THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case No: DA 19/2023

In the matter between:

NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT AND LOGISTICS INDUSTRY	**Appellant**
and	
COMMISSIONER A DEYSEL *N.O.*	**First Respondent**
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**Second Respondent**
INTERMODAL CARGO SOLUTIONS (PTY) LTD	**Third Respondent**

Heard: **14 November 2024**
Delivered: **7 April 2025**
Coram: **Savage ADJP, Van Niekerk JA *et* Govindjee AJA**

JUDGMENT

VAN NIEKERK, JA

Introduction

[1] The appellant is a bargaining council, registered in terms of s 29 of the Labour Relations Act (LRA)[1] for the road freight and logistics industry. The appellant's certificate of registration defines its registered scope in the following terms:

> '"**Road freight and logistics Industry"** or "**Industry**" means the industry in which employers and employees are associated for carrying out 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 or accounting for all of goods where these activities are ancillary or incidental to paragraph (i);
>
> (iii) The hiring out by temporary employment services of employees for activities or operations which ordinarily or naturally fall within the transportation or storage of goods as contemplated by paragraphs (i) and (ii) of this definition.' (own emphasis)

[2] The appellant contends that the activities of the third respondent (Intermodal) are such that they fall within the appellant's registered scope. Intermodal's sole activities are those described in paragraph (ii), i.e. the storage of goods. Intermodal is not engaged in the activity described in paragraph (i) of the definition, i.e. the transportation of goods by means of motor transport. The appellant submits that Intermodal's storage activities fall within its registered scope because these activities are ancillary or incidental to the transportation of goods by means of motor transport, even though Intermodal is not itself engaged in the activity of transporting goods. Intermodal contends for a

[1] Act 66 of 1995.

conjunctive reading of paragraphs (i) and (ii), meaning that the 'ancillary and incidental' storage activities to which the paragraph refers are limited to those of the same employer engaged in the activity of the transportation of goods described in paragraph (i). Put another way, Intermodal submits that because it is not engaged in the activity of the transportation of goods by means of motor transport, the storage of goods activity that it undertakes cannot be ancillary or incidental to the transportation of goods activity referred to in paragraph (i).

[3] The dispute between the parties was referred to arbitration. In his award, the first respondent (the arbitrator) held that the storage activities referred to in paragraph (ii) of the definition meant storage undertaken by the same employer that carries on the motor transport activity referred to in paragraph (i). Because Intermodal is not engaged in road transportation, its storage activities are not ancillary or incidental to the activity of road transportation. The arbitrator concluded that the appellant's main agreement and other agreements are thus not binding on Intermodal.

[4] On review, the arbitrator's award was upheld by the Labour Court on the basis that the arbitrator's award met the threshold of reasonableness. With the leave of the Labour Court, the appellant appeals against that order.

Factual background

[5] The dispute between the parties proceeded to arbitration based on a stated case. The stated case records that Intermodal is a licensed container depot and, in the course of its business, receives, unpacks, stores, packs and despatches freight, which is delivered to or collected from its premises by "*various road transportation operators*". It is not in dispute that these operators, whose primary activities comprise the transportation of goods by means of motor transport, fall within the ambit of the appellant's registered scope.

[6] The stated case refers to a number of entities that are registered with the appellant, entities that respectively operate warehouses and offer transport services for reward and also road transporters, with their own vehicles, which operate warehouses. It is not in dispute that Intermodal falls into neither category and is engaged solely in the activity of storage. Intermodal has a customer base comprising various manufacturers, importers, clearing agents and the like, all of whom utilise Intermodal's storage facilities, without Intermodal being engaged in the manner or mode in which its customers' goods are conveyed to or dispatched from its storage facilities.

[7] The stated case also refers to Thrutainers Intercontinental CC (Thrutainers), which the appellant contended is an entity associated with Intermodal, whose vehicles (with those of other entities) are loaded by Intermodal employees. It is not in dispute that Thrutainers transports goods by means of motor transport, and as such, it is registered with the appellant. While the fact of the close commercial, business and operational relationship between Intermodal and Thrutainers appears initially to have been the basis on which the appellant sought to bring Intermodal's activities within its registered scope, this fact was not determinative of the issue that served before the arbitrator, nor did it assume any significance in subsequent proceedings.

[8] The parties further recorded that they were 'not convinced' that in the present circumstances, the publication of a notice as contemplated in s 62 (2) of the LRA was necessary, a matter that assumed some relevance in the review proceedings before the Labour Court. Section 62 provides that if the Commission for Conciliation, Mediation and Arbitration (CCMA) believes that a demarcation issue is of substantial importance, the CCMA must publish a notice in the Gazette regarding the particulars of the application and invite written representations by interested parties. Section 62 (9) requires the presiding commissioner to 'consult NEDLAC' before making a demarcation award.

[9] It is common cause that the CCMA did not designate the present dispute as being one of 'substantial importance' and that in consequence, the CCMA did not

publish a notice in the Gazette inviting written representations. It is also not disputed that the cover page of the arbitrator's award reflects the date of the award as 19 May 2019. The record also reflects that on 29 May 2019, the national director of the CCMA received correspondence from the acting executive director of NEDLAC, stating that NEDLAC supported the award. At the foot of the first page of the award, it is recorded that the document was last saved at 15:17 on 3 June 2019. The CCMA delivered the award to the parties by email on the same date.

The arbitration award

[10] The primary issue to be decided by the arbitrator was whether Intermodal's activities, being solely the activity of the storage of goods, fell within the appellant's registered scope. Intermodal's opposition to the appellant's contention that its activities fell within the appellant's registered scope was based on the assertion that it was solely engaged in the activity of storage in circumstances where that activity was neither ancillary nor incidental to the transportation of goods by means of motor transport. In response, the appellant submitted that it was sufficient that the transportation of goods by means of motor transport was conducted by a different, third-party employer. One of the issues that the arbitrator was thus required to decide was whether on a proper interpretation, the appellant's registered scope contemplated that the 'storage of goods' activity undertaken by an employer and referred to in subparagraph (ii) of the definition, need necessarily be undertaken in relation to the transportation of goods conducted by the same employer.

[11] The appellant contended that the reference in the definition to storage activities that are "*ancillary or incidental*" to the transportation of goods by means of motor transport, means the storage activities ancillary or incidental to either an employer's own transportation of goods, or the storage activities ancillary or incidental to motor transport services provided by another employer. Intermodal's storage activities are ancillary or incidental to motor transport, so the submission went, because goods are delivered to and dispatched from Intermodal's warehouses by means of motor transport.

In this sense, Intermodal's storage activities support the activity of the transportation of goods by motor transport.

[12] Intermodal submitted that the appellant's defined scope excluded its activities, since it is a 'stand-alone' business, engaged only in the storage of goods, and not in the transportation of goods by means of motor transport, nor in any storage activities that are ancillary or incidental to the transport of goods by motor transport.

[13] The arbitrator records:

> '[23] On my interpretation the purpose of the definition is to indicate that under certain specified conditions an employer providing a storage service would be regarded as also providing a motor transport service i.e. such an employer would only be regarded as providing a motor transport service, if the storage service provided by the employer is ancillary or incidental to the motor transport service provided by the employer.
>
> [24] The definition refer (sic) to at least two activities that the employer and it (sic) employees operating in the industry could be carrying out i.e. transportation of goods and storage of goods. The storage activity includes a number of other activities i.e. receiving, opening, unpacking, packing, despatching and clearing or accounting for goods subject to the proviso that these activities are ancillary or incidental to the transportation of goods by means of motor transport. An employer and its employees need not carry on all activities before their activities would fall within the industry. Their activities would fall within the industry as defined if they carry out one or more of these activities including logistics activities referred to as "despatching and clearing or accounting" subject to the proviso referred to above. Giving the wording of the definition and the contextual and purposive meaning, the reference to motor transport that the activities of the employer and its employees must be ancillary to or incidental to before it would fall within the industry, <u>can only be a reference to motor transport that the employer is carrying on</u>…' (own emphasis)

[14] The arbitrator went on to conclude that *"[A]ncillary business operations are business operations rendering service to existing customers or clients of the main business"*; a *"service that is subsidiary or auxiliary or supplementary to the main or primary service"… "The fact that part of an employer's business is ancillary to its main business is not per se conclusive. It must further be considered whether the ancillary part of the business is of such a magnitude that it can be fairly said that the employer is carrying out more than one industry"*. The arbitrator considered that an 'incidental business' is *"business carried on in connection with or resulting from the main or primary business and includes casual or insignificant activities".* He concluded:

> '31. Because the activities of Intermodal and its employees do not fall within the road freight and logistics industry they also do not fall within an industry that is ancillary or incidental to the road freight and logistics industry.
>
> 32. I have considered the argument advanced on behalf of the Council to the effect that the definition means that an employer performing a logistics function for a client is operating in the Road Freight Industry. Such a meaning can only be ascribed to the definition if the logistics function is part of the storage function referred to in the definition and if it is ancillary or incidental to a motor transport activity carried on by the employer and its employees.' (own emphasis)

[15] In short, the arbitrator considered whether Intermodal's storage activities, for the purposes of paragraph (ii) of the definition of the appellant's registered scope, could be said to be ancillary or incidental to the transportation of goods by means of motor transport. While the arbitrator did not discount the prospect of an employer engaged in the activity of storage of goods falling within the appellant's registered scope, he considered that it did so if and only if the storage activity was ancillary or incidental to the main activity of the transportation of goods by motor transport, conducted by the same employer. Since Intermodal did not transport goods by means of motor transport, its storage activity could not be ancillary or incidental to the transportation of goods. Intermodal was accordingly not bound by the appellant's main and other collective agreements.

The review

[16] The appellant filed an application to review and set aside the award. The grounds for review include the contentions that the arbitrator was wrong in his interpretation of the appellant's scope as defined in its certificate of registration. Although the appellant did not unambiguously articulate a more specific ground for review in either its founding or supplementary affidavit, the replying affidavit makes clear that the appellant's case is that the arbitrator incorrectly interpreted the appellant's registered scope and thus committed a reviewable irregularity, in the form of a material error of law.

[17] In its supplementary affidavit, the appellant contended further that the arbitrator had failed to consult with NEDLAC as required by s 62(9) of the LRA, and that the award stood to be set aside on this basis. At the same time, the appellant filed an application for a declaratory order in the following terms:

> 'Declaring that an employer and its employees associated for carrying on the storage of goods ancillary or incidental to the transportation of goods by means of road transport fall under the Applicant's registered scope irrespective of whether that transportation of goods is conducted by that employer or a third party.'

[18] The deponent to the supplementary affidavit explains that the appellant has a material interest in seeking clarity on its registered scope and, in particular, confirmation whether the activities mentioned in paragraph (ii) of the definition must be ancillary or incidental to the same employer's transportation transport operations. On this basis, and apart from the merits of the review, the appellant sought the declaratory order *"so that, at least, there can be certainty in the industry on the interpretation of Part (ii) of the Applicant's registered scope".*

The Labour Court's judgment

[19] The Labour Court dealt first with the application for the declaratory order and held that it was the function of the Court to resolve concrete disputes and *"not to deal with academic matters or give legal advice"* and that, in any event, demarcation disputes were a matter to be dealt with by the CCMA. In relation to the merits of the review, without the appellant having pleaded the unreasonableness of the outcome of the arbitration proceedings as a ground for review, the Labour Court concluded that the arbitrator's decision was *"correct and one that a reasonable decision maker may reach".* Regarding the alleged breach of s 62(9) of the LRA, the Court held that since the CCMA had not considered the matter to be one of sufficient importance to trigger an invitation to the public to make written representations in terms of s 62(7), the arbitrator was under no obligation to have consulted NEDLAC prior to issuing the award.

[20] The Labour Court accordingly dismissed the review application, with no order as to costs.

Grounds for appeal

[21] On appeal, the appellant submits that the Labour Court erred both in respect of the interpretation of the scope of its certificate of registration and its findings in relation to the application of s 62(9). Regarding the interpretation of the appellant's registered scope, the appellant repeats the submissions made at arbitration and contends that the Labour Court ought to have found that the third respondent did not itself have to be involved in the transportation of goods for its activities to fall within subparagraph (ii) of the definition of the appellant's registered scope. The appellant contends further that, properly interpreted, its registered scope extends to an employer that carries on the activity of the storage of goods, where this activity is ancillary or incidental to the transportation of goods by means of road transport, irrespective of whether the transportation is conducted by that employer or a third party.

[22] Regarding the Labour Court's finding on the application of s 62(9), the appellant submits that the Court erred in finding that consultation with NEDLAC is required only

where the CCMA had published a notice in the Gazette in terms of s 62(7). The appellant submits that consultation with NEDLAC is required before every demarcation award is issued and that in the present instance, on the facts, there was a failure to consult, with the consequence that the award stands to be set aside. In relation to the declarator, the appellant submits that the Labour Court ought to have found that in terms of section 62(3) of the LRA, the court was not precluded from determining the application and, given the fact of a live controversy, ought to have granted the declaratory order sought.

Analysis

[23] There are two issues to be decided. The first is whether the Labour Court was correct to conclude that the arbitrator's decision was not reviewable. The second issue is whether the Labour Court is correct to conclude that the arbitrator was under no obligation to consult NEDLAC in terms of section 62(9) prior to issuing his award and if so, whether he did consult.

Is the arbitrator's interpretation of the appellant's registered scope reviewable?

[24] Much of the argument before us concerned the basis on which demarcation awards might be reviewed and the threshold for review in these circumstances. A prior enquiry relates to the scope of intervention by a review court in respect of a demarcation award, if only on account of the various references to what is averred to be an error of law committed by the arbitrator and the loose reference, both during argument and in the judgment of the Labour Court, to the application of a reasonableness threshold for review.

[25] In *Bargaining Council for the Civil Engineering Industry v Commission for Conciliation, Mediation and Arbitration and others,*[2] this Court endorsed the following

[2] (2022) 43 *ILJ* 2702 (LAC); [2022] ZALAC 108.

passage from the Labour Court's judgment in *National Bargaining Council for the Road Freight Industry v Marcus NO and others*:[3]

> 'It should… be recalled that *Coin Security* is also authority for the point that a demarcation involves considerations of fact, law and social policy and that in these circumstances, due deference ought to be given to a commissioner making a demarcation award... As I understand the judgment, in demarcation judgments there will be, more often than not, no single correct judgment, and that a wide range of approaches and outcomes is inevitable. A reviewing court should be attuned to this reality, and recognise it by interfering only in those cases where the boundary of reasonableness is crossed.'

[26] In *Coin Security (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*[4] the Labour Court said, at paragraph 63 of the judgment:

> 'The demarcation process is one entrusted to a specialist tribunal in terms of the provisions of the Act. The demarcation decision is one involving facts, law and policy considerations. In demarcation decisions, there will, more often than not, be no one absolutely correct judgment. Particularly in decisions of this sort, and given the provisions of the Act, there must of necessity be a wide range of approaches and outcomes that would be in accordance with the behests of the Act. Due deference should therefore be given to the role and functions and resultant decisions of the CCMA in achieving the objects of the Act…'

[27] And at paragraph 64:

> 'The case for judicial deference becomes all the more competing in this matter given that NEDLAC agreed to support the provisional award.'

[28] As Myburgh points out,[5] the Constitutional Court has described demarcation awards as 'polycentric and policy-laden', where the decision-maker is a specialised

[3] (2011) 32 *ILJ* 678 (LC); [2011] 2 BLLR 169 (LC) at para 22.

[4] (2005) 26 *ILJ* 849 (LC); [2005] 7 BLLR 672 (LC).

body with specialist expertise.[6] Indeed, as counsel for the third respondent pointed out, when a demarcation issue arises in the course of proceedings before the Labour Court, that Court may not itself exercise a discretion to decide the demarcation issue in the interests of expediency, as it may do with other arbitrable issues.[7] The Labour Court is obliged to hold the proceedings concerned in abeyance and refer the issue to the CCMA to be dealt with in terms of the prescribed process.[8] All of this requires the review court to show a heightened deference toward the arbitrator and to apply a 'light touch' on review.[9]

[29] This approach is undoubtedly correct where the demarcation award concerns the application of an agreed interpretation of a bargaining council's registered scope to a given set of facts, and the challenge to the award assumes the form of a reasonableness review.[10] But where, as in the present instance, the issue is the

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[5] A Myburgh SC 'Reasonableness Review – the Quest for Consistency' (2024) 45 *ILJ* 1377 at 1383.

[6] See *National Union of Metalworkers of SA v Commission for Conciliation, Mediation & Arbitration & others* (2022) 43 *ILJ* 530 (CC); [2022] 3 BLLR 209 (CC). In *Coin Security (Pty) Ltd v CCMA & others* (2005) 26 *ILJ* 849 (LC); [2005] 7 BLLR 672 (LC) the Labour Court held that whether an employer and it employees fall within a particular sector for the purposes of a demarcation is a question to be determined in the light of all the surrounding circumstances, and that the character of an industry is to be determined by the nature of the enterprise in which the employer and its employees are associated for a common purpose, a question that involves considerations of fact, law and policy. This may involve the history of the enterprise, the skills of the employees, the location of the enterprise in any value chain, the nature of any competitors and whether the enterprise may fall under any other industry (*National Textile Bargaining Council v De Kock NO & others* (2014) 35 *ILJ* 1017 (LC); [2013] ZALCCT 37).

[7] See s 158 (2)(b) of the LRA.

[8] See s 62 (3) of the LRA.

[9] Myburgh 'Reasonableness Review – the Quest for Consistency' (2024) 45 *ILJ* 1377 at 1383.

[10] For example, see *National Union of Metalworkers of SA v Commission for Conciliation, Mediation & Arbitration & others* (2022) 43 *ILJ* 530 (CC); [2022] 3 BLLR 209 (CC) - whether the activities of the affected employers fell within the jurisdiction of the *Bargaining Council of the Civil Engineering Industry v Commission for Conciliation, Mediation & Arbitration & others* (2022) 43 *ILJ* 2702 (LAC); [2022] ZALAC 108 – whether the activities of the employer in relation to tailings dams and tailings storage facilities fall within the jurisdiction of the applicant bargaining council.

interpretation of the appellant's registered scope and a ground for review that relies on a material error of law committed by the arbitrator, there is no room for deference. This raises the question whether a material error of law can in itself serve as a ground for review under section 145 of the LRA, divorced from any considerations of reasonableness.[11]

[30] While the intention of the drafters of section 145 may have been to limit the scope of review (as evidenced by the limitation of the grounds for review in s 145 to those recognised by section 33 of the Arbitration Act[12]), the subsequent enactment of section 33 of the Constitution, which guarantees the right to administrative action that is lawful, reasonable and procedurally fair, has had the effect of considerably expanding the scope for review. In *Sidumo and another v Rustenburg Platinum Mines Ltd and others*[13] *(Sidumo),* the Constitutional Court held that a CCMA arbitration constituted administrative action but was not subject to the Promotion of Administrative Justice Act[14] (PAJA), and that section 145 of the LRA was to be interpreted as encompassing the constitutional standard of reasonable administrative action. The test for

[11] The review application was argued as an application in terms of s 145 of the LRA, as are most reviews of demarcation rulings (see, for example, *National Union of Metalworkers of SA v Commission for Conciliation, Mediation & Arbitration & others* (2024) 45 ILJ 2608 (LC); [2024] 9 BLLR 991 (LC), *Intasol Tailings (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2021) 42 *ILJ* 2204 (LC); [2021] 10 BLLR 1027 (LC)). Section 62 (4) provides that when the CCMA receives a demarcation dispute, it must appoint a commissioner to determine the issue, and that s 138 (which deals generally with arbitration proceedings) applies, with the necessary changes. In *National Union of Metalworkers of SA v Commission for Conciliation, Mediation & Arbitration & others* (2022) 43 *ILJ* 530 (CC); [2022] 3 BLLR 209 (CC), the Constitutional Court noted that the Labour Court derived its powers to review demarcation awards from s 158 (1)(g) of the LRA. That section provides that the Labour Court may *"subject to section 145, review the performance or purported performance of any function provided for in [the LRA] on any grounds that are permissible in law"*. This formulation does not preclude a review of a demarcation award in terms of s 145 (on the grounds established by that section, suffused by reasonableness), as was done in the present instance.

[12] Act 42 of 1965.

[13] [2007] 12 BLLR 1097 (CC); (2007) 28 *ILJ* 2405 (CC).

[14] Act 3 of 2000.

reasonableness to be applied in an application for review under section 145 is whether the decision reached by the arbitrator is one that a reasonable decision-maker could not reach.

[31] It should be recalled that the issue that served before the court in *Sidumo* was the *"moral or value judgment to established facts and circumstances"*[15] applied by a commissioner when determining the fairness of the penalty of dismissal. The 'threshold of reasonableness' established by the judgment recognises that in relation to the penalty of dismissal, value choices may differ in relation to the same factual matrix but nonetheless fall within a range of decisions to which a reasonable decision-maker could come. The metaphor of an elastic band has been usefully employed to illustrate the applicable threshold – the function of the review court is to determine the point to which the elastic of reasonableness can stretch without snapping.[16]

[32] Post-*Sidumo* reviews seeking to rely on material errors of fact or law committed by the arbitrator were met with the response that errors of that nature did not in themselves constitute grounds for review. In *Herholdt v Nedbank Ltd (Congress of South African Trade Unions as amicus curiae)*, *(Herholdt)*[17] the Supreme Court of Appeal held that material errors of fact, as well as the weight to be attached to particular facts *"are not in and of themselves sufficient for an award to be set aside, but are only of any consequence if their effect is to render the outcome unreasonable"*.[18] Following *Herholdt*, a similar view was adopted by this Court in *Head of the Department of Education v Mofokeng and Others (Mofokeng)*,[19] where Murphy AJA said in an often-quoted passage:

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[15] *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & others* (1996) 17 *ILJ* 455 (A); [1996] 6 BLLR 697 (AD).

[16] Myburgh *supra* at 1379.

[17] [2013] 11 BLLR 1074 (SCA); (2013) 34 *ILJ* 2795 (LAC).

[18] Ibid at para 25.

[19] (2015) 36 *ILJ* 2802 (LAC); [2015] 1 BLLR 50 (LAC).

> 'Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result.'[20]

[33] Cases such as *Herholdt* and *Mofokeng* recognise that the limited grounds established by s 145 admit a review based on a material error of fact or law only when the ensuing result is an unreasonable award. *Mofokeng*, in particular, establishes a structure within which an alleged material error of fact or law engages with the threshold of reasonableness. The court said in a well-known passage:

> 'Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will *ex hypothesi* be material to the determination of the dispute. A material error of this order would point to at least a *prima facie* unreasonable result.'[21]

[34] What this formulation requires is the review court first to identify errors or irregularities committed by the arbitrator and then to determine materiality, a requirement that is satisfied if but for the error or irregularity, the arbitrator would have come to a different result. If this is established, the incorrect result arrived at by the

[20] Ibid at para 32.

[21] *Mofokeng* at para 33.

arbitrator is *prima facie* unreasonable. The enquiry then moves to a consideration of whether the result is nonetheless capable of justification, having regard to the totality of the evidence.

[35] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and others*[22] this Court suggested that to the extent that *Sidumo* established that the constitutional standard of reasonableness suffuses the application of s 145 of the LRA, it was not sufficient for an applicant to establish one or more of the grounds for review specified in s 145 (misconduct, gross irregularity in the proceedings, exceeding powers); the applicant must always establish that the result of the award is unreasonable.[23] In other words, reasonableness is to be applied as a universal threshold.

[36] The application of this approach soon gave rise to difficulties when the subject of the review admitted a single, correct answer. These were typically interlocutory rulings made by arbitrators, often concerning what were described as 'jurisdictional' issues – e.g. whether the referring party was an 'employee' as defined in s 213 of the LRA, the existence of a 'dismissal' for the purposes of s 186(1), and the like. The response by the Labour Courts was to recognise and apply a 'correctness' standard of review, notwithstanding the fact that in most instances, the review had been sought on grounds of unreasonableness.[24] The enquiry on review in this instance is not whether the arbitrator's ruling was justifiable, rational or reasonable, but whether objectively speaking, the facts that would give the CCMA or bargaining council the jurisdiction to

[22] (2014) 35 *ILJ* 943 (LAC); [2014] 1 BLLR 20 (LAC).

[23] Ibid at para 14.

[24] A Myburgh 'The Correctness Standard of Review' (2023) 44 *ILJ* 724. *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others* (2008) 29 *ILJ* 2218 (LAC); [2008] 9 BLLR 845 (LAC); *De Milander v Member of the Executive Council for the Department of Finance: Eastern Cape & others* (2013) 34 *ILJ* 1427 (LAC); [2012] ZALAC 37, *Solid Doors (Pty) Ltd v Commissioner Theron & others* (2004) 25 *ILJ* 2337 (LAC); [2004] ZALAC 14.

entertain the dispute existed.[25] This approach reflects the general view adopted by the courts over many years in administrative law matters relating to what were termed 'jurisdictional errors of law'. Jurisdictional errors of law were once considered reviewable; non-jurisdictional errors were not.[26] In the former instance, the principle underlying a review is that where the jurisdiction is dependent on the existence of a particular state of affairs, the administrative authority cannot give itself jurisdiction by incorrectly finding that the conditions for the exercise of jurisdiction are satisfied.[27] In the development of the 'correctness review', the Labour Courts showed no *Sidumo*-like deference to the arbitrator; the approach assumed that the award under review may be set aside if it is incorrect – nothing more need be established. A perusal of the case law suggests that the 'correctness' standard in this sense was regularly applied by the Labour Courts, often in the face of reviews relying only on unreasonableness as a ground for review, and without reference to the circumstances in which a material error of law ought to be recognised as a discrete ground for review.

[37] Uncertainty as to the universality of the reasonableness standard and the role of reasonableness where the standard for review called for a determination of the correctness of the award under review led to the development of what this Court termed a 'bifurcated review standard'. In this approach, the nature of the issue in dispute determines which of the standards of correctness or reasonableness ought to be applied.[28] In some instances, both thresholds were found to apply, giving the applicant an election to rely on either or both. For example, in *National Union of Metalworkers of SA v Assign Services and others*,[29] the Court expressed the view that a material error of law will result in both an incorrect and unreasonable award, and that a party seeking to

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[25] *SA Rugby Players Association (SARPA) & others v SA Rugby (Pty) Ltd & others; SA Rugby (Pty) Ltd v SARPU & another* (2008) 29 *ILJ* 2218 (LAC); [2008] 9 BLLR 845 (LAC).

[26] Hoexter and Penfold *Administrative Law in South Africa* 3 ed (Juta 2021) at p 391-2.

[27] Ibid at 390 -392.

[28] *Jonsson Uniform Solutions (Pty) Limited v Brown and others* [2014] JOL 32513 (LAC); [2014] ZALCJHB 32.

[29] (2017) 38 *ILJ* 1978 (LAC); [2017] 10 BLLR 1008 (LAC).

review and set aside the award may do so either on the basis of its correctness or for its being unreasonable.[30] In *MacDonald's Transport Upington (Pty) Ltd v Association of Mineworkers and Construction Union and others (MacDonald's Transport),*[31] this Court considered the basis for review in a case involving circumstances similar to the present. The dispute concerned an award in which the arbitrator had interpreted a trade union's constitution. The Court engaged in an exhaustive analysis of the relevant authorities, and concluded ultimately that it was not necessary to decide whether the appropriate test was whether the decision reached by the arbitrator was 'correct' rather than 'reasonable', since the award was reviewable on either basis.[32] This approach was confirmed, in the context of the review of a demarcation award, in *SBV Services (Pty) Ltd v National Bargaining Council for the Road Freight and Logistics Industry & others*[33] where this Court held:

> '[26] The other issue raised by the parties is the test that should apply in reviewing a demarcation dispute particularly when the dispute is about the interpretation of words or phrases in a certificate of registration or similar instruments. The issue was finally resolved in the matter of *National Union of Mineworkers of SA* (sic)[34] *v Assign Services & others* where this court held that:
> "An incorrect interpretation of the law by a commissioner is, logically, a material error of law which will result in both an incorrect and unreasonable award. Such an award can either be attacked on the basis of its correctness or for being unreasonable."
>
> [27] In matter such as the present, the test that is of application is that of correctness or reasonableness…'

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[30] Ibid at para 32.

[31] (2016) 37 *ILJ* 2593 (LAC); [2017] 2 BLLR 105 (LAC).

[32] Ibid at para 31.

[33] (2018) 39 *ILJ* 1290 (LAC).

[34] The appellant was the National Union of Metalworkers of SA. See the report at (2017) 38 *ILJ* 1978 (LAC); [2017] 10 BLLR 1008 (LAC).

[38] While it may be so that an incorrect award on a question of law is axiomatically unreasonable and thus reviewable in terms of s 145 of the LRA on that basis, the legal basis for the application of the correctness standard has never been clearly articulated by the Labour Courts. As I have indicated, in those cases that concerned jurisdictional errors, the Labour Courts implicitly recognised a material error of law as a ground for review, independently of any assessment of the reasonableness of the award or ruling under review.

[39] In the constitutional era, the proper basis for a correctness challenge brought in terms of section 145 of the LRA is section 33 of the Constitution of the Republic of South Africa 1996, and in particular, the right to administrative action that is lawful. Section 6 of PAJA establishes a material error of law as a ground for the review of administrative action. *Sidumo* holds that PAJA does not apply to arbitration awards issued in terms of the LRA – at least in the case of the CCMA and bargaining councils, the permitted grounds for review are those reflected in section 145 of the LRA. But *Sidumo* also holds that section 145 is to be read subject to section 33 of the Constitution. In that instance, the Constitutional Court held that *"… section 145 is now suffused by the constitutional standard of reasonableness"*. But reasonableness is not a universal standard, nor should it be applied as such. Section 33 (1) treats lawfulness separately from reasonableness.[35] In *Duncanmec (Pty) Ltd v Gaylard NO and others*[36] the Constitutional Court held:

> 'Since an award like the one we are concerned with here constitutes administrative action, the Constitution requires it to be procedurally fair, lawful and reasonable. This means that an award that fails to meet these requirements is liable to be set aside on review. These requirements are in addition to the grounds of review listed in s 145 of the LRA. However, to some extent the latter grounds may overlap …' (own emphasis)

[35] Hoexter and Penfold (supra) at 400.

[36] (2018) 39 *ILJ* 2633 (CC); [2018] 12 BLLR 1137 (CC) at para 40.

[40] Reading down section 145 to incorporate a requirement of reasonableness is wholly appropriate in a case such as *Sidumo*, concerned as it was with the exercise of a value judgment by an arbitrator in relation to fairness as a penalty for misconduct, a judgment that by definition admits a range of responses. Matters such as the present, where the administrative action in issue involves a question of law that can produce a single correct answer, are best understood and assessed when section 145 of the LRA is read as suffused by the constitutional standard of lawfulness. Put another way, just as the constitutional standard of reasonableness was found in *Sidumo* to have suffused section 145, the constitutional standard of lawfulness does likewise.[37]

[41] This Court alluded to this principle in *MacDonald's Transport*, when it referred to *Democratic Nursing Organisation of SA on behalf of Du Toit and another v Western Cape Department of Health and others*,[38] where the Court, per Davis JA, said the following:

> '[21] Since the advent of the Constitution of the Republic of South Africa 1996 (the Constitution), the concept of review is sourced in the justifications provided for in the Constitution and, in particular, that courts are given the power to review every error of law provided that it is material; that is that the error affects the outcome…
>
> [22] To recap, Navsa AJ said in *Sidumo* at para 105 that the review powers in terms of s 145 "must be read to ensure that administrative action by the CCMA is lawful, reasonable and procedurally fair". Given that the section must be interpreted to be in compliance with the Constitution, it would appear that the concept of error of law is relevant to the review of an arbitrator's decision within the context of the factual matrix as presented in the present dispute; that is a material error of law committed by an arbitrator may, on its own without having to apply the exact formulation set out in *Sidumo*, justify a review and setting aside

[37] Myburgh and Bosch *Reviews in the Labour Courts* (LexisNexis 2016) at 244.

[38] (2016) 37 *ILJ* 1819 (LAC); [2016] ZALAC 15 at paras 21-22.

of the award depending on the facts as established in the particular case.' (own emphasis)

[42] What this approach recognises is that the right to review established by s 145, where the applicant seeks to review an arbitration award on the basis of a material error of law committed by an arbitrator, is not limited to circumstances where the alleged error resulted in an unreasonable award.[39] A material error of law is a discrete, substantive ground for review under s 145 of the LRA. It follows that a reviewing court, when faced with what is alleged to be an error in law in relation to the interpretation of an instrument, is empowered to interpret the relevant text itself, rather than assessing whether the arbitrator's decision was reasonable.[40]

[43] In short: although a material error of law may previously have been viewed as no more than a side car on the motorcycle of reasonableness,[41] the constitutional right to administrative action that is lawful requires that the grounds for review established by s 145 of the LRA be understood as admitting a material error of law as a discrete, legitimate ground for review.

Did the arbitrator commit a material error of law?

[39] At least in relation to an irregularity in the conduct of arbitration proceedings, this Court has, reasonableness aside, previously acknowledged the remaining s 33 requirements as suffusing s 145 of the LRA. In *Arends & others v SA Local Government Bargaining Council & others* (2015) 36 *ILJ* 1200 (LAC); [2015] 1 BLLR 23 (LAC) at para 19, Murphy AJA found: "*the undertaking of the enquiry in the wrong or in an unfair manner by an arbitrator is an irregularity in the conduct of the proceedings reviewable in terms of s 145 of the LRA as suffused by the constitutional right to administrative action that is lawful and procedurally fair*".

[40] Hoexter 3 ed at 400.

[41] The image is drawn from Alan Hyde "What is Labour Law?' in Davidov and Langille (eds) *Boundaries and Frontiers of Labour Law* (Hart 2006) at p 60, in relation to the relationship between subordinate employment and labour law as a collection of regulatory techniques.

[44] The question to be decided then is whether by interpreting the appellant's registered scope as he did, the arbitrator committed a material error of law. Errors of law arise in relation to questions of law. To qualify as a question of law, the issue must constitute neither a question of fact nor the exercise of judicial discretion. An error of law traditionally refers to a wrong or mistaken interpretation of a legislative provision.[42] More broadly, questions of law are all issues that are determined by authoritative legal principles and include questions which a court is bound to answer in accordance with a particular rule or law, and questions as to what the law is.[43] Questions of interpretation and construction are clearly questions of law.[44] Reasonableness is not a sufficiently exacting standard when it comes to reviewing statutory interpretations. The rule of law does not permit two contradictory, yet potentially reasonable, interpretations of a statute or other regulatory measure by which citizens order their lives.

[45] Intermodal does not dispute that the interpretation of the appellant's registered scope raises a question of law or that what is in issue is what the appellant contends to be the wrong or mistaken interpretation of its registered scope. There is also no dispute that if the arbitrator is found to have adopted an erroneous interpretation, the error would be material, if only because the result or outcome would have been different.

[46] During argument, Mr Beckenstrater, who appeared for the appellant, submitted that the words *"ancillary and incidental to"* motor transport introduced a degree of flexibility into the definition, in terms of which short-term storage for the purposes of distribution by means of motor transport would fall within the appellant's registered scope but other, longer-term forms of storage, or storage at a seaport prior to goods being shipped, for example, would not. He submitted that it was the fact that goods were delivered to Intermodal's storage facilities by means of road transport and

[42] Hoexter and Penfold at 389.

[43] *Media Workers Association of SA and others v Press Corporation of SA Ltd* (1992) 13 *ILJ* 1391 (A); [1992] 2 All SA 453 (A) at 1396F-H.

[44] *General Life Assurance Co v Moyle* 1919 AD 1 at 9; *Coertzen v Gerard NO and Another* 1997 (2) SA 836 (O) at 845H.

dispatched from those facilities by the same means, which brought Intermodal's storage activity within the appellant's registered scope.

[47] The appellant challenged the arbitrator's interpretation of its registered scope (and the Labour Court's upholding of the arbitrator's award) on three specific grounds. The first is a contextual argument that relies on a change in the appellant's name, effected during 2010. The appellant submits that this has significant bearing on the interpretation of its registered scope, given that the change inserted the words *"and Logistics"* into to "*Road Freight Industry*" thus signifying, so the appellant submits, that an employer engaged only in the logistics could, potentially at least, fall within its registered scope. The second and third submissions advanced by the appellant are to the effect that the interpretation adopted by the arbitrator leads to the redundancy of the introductory words to the definition, 'one or more of the following activities…', and also to the whole of paragraph (ii). In particular, the appellant submits that the words '*one or more*' in the definition should be read disjunctively to mean that an enterprise falls within its registered scope if it engaged in the activities, either singly or in any combination, described in paragraphs (i) to (iii), respectively. On the arbitrator's interpretation, it would be impossible for an employer to be engaged only in the activity of storage, since an employer could be engaged in that activity only if that employer is already engaged in the activity of transport.

[48] Further, the appellant relies on what it terms general principles of demarcation, which require that an employer's activity that is ancillary to that employer's main activity be demarcated together with its main activities.

[49] The appellant submits that there would be no purpose to paragraph (ii) if it meant that an employer's storage activity only falls within the appellant's registered scope if it is ancillary to that employer's road transport activity. As Mr Beckenstrater put it, ancillary activities go with the main activity. If the main activity is transportation by road, all of the employer's ancillary activities are demarcated into that industry. On this basis, the arbitrator's interpretation, paragraph (ii) would have no meaning beyond that which

would already apply, thus enabling paragraph (ii) to be removed from the definition with no consequence to the scope of the industry.

[50] The appellant thus contends that contrary to what the arbitrator found, the definition of its registered scope simply requires the storage of goods activity to support road transport activities, regardless of the identity of the employer that conducts those road transport activities.

[51] The principles of interpretation are well-established. In *University of Johannesburg v Auckland Park Theological Seminary and Another*[45], the Constitutional Court summarised the approach to be adopted, recording that the approach to interpretation post-*Endumeni*[46] requires that the context and the language of the instrument concerned be viewed holistically, simultaneously considering text, context and purpose. In other words, context and purpose must be considered as a matter of course, and not only when there is a lack of clarity or any ambiguity in the text. In the present instance, it should be recalled that the arbitrator was not concerned with the application of principles governing demarcation; the dispute before him related solely to the interpretation of the appellant's registered scope.

[52] I deal first with the appellant's submission regarding its change of name effected in 2010, and its reference to what it contends to be the significance of that change for the interpretation of its registered scope. The difficulty with this submission is that there was no evidence that served before the arbitrator, or the review court for that matter, regarding the purpose of or reasons for the change in the appellant's name. The stated case makes no mention of it; this is a matter raised for the first time on appeal. The lack of any evidence to support the significance that the appellant seeks to attach to the change in name aside, it does not necessarily follow that 'transport' on the one hand

[45] 2021 (6) SA 1 (CC); [2021] ZACC 13 at paras 64-66.

[46] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA); [2012] ZASCA 13.

and ‘logistics’ on the other hand are distinct concepts. The definitions to which the appellant refers can equally be interpreted to mean that transport is an integral part of logistics and that the appellant’s name change, if it has any bearing on the matter, simply recognises that many road freight companies perform an overall logistics function, as the stated case indicates, by virtue of the ‘ancillary’ or ‘incidental’ functions set out in paragraph (ii) of the definition. It is also by no means clear that, as the appellant contends, ‘transport’ and ‘logistics’ are discrete activities, or that ‘logistics’ necessarily equates with storage activities. The OED defines ‘logistics’ to mean, among other things, the commercial activity of transporting goods to customers. Logistics, as an activity, is concerned with the management of the flow of goods; it is not a synonym for storage. I thus fail to appreciate how the appellant’s change in name, effected in 2010, is of any relevance to the interpretation of its registered scope.

[53] Turning next to the appellant’s submission based on the wording of the preamble to the definition (*“one or more of the following activities…”*), read with paragraph (ii), what is clear is that the definition of the appellant’s registered scope contemplates the activity of storage as a discrete activity falling within that scope, in all the manifestations listed (receiving, opening, unpacking, dispatching, clearing or accounting) and more, given that the list is illustrative rather than exclusive. But it does not follow, as the appellant contends, that paragraph (ii) of the definition is redundant if the definition is interpreted as it was by the arbitrator. The preamble does not refer to one or more ‘employers’; the reference is to one or more of the listed activities. There is no indication from the definition that the activities need to be conducted by different employers, nor does it follow that paragraph (ii) is redundant if paragraphs (i) and (ii) are to be read as referring to a single employer. The context of demarcation disputes, as the arbitrator recognised, is an acceptance that an employer may employ employees in different industries. On this reading, paragraph (ii) of the definition of the appellant’s scope is intended to provide clarity as to which classes of employees of any particular employer would fall within the appellant’s registered scope by virtue of their employment being ancillary or incidental to the transportation of goods by road.

[54] The appellant submits that on the arbitrator's reasoning, paragraph (ii) is redundant because on an application of general principle, any storage activity that is ancillary to transportation activities undertaken by the same employer would, in any event, be demarcated into the activity of road transport. As I understand the submission, paragraph (ii) contemplates that the employer undertaking the secondary activity of storage need not be the same employer that undertakes the primary activity of road transport, because an employer undertaking storage as a secondary activity would in any event be demarcated into the road transport industry. In my view, paragraph (ii) of the appellant's registered scope does no more than recognise that, at least in certain circumstances, not all employees of an employer necessarily fall into the same industry. Some employees might thus fall within the appellant's registered scope by virtue of paragraph (i); other employees of the same employer might fall within the registered scope by virtue of their being involved in the storage activities described in paragraph (ii), where these are ancillary or incidental to the activity of motor transport conducted by their employer. For example, an employer that operates transport services might simultaneously and incidentally offer storage facilities to its clients. Indeed, operations of this nature are acknowledged in the stated case. Paragraph 23 of the stated case lists entities that both operate warehouses (where storage activities would no doubt be undertaken) and conduct transport services for reward.

[55] Viewed thus, on the arbitrator's interpretation of the appellant's registered scope, the provisions of paragraph (ii) are not redundant.

[56] The arbitrator's conclusion that the employer engaged in storage for the purposes of paragraph (ii) must necessarily be the same employer engaged in the activity of motor transport described in paragraph (ii), finds further support in the plain meaning of the words 'ancillary or incidental to', as well as the context in which the definition falls to be interpreted. What is obvious from the definition is that the association of employers and employees in the activity of storage is a form of association that is qualified – not all storage activity falls within the appellant's registered scope. The appellant's scope extends only to those employers and

employees who associate for the purpose of carrying out the activity of storage that is *"ancillary or incidental"* to the transportation of goods by motor transport.

[57] Put another way, employers and employees engaged only in the storage of goods, if that activity cannot be said to be ancillary or incidental to the primary activity of the transportation of goods by road, are excluded from the definition. I understood Mr Beckenstrater to submit as much when he stated that the appellant has no interest in storage activities attached to ports, railway sidings, or the personal use of storage units, and the like.

[58] An ancillary business activity, as the arbitrator observed, comprises a service that is subsidiary or auxiliary or supplementary to a main or primary service (in this case, the transportation of goods by road). The appellant submits that the words *"ancillary or incidental to the transport of goods by means of motor transport"* do not connote a primary and a secondary activity (the former being transportation and the latter storage); what the definition contemplates is storage as a primary activity, at least in circumstances where that activity is related to road transportation. That condition is satisfied in the present instance, so the submission went, because goods are delivered to Intermodal's storage facilities by means of road transportation and dispatched by the same means.

[59] In my view, the concept of an ancillary or incidental activity, by definition, connotes the existence of a secondary activity in support of a primary activity. It is difficult to conceive, in the context of a demarcation dispute, how the secondary activity of one employer can be ancillary or incidental to the primary activity of another employer. On the appellant's interpretation of its registered scope, a simple storage facility, performing no other function, would fall within its registered scope if its activities were ancillary to road transport operations other than its own. This would create an untenable anomaly in that the demarcation question would be determined not by an entity's own business activities but by the business activities of that entity's clients or the contractors engaged by those clients. Further, it will be difficult, if not impossible, to

distinguish long term storage (which the appellant concedes is not contemplated by paragraph (ii)) with shorter term storage, which the appellant contends falls within its registered scope. In both instances, goods are delivered and removed by motor transport; the distinction is one that goes only to the contemplated period of storage. At what point does short term storage become long term storage? What is the position of an employer that offers both? These are not matters, as Mr Beckenstrater submitted, that can simply be addressed in due course, with an application of demarcation principles in each case. A sensible, business-like interpretation of the appellant's registered scope would exclude that prospect.

[60] Finally, and fundamentally, the link between the activities of storage and motor transport that the appellant seeks to draw, a link that relies ultimately and only on the fact that goods arrive at Intermodal's storage facilities by means of road transport and are dispatched from those facilities by the same means, is not sufficient to sustain the submission that Intermodal's activities are ancillary and incidental to the activity of transport by road. That transport is engaged at the instance of Intermodal's customers, who make the necessary arrangements for the transportation of their goods to and from Intermodal's storage facility. To bring Intermodal's activities within the appellant's registered scope, more is required.

[61] In the result, the arbitrator did not commit any material error of law in his interpretation of the appellant's registered scope. There is no basis on which to interfere with the outcome of the arbitration hearing under review, and the application to review the award was correctly dismissed.

Consultation with NEDLAC

[62] Section 62(7) of the LRA requires the CCMA to invite written representations by way of a notice published in the Government Gazette when it believes that a demarcation question referred to it is of 'substantial importance'. Section 62(9) follows on from that and reads:

> 'Before making an award, the commissioner must consider any written representations that are made, and must consult NEDLAC.'

[63] The Labour Court concluded that given that the dispute between the parties concerned the interpretation of the appellant's registered scope, and in the absence of the publication of a notice in the Gazette inviting representations on a demarcation matter deemed by the CCMA to be of substantial importance, there was no obligation on the arbitrator to consult NEDLAC prior to issuing his award. This conclusion overlooks the decision by this Court in *SA Municipal Workers Union v Syntell (Pty) Ltd and others*[47] *(Syntell),* where the Court affirmed that s 62(9) of the LRA contemplated two sources of input in the making of a demarcation award. First, in cases where the CCMA has published a notice in the Gazette inviting written representations, the arbitrator would have available those representations, since a hearing cannot be convened until after the date for the submission of representations has elapsed. The obligation to consult NEDLAC is a discrete requirement, was context specific, and contemplated NEDLAC furnishing the commissioner with its views. The Court said the following:[48]

> 'As regards the consultation with NEDLAC, s 62(9) does not define consultation for these purposes nor does it prescribe any formalities or stipulate at what stage the commissioner must consult NEDLAC, other than it must, axiomatically, be before 'making an award'. No indication is given in the record of the usual practice followed in consulting NEDLAC. Notably, the duty imposed on the commissioner is not to invite NEDLAC to participate in the hearing, which, it is plain from the text of the section, is a distinct happening. Thus, there is no contemplation apparent from the text of the section that there would be any interaction between the immediate disputants and NEDLAC.'

[47] (2014) 35 *ILJ* 3059 (LAC); [2014] ZALAC 18.

[48] Ibid at para 26.2.

[64] As this Court pointed out in *Syntell*, NEDLAC undertakes the initial demarcation of sectors over which bargaining councils exercise jurisdiction. NEDLAC, as the decision-maker originally responsible for the demarcation of a sector, clearly has an interest in the outcome of proceedings in which demarcation disputes are determined. The nature and extent of this interest supports an interpretation of s 62(9) that requires the arbitrator to consult NEDLAC prior to making any demarcation award, and not only in relation to those disputes where the CCMA has elected to invite written representations by way of a notice published in the Gazette.

[65] In *National Union of Metalworkers of SA v Commission for Conciliation, Mediation and Arbitration and others*[49] *(National Union of Metalworkers of SA)* the Constitutional Court held that the requirement that a commissioner consult NEDLAC was 'significant' and that this was a 'peremptory requirement', one that distinguishes demarcation arbitrations from conventional arbitrations contemplated in the LRA.[50] In the course of its judgment, the Constitutional Court endorsed the decision by this Court in *Syntell* on the nature and timing of consultation.

[66] In *Syntell,* this Court considered the meaning of 'consult' in s 62(9) and held that the word must necessarily bear a meaning that is context specific and functional to the overall objectives of s 62. The Court said:[51]

> 'The intrinsic nation of 'consultation' embraces a solicitation about a contemplated course of action or decision. In this section it contemplates NEDLAC, the decision maker which initially demarcated the sector, furnishing the commissioner with its views about a decision to be taken by him. Accordingly, it would seem wholly appropriate that the timing of this peremptory consultation be the moment when a prima facie view can be expressed by the commissioner and comment can be solicited about that prima facie view. Self-evidently, it cannot be

[49] (2022) 43 *ILJ* 530 (CC); [2022] 3 BLLR 209 (CC).

[50] Ibid at para 53.

[51] Ibid at para 27.

the commissioner's final view because that would render the consultation a sham. Lastly, it bears emphasis that the role of NEDLAC is not to 'approve' an award; the decision, from first to last, is that of the commissioner.'

[67] In sum: where in demarcation dispute the CCMA takes the view that the matter is one of substantial importance, the CCMA must invite written representations by way of a notice in the Gazette. Any representations must be made available to the arbitrator presiding at the demarcation hearing. Regardless of whether the CCMA has invited written representations, the arbitrator in any demarcation dispute must consult with NEDLAC before an award is issued and served on the parties. Consultation in this context contemplates that the arbitrator makes available to NEDLAC a *prima facie* view, in the form of a draft award or otherwise, inviting comment before the award in its final form is issued and served on the parties by the CCMA. The Labour Court was bound by this Court's decision in *Syntell* and the Constitutional Court's decision in *National Union of Metalworkers of SA* that consulting NEDLAC is a peremptory requirement. The Labour Court thus erred in finding that NEDLAC had no interest in the present demarcation and that the arbitrator was under no obligation to consult NEDLAC.

[68] The question that remains is whether by submitting his award to NEDLAC at the time and in the circumstances that he did, there was compliance with the provisions of s 62(9). It is not disputed that the award is signed and dated 19 May 2019, but that it was served on the parties only on 3 June 2019. In the interim, on 29 May 2019, NEDLAC wrote a letter to the CCMA stating its support for the demarcation award. It follows that the award had been forwarded to NEDLAC between 19 May 2019 and 29 May 2019, prior to service of the award on the parties as contemplated by s 138(7)(b). It is not in dispute that NEDLAC took no issue with the process that had been followed when the award was forwarded to that body. The only reasonable inference to be drawn is that despite applying the date and his signature to the award before forwarding the award to NEDLAC, the CCMA held back on service of the award until NEDLAC's response was

received. On receipt of NEDLAC's endorsement, the release of what then in effect became a final award was authorised, and the award served on the parties.[52]

[69] In these circumstances, there was substantial compliance with s 62(9), and there is no merit in the appellant's contention that the award ought to be set aside on the basis of a failure to comply with that section.

[70] The question of the declaratory order sought by the appellant in its amended notice of motion was faintly pursued in the appellant's heads of argument. The Labour Court was correct to observe that it is not the function of the court to grant orders divorced from the concrete facts of a specific dispute and further, in terms of section 62 (4), the correct forum for the determination of demarcation disputes is the CCMA. The fact that the Labour Court has the power under section 158 (1)(a)(iv) to make declaratory orders does not extend jurisdiction to the Court to undertake what amounts to a demarcation by way of a declaratory order, in circumstances where that jurisdiction has specifically been vested elsewhere. The application for a declaratory order seeking to extend the appellant's jurisdiction to employers and employees associated for carrying on the storage of goods ancillary and incidental to the transportation of goods by means of motor transport, regardless of whether that transportation of goods is conducted by that employer or a third party, was nothing less than an attempt by the appellant to seek through the back door what had been explicitly refused by the arbitrator.

Costs

[52] Section 138(7) provides that the commissioner must issue and award with brief reasons and that the CCMA must serve a copy of the award on each party to the dispute. For the purposes of s 62(9), an award is 'made' once it has been served on the parties in terms of s 138(7) – merely signing an award is not tantamount to making it.

[71] Section 179 of the LRA provides that this Court may make orders for costs according to the requirements of the law and fairness. This formulation has the consequence that the rule ordinarily applicable in the civil courts, that costs follow the result, does not apply. In the present instance, the interpretation of the bargaining council's registered scope is a matter of some importance to the parties, and to the road freight sector more broadly. The appeal was not brought frivolously nor vexatiously. The requirements of s 179 are best satisfied by each party bearing its own costs.

[72] I make the following order:

Order

1. The appeal is dismissed.
2. There is no order as to costs.

van Niekerk JA

Savage ADJP concurs.

GOVINDJEE, AJA

[73] I have had the benefit of reading and considering the judgment of my colleague (the main judgment). I agree with the learned exposition of the issues and applicable legal position detailed in the main judgment, save only for the interpretation of the appellant's registered scope (paragraphs 52–61, above) and the question of a declaratory order (paragraph 70, above).

[74] The main judgment accurately records one of the key issues to be determined by the arbitrator: whether, on a proper interpretation, the appellant's registered scope contemplated that the *"storage of goods"* activity undertaken by an employer and referred to in subparagraph (ii) of the definition, need necessarily be undertaken in

relation to the transportation of goods conducted by the same employer. For reasons that follow and are aligned with the crux of the appellant's arguments on this point, my view is that the arbitrator erred in answering that question in the affirmative.

[75] On the arbitrator's approach, the definition permits a single employer to fall within the 'industry' based on its association with its employees for two broad activities: transportation of goods by means of motor transport (transportation) and storage of goods. But only when the employer and its employees are already engaged in the primary activity of transportation would 'supplementary', ancillary or incidental storage work carried out by other employees of the same employer be encompassed (storage activity). Put differently, those employees engaged in storage activity for a transportation company would not have been covered by the definition were it not for the inclusion of subparagraph (ii).

[76] That approach, which is endorsed by the main judgment, respectfully appears to deviate from an established principle of demarcation. 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 employees and employer are associated for a common purpose. Once the character of the industry is determined, *all* employees are engaged in that industry. The precise work allotted to each employee by the employer is insignificant.[53] The implication is that once an employer and employees are associated primarily by virtue of the character of their industry being transportation, so that their activities fall within subparagraph (i) of the definition, any ancillary activities performed by other employees are subsumed by the primary activity for purposes of demarcation.[54]

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[53] *R v Sidersky* 1928 TPD 109 at 112–113. There appears to be no need, for present purposes, to consider old authorities pertaining to employers engaged in more than one industry.

[54] *Attorney-General, Transvaal v Moores (SA) (Pty) Ltd* 1957 (1) SA 190 (A) at 196H–197B. Also see the facts of *Coin Security (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2005) 26 *ILJ* 849 (LC); [2005] 7 BLLR 672 (LC), especially paras 29–30.

[77] This means that an employer engaged in the primary activity of transportation and who, in ancillary or incidental manner, happens to also associate with some other employees in respect of storage activity, is fully covered by subparagraph (i) of the definition already. There is no need to have recourse to subparagraph (ii) of the definition to arrive at this outcome. If this is so, the arbitrator's approach reads subparagraph (ii) as simply confirmatory of what is the usual position. While the possibility of subparagraph (ii) having been inserted *ex abundant cautela* (out of an abundance of caution) cannot be excluded, this would conflict with the principle of interpretation that language is not used unnecessarily. It has not been suggested that any one of the exceptions to this rule are applicable.

[78] To be meaningful, the separate inclusion of subparagraph (ii) of the definition must relate to a different scenario from that already covered by subparagraph (i). As indicated, on my understanding, subparagraph (i) already includes employees carrying on ancillary storage activity for an employer primarily engaged in transportation. Read in context, subparagraph (ii), which must be capable of sensible and business-like application on its own, could only refer to an employer and employees associated for carrying on storage activity where this is ancillary or incidental to transportation by a *different* employer. If that is so, the key question posed by the arbitrator was answered incorrectly.

[79] The main judgment does not dispute that the definition of the appellant's registered scope contemplates storage as a discrete activity falling within that scope. On my reading, there is simply no textual or contextual basis to restrict storage activity, in subparagraph (ii) of the definition, to employers/employees also involved primarily with transportation, as defined in subparagraph (i). The appellant's argument is supported when the definition is read in its entirety and in context, bearing in mind the appellant's name change and the circumstances that resulted in the inclusion of 'Logistics' in addition to 'Road Freight'. Warehousing and distribution are key components of road logistics. An interpretation of the definition that effectively includes only companies engaged primarily in the actual transportation of road freight, whether

they are also engaged in ancillary storage work or not, under-emphasises both the name change and the use of the words 'one or more' in the definition.

[80] As the definition is worded, it must be accepted that there is a 'storage of goods industry', including the various activities described.[55] When employers and employees associate for carrying out any of these activities, they form part of this 'storage' industry, subject to a crucial limitation: their activities must be demarcated as (predominantly) ancillary or incidental to the primary activity of transportation of goods by means of motor transport. The language used, read in context, seems clear and will ensure that the preferred interpretation does not open the floodgates. Employers and employees engaged primarily in the activity of pure storage of goods, or storage predominantly disconnected from transportation by means of motor transport, are excluded from the definition. This is because such forms of storage cannot be said to be ancillary or incidental to the primary activity of transportation of goods by motor transport and, therefore fall outside the definition.

[81] Whether or not the storage activity is ancillary or incidental to motor transportation is the purview of demarcation proceedings. As my colleague rightly points out, this requires investigation and resolution by commissioners with specialist expertise. While I accept that circumstances such as the present pose a challenge for demarcation commissioners, I fail to appreciate the untenable anomaly highlighted by the main judgment.[56]

[82] It follows that I am of the view that the Labour Court erred in upholding the arbitrator's interpretation. In the circumstances, it is tempting to uphold the appeal and grant the alternative relief sought by the appellant, namely, to set aside the award and

[55] This includes the receiving, opening, unpacking, packing, dispatching and clearing or accounting for of goods where these activities are ancillary or incidental to the transportation of goods by means of motor transport.

[56] See, for example, the facts of *National Union of Metalworkers of SA v Commission for Conciliation, Mediation and Arbitration and others* (2022) 43 *ILJ* 530 (CC); [2023] 2 BLLR 159 (LC).

remit the matter for determination by a different commissioner. The lengthy period that has elapsed since the demarcation award was issued makes this unpalatable. In addition, while I agree with the appellant's interpretation of the definition, I am unconvinced that the stated case does enough to demonstrate that Intermodal's storage activity was properly classified as 'ancillary or incidental to the transportation of goods by means of motor transport', as opposed to being only partly linked to motor transportation, but predominantly related to other forms of storage.

[83] What remains is to consider the declaratory relief sought. This was one of the three grounds of appeal specified in the notice of appeal and motivated as follows in the appellant's heads of argument:

> 'For the sake of certainty in the industry, the appellant presses upon the court the advantage of a determination of the interpretation of part (ii) of its registered scope. It was for the sake of such clarity that the appellant had sought a declarator from the Court below on the interpretation of part (ii). The appellant simply emphasises the advantage to the appellant and the industry in general of a binding finding on the interpretation issue.'

[84] The Labour Court summarily dismissed this aspect of the review without any reference to s 158(1)(*a*)(iv) of the LRA.[57] On my interpretation of the definition, the court did so without good reason. The fact that demarcations are the purview of the CCMA was certainly not a good basis for not considering the point properly. Given the various occasions in the past where the issue has tested arbitrators and the Labour Court, it also cannot be said that the interpretation of the definition was academic or abstract.[58] Instead, as the appellant argues, the case presented an opportunity for clarification. The

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[57] 'S 158(1): The Labour Court may

(a) make any appropriate order, including – …

(iv) a declaratory order;…'

[58] *Minister for Public Service & Administration & another v Solidarity & others* (2007) 28 ILJ 1747 (LAC); [2007] ZALAC 28 at paras 16–18, including the authorities cited.

Labour Court failed to exercise its discretion judicially on the point, and I would replace its order with the following:

> 'It is declared that an employer and its employees associated for carrying on the storage of goods ancillary or incidental to the transportation of goods by means of motor transport fall under the applicant's registered scope irrespective of whether that transportation of goods is conducted by that employer or a third party.'

Govindjee AJA

APPEARANCES

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