was no evidence to suggest that similar businesses

are registered with the council. In determining that the nature of the business does not fall within the road freight and logistics industry, it is not material to consider the activities of employees or categories of employees.

30. I have particularly considered the labour appeal court decision in the matter between the NBCRFLI and Richards Rentals (Pty) Ltd (case number JA70/10) (12 December 2012). The labour appeal court upheld the decision that Richards Rentals (Pty) Ltd does not fall under the scope and jurisdiction of the NBCRFLI. The business was described as an entity that hires out tipper-trucks and drivers to its clients in the mining and construction industries. The tipper-trucks are used to convey landfill and aggregate rubble within the relevant site areas and occasionally to and from landfill or dumping points outside the sites. The labour appeal court agreed with the finding of the CCMA commissioner that the activity of hiring out plant or vehicles for rental is not contemplated in the road freight definition. The labour appeal court agreed with the finding that the activities of Rental Richards (Pty) Ltd fell outside of the ambit of the industry's definition. To the extent that the activities of Rental Richards (Pty) Ltd are similar to the activities of the applicant, the labour appeal court decision has been considered.
31. I have accepted that demarcation of an enterprise or business is a policy laden decision with far reaching consequences. Demarcation determines wages, working conditions and social security for employees and regulates competition amongst employers. A demarcation decision is therefore a weighty one, requiring careful, thoughtful consideration of facts, law and social and industrial relations policy. In this regard I have considered the *Coin Security* judgment referred to above. Commissioners entrusted with demarcation decisions must enquire into relevant collective bargaining practices and structures and must consider socio-economic considerations. The LRA serves to promote orderly collective bargaining as well as collective bargaining at sectoral level. My decision not to demarcate Rocket Trading 117 CC under the provisions and jurisdiction of the NBCRFLI, have taken these considerations into account. I do not find that there are socio economic factors in this case that would override the established demarcation principles as laid down in the current jurisprudence. I have also considered that it was undisputed that the drivers employed in the applicant business receive the same salary rates as prescribed in the NBCRFLI and are awarded the same salary increments as regulated by the NBCRFLI. I have not found any ulterior motive in the fact that one driver from the applicant's business is registered with the council. This appears to emanate from historical reasons.

Award

32. I find that the operations/activities of Rocket Trading 117 CC do not fall under the registered scope and jurisdiction of the National Bargaining Council for the Road Freight and Logistics Industry as regulated by its main collective agreement and other supporting legislation. The main collective agreement and other supporting legislation are therefore not binding on Rocket Trading 117 CC and all its employees.



HILARY MOFISOWITZ
CCMA SENIOR COMMISSIONER



APPROVED