CCMA

ARBITRATION AWARD

Commissioner: **D. I. K. Wilson**
Case No.: WECT 15032-14
Date of Award: **20 February 2015**

In the arbitration between:

HENQUE 2890 CC t/a BRAZIER & ASSOCIATES Applicant

and

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY Respondent

Applicant's representative: Mr L. Bell
Attorney, C & A Friedlander Attorneys

Applicant's address: Unit 1
13 Dipka Street
STIKLAND
7530

Telephone: (021) 823 6770 / 487 7800
Telefax: 086 684 8031 / (021) 426 5653
E-mail: vaugn@braze.co.za

Respondent's representative: MS M. van der Watt
Designated Agent

Respondent's address: ABSA Building
141 Voortrekker Road
Cnr. Van Eyssen Street
PAROW
7500

Telephone: (021) 930 7720
Telefax: (021) 930 6032 / 086 684 8031
E-mail: madelein.vanderwatt@nbcrfi.co.za

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing was held at the Cape Town offices of the CCMA and at the offices of the Respondent on 2 February 2015. The Applicant, Henque 2890 CC trading as Brazier & Associates, was represented by Mr Leon Bell of C. & A. Friedlander Attorneys. The Respondent, the National Bargaining Council for the Road Freight and Logistics Industries (NBCRFLI), was represented by Ms Madeleine van der Watt, a Designated Agent. Proceedings were conducted in English and were digitally recorded.

2. An inspection *in loco* was held at the Applicant's premises in Stikland, whereafter the hearing continued at the offices of the NBCRFLI in Parow. Parties submitted additional closing arguments in writing which were received by 6 February 2015.

ISSUE IN DISPUTE:

3. The issue in dispute was one of demarcation. Applicant alleged that its business does not fall within the scope of the Respondent.

BACKGROUND TO THE DISPUTE:

4. Applicant operates as a cash processing facility; this involves collecting cash from clients, counting and processing it in a form required by Standard Bank, on its own premises, and thereafter banking the cash. The client is credited with the amount collected on the same day, and pays a lower processing / deposit rate than charged by the bank. Applicant employs 35 people, of whom 11 are involved in transporting the money.

5. Applicant argues that its main business is cash processing, not transportation, and that the transport of cash is ancillary to its main business. Applicant also argues that cash does not constitute "goods" as per the defined scope of the Respondent. Respondent argues that it has full jurisdiction over the Applicant, including those employees not directly involved in transporting cash.

6. Applicant has been registered with the Respondent since 2004, in respect of the employees involved in transporting cash. However, it argues that none of its employees should fall within the scope of the Respondent.

7. An inspection *in loco* was held at the Applicant's premises. Salient points arising from the inspection, as agreed to by the parties, were as follows:

   7.1 The Applicant's premises and vehicles do not bear any signage or branding, as a security measure.

   7.2 Vehicles drive into a secure bay, where the cash is offloaded and passed through a chute into the counting room. Seal numbers are verified and the bag is allocated to a teller for processing. Cash is

counted using counting machines (both for coins and notes) and the tellers audit the amounts received. (Amounts were audited two to three times before being sent to the bank). The coins / notes are sorted and packed according to the requirements of Standard Bank before being transported to the bank.

7.3. Admin staff are located in a separate room. There are 8 employees involved in admin, cleaning and management and 16 staff involved in counting / auditing of cash received. Admin staff deal with the deposits and the crediting of clients. Since the client was credited immediately, using the Applicant's funds, the money was deposited into the Applicant's bank account.

7.4 The Applicant collects 90 % of the cash received. Some clients deliver cash directly to the Applicant's premises, and in some instances a subcontractor is used to collect cash.

7.5 The Applicant has four vehicles; two Toyota HI-Aces, one Dyna truck and one Iveco.

7.6 The application relates only to the Cape Town branch of the company. The Johannesburg branch operates on a different business model in terms of which all collections are subcontracted, and the counting and processing is done by the bank.

SUMMARY OF EVIDENCE AND ARGUMENT:

8. **Mr Shannon Blake** testified that he was a Manager of the Respondent; his duties included overseeing the counting process and supervising the staff, dealing with clients, and liaising with the bank. The Applicant was a cash originator for Standard Bank, who could obtain cash more cheaply from the Applicant than from the Reserve Bank. Clients were also charged less for processing and banking than they would be charged by the bank. The bank charged R1-30 per R100, while the Applicant's rates were 30 – 40 cents per R100. He evaluated the client's needs, based on its turnover. The higher the volume of cash, the lower the rate.

9. Money was not transported straight from the client to the bank; all cash was brought to company premises for processing before being banked. The Applicant collected cash from some clients for free, and from others at below cost. It did not make money out of collections; it made money out of processing the cash. It generally did not subcontract collection in Cape Town because its clients generally wanted on company to be responsible for its cash, and because it would only be able to subcontract to its competitors, who would then try to take the business away.

10. Applicant deducted its fee before crediting the client. The fee charged was a processing fee, and there was no separate transport fee. The transport was expensive due to vehicle repair bills and staff wages and benefits, but this was seen as a necessary expense.

11. The cash-in-transit (CIT) staff included drivers, gunmen (guards) and crewmen. They occasionally performed other duties, but their primary function was the transport of cash. The Controller remained on the premises at all times.

12. The Applicant was Standard Bank's largest cash provided, depositing R473 million in December 2014. The average deposits were approximately R370 million per month.

13. The Applicant's operation was not similar to Coin Security or other CIT businesses, as their primary function was the transport of cash. In the Applicant's case the primary function was the processing of cash.

14. Under cross-examination Mr Blake stated that he had been employed for approximately three years. The business process had not changed since he had been there. Chrisna Cloete (one of the Admin staff) had been employed longer than him. If the Applicant did not collect the cash it would have to subcontract one of its competitors such as Coin Security or SBV to do so on its behalf.

15. This concluded the evidence for the Applicant.

16. **Ms Elaine van Rooyen,** an Agent, testified for the Respondent. She stated that she had arranged with Mr Brazier for an inspection on 6 November 2014 at 10 a.m. When they arrived Mr Brazier was not available and she was assisted by Ms Chrisna Cloete. Ms Cloete said that the business was a CIT company which collected money from its clients, took it to the company premises and then banked it. There were three people on each vehicle. She said that they do the same work as other CIT companies. The company had approximately 200 clients.

17. The cash-in-transit sector was covered by the Council's collective agreement. The bargaining unit had been extended to include counting-house tellers, receptionists, etc. The collective agreement also included "Custodians" and various categories of Security Officers.

18. Under cross-examination Ms van Rooyen agreed that certain of the Applicant's employees were registered with the Council. Other CIT companies were also registered with the Council. With regard to the definition of "goods" as per the Council's scope, she stated that cash could be a substance or a commodity. She agreed that cash was not specifically mentioned in the definition of the industry. She felt that the employer and employees were associated for the purpose of processing AND transportation of cash.

19. This completed the evidence for the Respondent.

20. In closing Mr Bell argued that Mr Blake's evidence that the sole purpose of the business was the processing of cash was not disputed by the Respondent. The Respondent made its money from the cash-processing margins, not transport which was an ancillary service. The transport side was a loss-leader; if the Respondent could not do it, it would have to sub-contract it out. Only one third of the staff was involved in transport.

21. Mr Bell argued that the word "goods" in the definition of the Industry scope had to be given its ordinary meaning. The question of whether money fell within the meaning of "goods" was considered in the case of *Coin Security (Pty) Ltd v CCMA & Others* [2005] 7 BLLR 672 (LC), but the point was not decided as the argument was raised for the first time in the review hearing.

22. Ms van der Watt argued that it was found in an Enforcement Arbitration Award that the Respondent fell within the jurisdiction of the Council. The Respondent had not challenged the award. The Respondent was described as a Cash-in-Transit company by the Provincial Head of Standard Bank in the Western Cape, in an online magazine interview.

23. Ms van der Watt stated that the Applicant's competitors such as Coin Security, Fidelity Guards, SBV and G4 Security were all registered with the Council. 90 % of the money processed by the Applicant was also transported by the Applicant. The lack of signage on vehicles and premises was irrelevant.

24. Ms van der Watt stated that she had not come prepared to argue on the question of the meaning of "goods". It was agreed that she would submit arguments on this point by Wednesday 4 February, and Respondent would have an opportunity to reply in writing by Friday 6 February 2015. On 4 February Ms van der Watt submitted a copy of the In Limine Ruling in the matter between SBV Services (Pty) Ltd and the Council (CCMA case number GA 19997-05). This matter was referred as a demarcation dispute, in which a preliminary issue was raised with regard to whether cash constituted "goods" as contemplated in the registered scope of the Council. In that Ruling, the commissioner found that the word "goods" in the Registration Certificate of the Council should be given a wide or extended meaning which includes money.

25. In his written reply, Mr Bell argued that the ruling of Commissioner Brand in the matter referred to by Ms van der Watt was not binding authority. He argued that the word "goods" should be given its ordinary meaning, which was that referred to in the definition, being "article, commodity or substance". He argued that the commissioner did not provide any authority for the finding that a restrictive interpretation of "goods" would be against one of the objectives of the LRA, that being to encourage collective bargaining. Collective bargaining in councils should only be between the parties to the Council. The court in *Greatex Knitwear (Pty) Ltd v Viljoen & Others* 1960 (3) SA 338 (T) advocated a restrictive interpretation of the Industry definition, although this approach was ameliorated in later cases.

26. Mr Bell argued that the *SBV* case was distinguishable due to the different modes of operation of the Applicant's business and SBV. Because the client was credited on the same day the money was collected, and before it was banked, the cash in effect became the property of the Applicant. The process was more one of a form of payment and money conversion (from cash to electronic funds) rather than the transport of paper and metal.

27. Mr Bell argued that in the circumstances, the definition of "goods" as referred to in the Respondent's Certificate of Registration and in the Council's Collective Agreement should not be found to encompass money.

ANALYSIS OF EVIDENCE AND ARGUMENT:

28. 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 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.

29. 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.

30. 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*".

31. 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.

32. 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]"

33. In terms of the *Greatex Knitwear* case, the point of departure is to interpret the definition. Although the court stated that the definition was often restrictively interpreted, this is not always necessarily the case, as pointed out in the later cases cited by Mr Bell. When it comes to the interpretation of labour statutes, the doctrine of purposive interpretation is most widely used (see *Equity Aviation Services (Pty) Ltd v SATAWU & others* [2009] 10 BLLR 933 (LAC)). This means that as a general rule, labour legislation must be interpreted in a manner which best accords with its purposes and primary objectives. While the Collective Agreement is not labour legislation as such, in *Platinum Mile Investments (Pty) Ltd t/a Transition Transport v SATAWU & another* [2010] 10 BLLR 1038 (LAC) the Labour Appeal Court held that bargaining council agreements have the status of subordinate legislation. As such I believe that the same principle of purposive interpretation should apply.

34. The most contentious part of the definition, in this arbitration at least, is the question of the meaning of the word "goods", and in particular whether money (coins and notes) can be regarded as falling within the meaning of the word. "Goods" is defined in the Collective Agreement as "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". Mr Bell argued that money was not an article, commodity or substance and therefore fell outside of the definition; however this does not take into account the words "including but not limited to..." which denote an intentionally broad definition, going beyond the scope of only articles, commodities and substances.

35. I acknowledge that I am not bound by the decision of Commissioner Brand in the *SBV* case (*supra*), however I do find it of persuasive value. Commissioner Brand gives a detailed and well-reasoned analysis of why, in the case of SBV, money should be included in the meaning of "goods". He notes that many of the dictionary definitions of "goods" specifically exclude money, and accepted that money was not usually understood to constitute merchandise, wares or a commodity. Money is generally a means of exchange. However, in the case of a company involved in transporting money on behalf of clients, the money concerned is not a means of exchange, but rather simply movable property. As Commissioner Brand put it (para. 33 of the Ruling): "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."

36. The interpretation of "goods" as including money advances one of the primary purposes of the Labour Relations Act, which is to encourage collective bargaining at sectoral level. Mr Bell's argument that sectoral bargaining should only involve the parties to the Council is unconvincing; the decision that I must make is

whether the Applicant should be registered with the Council or not. If so, it will fall under the collective bargaining processes at the Council; and if not, it will not. The point is that if a narrow interpretation is given to the word "goods", so as to exclude money, the Applicant will be automatically excluded from the sectoral collective bargaining process. The wider interpretation will advance the primary purposes of the LRA and should therefore be preferred.

37. Commissioner Brand also makes the point that it would be wrong to restrict the generality of the transport business which is intended to be covered by the Council's agreements without any clear indication in the Registration Certificate that such restriction was intended. The wording of the definition of "goods" makes it clear, I believe, that the widest possible meaning was intended.

38. Mr Bell argued that the SBV case was distinguishable because of the different business models of the companies. I do not believe this to be the case; the major difference is that while SBV transports clients' money directly to the banks, the Applicant first transports it to its own premises for processing, before transporting it to the bank. Both companies are however involved in transporting money and to this extent they are comparable.

39. For the purposes of this arbitration I accept that money is included in the definition of "goods" as referred to in the Council's Registration Certificate and Collective Agreement.

40. The next step is to compare the activities of the Applicant with the industry definition. Applicant argued that it was not transporting clients' money for reward because, once it credited the client, the money became its own money. However the fact is that the client is only credited once the money is received at the Applicant's premises and audited; therefore in collecting the money from the client and transporting it to its own premises, the Applicant is transporting the client's money. While it may not charge a separate transport fee for this service, there can be no doubt that the transport cost is incorporated in the processing fee. While the Applicant testified that it picked up money for free from about three clients, this is very much the exception. I find that the transporting of money by the Applicant falls within the definition of the Road Freight Industry.

41. Applicant argued that, in the event of the transport of money being found to fall within the industry definition, the transport of money was ancillary to the Applicants' main purpose, which was the processing of the money, incorporating counting and packing the money in a form required by the bank. I do not regard this as an ancillary activity; it is an essential part of the service provided by the Applicant to its clients. This is supported by the fact that the Applicant collects 90% of the money it receives from clients. Even if it were to be found to be an ancillary activity, it would be of such a magnitude that the Applicant would still be engaged in the Road Freight Industry.

42. The overall impression of the business is that it is in effect a Cash-in-Transit business. The fact that the business model includes the processing of the cash into a form required by the bank for banking purposes does not detract from the fact that the main purpose of the business is to collect the money from clients and to bank the money. The fact that the business model allows the Applicant to offer clients a more economical way to bank their money, and to profit from its arrangement with the bank, does not detract from this. Applicant has specialized vehicles for the transport of the money and one third of its staff is dedicated to transport activities. It is clear that transport is an essential part of the business.

43. The Council's collective agreements make specific provision for the inclusion of cash-in-transit businesses. Clause 65 of the 2012 Main Agreement (validity extended until 29 February 2016) deals specifically with the cash-in-transit sector. Clause 7 of the agreement amending the Main Agreement (published in Government Gazette No. 36017 of 28 December 2012) also refers to extended bargaining unit employees engaged in the cash-in-transit sector.

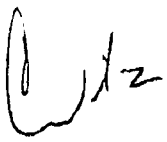
44. In terms of the *Coin Security* case, once the nature of the business has been determined as falling within a particular industry, all the employees in the business are engaged in that industry; it does not matter what the precise activities of each employee are. The Council's collective agreement supports this in that its job categories include Custodians, Security Officers, Vehicle Guards, Counting-House Tellers, Cleaners and Receptionists. I note that the bulk of the Applicant's staff would appear to fall into the category of Counting-House Tellers.

45. Applicant testified that it was reluctant to subcontract the transport operation in Cape Town as it would be obliged to do so to companies such as SBV, Fidelity etc. which it viewed as its competitors. It was not disputed that most if not all of these cash-in-transport businesses are registered with the Respondent. It would therefore seem to be unfair for the Applicant not to be similarly registered.

46. In the circumstances I find that the Applicant's business falls within the definition of the Road Freight and Logistics Industry, and that all of the Applicant's employees in Cape Town fall within the scope of the Respondent. The Applicant is therefore required to register with the Respondent in respect of all of its employees.

AWARD:

47. The Applicant, Henque 2890 CC t/a Brazier & Associates is determined to be engaged in the Road Freight and Logistics Industry and its employees in its Cape Town branch are determined to be subject to the jurisdiction of the Respondent, the National Bargaining Council for the Road Freight and Logistics Industry. The Applicant is ordered to register with the Respondent in respect of all of its Cape Town branch employees within 30 days of the date of receipt of this award.



D.I.K. Wilson
CCMA Senior Commissioner