IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO:

JR 2130/02

In the matter between:

COIN SECURITY (PTY) LIMITED

Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION

First Respondent

KATE SAVAGE N.O.

Second Respondent

TRANSPORT & GENERAL WORKERS UNION

Third Respondent

THE NATIONAL BARGAINING COUNCIL FOR THE ROAD FREIGHT INDUSTRY

Fourth Respondent

FIDELITY CASH MANAGEMENT SERVICES (PTY) LTD

Fifth Respondent

THE NATIONAL ECONOMIC DEVELOPMENT &

LABOUR COUNCIL

Sixth Respondent

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JUDGMENT

FRANCIS J

Introduction

1. This is an application to review and set aside a demarcation award issued by the second respondent ("the commissioner"), in terms of which she found that the applicant's assets-in transit ("AIT") division is engaged in the Road Freight Industry and falls within the jurisdiction of the fourth respondent and is bound by its collective agreements.

2. The application was opposed by the third respondent - the Transport and General Worker's Union ("the TGWU"), the fourth respondent - the National Bargaining Council for the Road Freight Industry ("the Road Freight Bargaining Council") and the fifth respondent - Fidelity Cash Management Services (Pty) Ltd ("Fidelity").

3. The applicant has abandoned its grounds of review challenging the proceedings before the sixth respondent, the National Economic Development Labour Council ("NEDLAC").

The background facts

4. On 27 August 1971, a demarcation order was made by the Industrial Tribunal under section 76 of the Industrial Conciliation Act, 1956 to the effect that the cash-in-transit

("CIT") operations of, *inter alia,* Fidelity was engaged in the Motor Transport Undertaking (Goods). Fidelity has the largest CIT which is synonymous with the AIT operation in the country. It has a market share in excess of 50%, and is registered with the Road Freight Bargaining Council and complies with its agreements. The result of this order was that such operations were subject to the jurisdiction of the Industrial Council for the Motor Transport Undertaking (Goods) ("ICMTU"), whose area of jurisdiction was then limited to the PWV and surrounding areas. The ICMTU was the Road Freight Bargaining Council's predecessor.

5. In approximately 1983, the applicant commenced providing an AIT service.

6. On 18 July 1984, the applicant was registered as an employer with the ICMTU. It complied with the agreements of the ICMTU. It was one of eight CIT operators to have registered with the ICMTU.

7. On 27 February 1989, the applicant appealed to the Minister of Labour, under section 51(6) of the Labour Relations Act 28 of 1956, against a ruling by the ICMTU refusing the applicant an exemption. The appeal was dismissed.

8. In 1991, the applicant brought an application for demarcation in the Industrial Court challenging the jurisdiction of the ICMTU. The application was subsequently withdrawn.

9. In its objections dated 15 December 1995, the applicant objected, *inter alia*, to the

proposed variation of scope of the area of jurisdiction of the ICMTU to cover the whole country. The applicant recorded, in its objections, that it was currently proceeding with a Constitutional Court application about the application of the main agreement of the ICMTU to the security industry. No such application was launched.

10. With effect from 31 May 1996, the area of jurisdiction of the ICMTU was extended to the entire country, save for the former TBVC states and self governing territories.

11. The Labour Relations Act 66 of 1995 ("the Act") came into operation on 11 November 1996.

12. On or about 9 December 1996, the applicant launched an application in the Transvaal Provincial Division of the High Court for, *inter alia*, a declaratory order that the main agreement of the ICMTU did not apply to it. On 8 October 1999, Van der Walt J dismissed the applicant's High Court application on the basis that the High Court lacked jurisdiction. The applicant then appealed to the Supreme Court of Appeal. In a judgment delivered on 10 May 2001, the Supreme Court of Appeal dismissed the applicant's appeal against the judgment of Van der Walt J.

13. On 9 February 1998 the Road Freight Bargaining Council registered under the Act, with its area of jurisdiction being the entire country. There are two separate Road Freight Bargaining Council agreements: the "A" agreement, which applies to the Gauteng and surrounds; and the "B" agreement, which applies to the balance of the country. While the applicant has, at all material times, complied with the agreement

in the "A" area, it did not comply with the agreement in the "B" area.

14. On 27 February 1998 the applicant dismissed certain of its employees for participation in alleged unprocedural and illegal strike action. The dispute concerning the dismissal of the employees was referred to this Court for adjudication. The employees, represented by TGWU filed a statement of claim and the applicant filed a reply. TGWU alleged that the Road Freight Bargaining Council had jurisdiction in relation to the dispute and over the operations of the applicant. The applicant pleaded in its plea dated 2 March 1999 that the Road Freight Bargaining Council did not have jurisdiction over the matter.

15. On 11 September 1998, in an application brought by Fidelity at the CCMA in 1997, commissioner Marcus issued a demarcation award ("the Marcus Award") under section 62 of the Act, in terms of which he found that the CIT activities of Springbok Patrols (Pty) Ltd and Khulani Springbok Patrols (Pty) Ltd were engaged in the Motor Transport Undertaking (Goods) sector as defined in the main agreement of the ICMTU (by then the bargaining council).

16. On 7 April 1999, the Marcus award was made an order of Court under case number J451/99.

17. On 10 June 2000, Fidelity instituted demarcation proceedings against the applicant in the CCMA under section 62(1) of the Act. The applicant opposed these proceedings on the basis of the pending appeal in the Supreme Court of Appeal.

18. The matter was set down before this Court on 23 October 2000. Basson J ordered that the demarcation dispute be referred to CCMA in terms of section 62(3) of the Act. The Registrar of this Court was directed to process the referral within three weeks of the date of the order, failing which the necessary steps were to be taken by TGWU and employees.

19. The CCMA set the matter down for a hearing before the commissioner on 3 September 2001. This was later changed to 7 September 2001. On 7 September 2001 the Road Freight Bargaining Council intervened in the dispute. It raised a point *in limine* that the CCMA was *functus* officio as the CCMA had already made a binding demarcation in a dispute between Fidelity and Springbok Patrols. The point *in limine* was dismissed by the commissioner.

20. In her directive dated 7 September 2001, the commissioner called upon both the applicant and the Road Freight Bargaining Council to discover certain documents and make written submissions in support of their respective positions. The Road Freight Bargaining Council duly delivered written submissions with a collection of documents. The applicant delivered a statement of facts and bundles of documents. Fidelity delivered written representations. TGWU filed a brief statement.

21. On 26 October 2001 a notice in terms of section 62(7) of the Act was published in the Government Gazette.

22. On 14 December 2001, it was agreed that the "central factual document" would be the

applicant's statement of facts and that the applicant would accept all the facts contained in the other submissions and documents, which are not in conflict with the applicant's document. Where there are additional facts over and above those submitted by the applicant, the applicants would not dispute those facts contained in the documents.

23. The applicant went on to record that it accepted that the documents were what they purport to be, but did not accept the correctness of every statement. The Road Freight Bargaining Council had made its position clear before the commissioner that it intended and would be entitled to refer to the documents filed of record in argument. In preparation for the hearing on 18 March 2002, heads of arguments were delivered by the Road Freight Bargaining Council on 21 February 2002 and by the applicant on 15 March 2002. It recorded in paragraph 6 of its heads of argument that no oral evidence was led and that there were no factual disputes that required the testing of evidence in oral hearing.

24. The status of the statement of facts and other documents submitted to the commissioner was determined and agreed before the commissioner, immediately preceding the hearing of argument. It was agreed that the statement of facts would be the central factual document and in addition that any facts contained in the documents referred to in the submissions of the Road Freight Bargaining Council and Fidelity, which were not in conflict with the Statement of Facts, would be accepted. This constituted the factual basis in respect of which the demarcation was to be decided. It was called the "matrix of facts".

25. On or about 13 or 14 May 2002 the commissioner made available to the participants in the proceedings a document headed "Provisional Demarcation Award subject to consultation with NEDLAC in terms of section 62 of the Act as amended". At the end of the document it was noted that the award had been submitted to NEDLAC for consultation in terms of section 62 of the Act.

26. The determination was referred to NEDLAC on 6 July 2002 and was considered by certain members of the Demarcation Standing Committee at a meeting on 8 August 2002 and was ratified at a meeting held on 1 September 2002.

27. On 13 September 2002, NEDLAC notified the CCMA that it had "agreed to support the provisional award". The applicant's attorneys came to learn of this on 16 October 2002.

28. The review application was delivered on 3 January 2003.

The award

29. The commissioner found that the applicant's AIT division, and their employees in such division, is engaged in the transportation of goods for hire or reward by means of road transport and therefore fell within the scope of the Road Freight Industry as defined in the Road Freight Bargaining Council's constitution.

30. The commissioner found that the applicant had failed to prove that the transportation of assets by its AIT division is ancillary to the securing of such assets. Further that the main business of the AIT division is the transportation of assets for reward.

Ancillary to such transportation is the security element, in that security is required during the transportation given that the latter occur under circumstances often of extreme danger and high risk. Transportation by the AIT division is not incidental to securing the assets but central to the business of the division. The applicant's AIT business had not been distinguished from Fidelity which also operates within the AIT sector defined as the transportation of goods for hire or reward by means of road transport in the Republic of South Africa. The sector had for almost two decades been demarcated as falling within the road transportation Industry and not the security industry. The applicant would derive a competitive advantage against its competitors which would not promote a system of orderly collective bargaining at sectoral level.

The issue of condonation

31. It is common cause that the review application was not brought within six weeks from the date of service of the award. The applicant contended that the provisions of section 145 of the Act are not applicable and that the application was brought within a reasonable period. The application was brought in terms of section 158(1)(g) of the Act. TWGU and Fidelity raised the issue that the application was not brought within six weeks of the award. It was contended that since there was no application for condonation, the application should be dismissed. The Road Freight Bargaining Council accepted that section 158(1)(g) as opposed to section 145 of the Act was applicable to review the application.

32. I am of the view that the provisions of section 145 of the Act are not applicable to this application. This is not an unfair dismissal or an unfair labour practice dispute which is governed by chapter VIII of the Act. Chapter VII of the Act which deal with

Dispute Resolution is also not applicable. This is a dispute about demarcation between sectors and areas. Section 62 of the Act is applicable. Section 62(4) of the Act provides that the provisions of section 138 apply read with the changes required by the context. Section 138 deals with general provisions for arbitration proceedings.

33. The application was brought within a reasonable period and there is no need to apply for condonation.

New issue raised

34. Before dealing with the grounds of condonation I need to deal with the new issue raised by the applicant. The applicant has raised in a supplementary affidavit an issue that was not raised with the commissioner namely that the commissioner had to decide whether the items being carried by the applicant in its activities constituted "goods". If the items carried by the applicant did not fall within that definition, it was not open to the commissioner to make a demarcation award that the items carried and that the AIT activity falls within the definition of the Certificate of Registration ("the Certificate").

35. It was contended that cash, whether notes or coins, cheques, credit cards slips and vouchers and other negotiable instruments do not constitute "goods" as referred to in the Certificate. The Certificate records that the Road Freight Bargaining Council is registered "in respect of the transportation of goods for hire or reward by means of road transport in the Republic of South Africa.....". The terms "transportation of goods" is defined as meaning the undertaking in which employers and their employees are associated for carrying out one or more activities for hire or reward,

including the transportation of goods by means of motor transport, the storage of goods and the hiring out by labour brokers of employees for activities or operations which ordinarily will naturally fall within the transportation of goods. Although the scope of registration was changed on 9 February 1998, the definition of "transportation of goods" was not changed. The word "goods" is not defined and must accordingly bear its ordinary meaning. This would mean in interpreting the Certificate, the language must be examined, not what the writer of the document may have had in mind. The ordinary meaning of the word "goods" excludes money, coins of the realm, and negotiable instruments. These are not commodities, but the means of exchange for purchasing or selling commodities. There is nothing in the Certificate which indicates that the word should be given any more extended a meaning than that appearing in the dictionaries and case law.

36. It was further contended that although the commissioner did not consider this question, apparently because it was not argued before her, it was contended that she was nevertheless obliged to consider the question of the meaning of "goods" as a fundamental question in the demarcation case. The issue is a legal one, and not one on which the commissioner could exercise a discretion. The Commissioner assumed that the items which the applicant carried in the course of its AIT activities (cash and negotiable instruments) were "goods", as defined in the Certificate. This meant that she approached her task on an erroneous legal basis and failed to address her mind to her task in accordance with the statute. On the other hand, if she simply disregarded the issue then she failed to consider a material matter that it was essential to consider and thereby approached her task on an erroneous basis.

37. I do not understand how it can be contended that the commissioner has committed a reviewable defect in failing to appreciate that "money" does not constitute "goods" in the context of the Road Freight Bargaining Council's Certificate when the applicant did not raise this point before the commissioner and did not raise it in its founding papers in these proceedings. This is a review application and I am of the view that it is impermissible for the applicant to raise this now. This was not something that was fully canvassed in evidence before the commissioner. In any event it is in conflict with the factual concession made during the demarcation proceedings that "goods" as defined are transported. It is not a purely legal issue of the nature that can be raised at this stage.

38. The commissioner should have been afforded an opportunity to deal with that issue. The Legislature had deemed it necessary to grant the CCMA the exclusive jurisdiction to deal with the issue of demarcation. This court does not have the necessary jurisdiction to deal with demarcation disputes save when it deals with it in a review application.

The grounds of review

39. The grounds of review are as follows:

39.1 The approach of the commissioner was fundamentally flawed in that she disregarded the law relating and failed to approach her task in accordance with the relevant authorities. She misunderstood the law as it related to demarcations, and embarked upon the wrong inquiry. The commissioner

ought to have started from the point that the applicant operates the business of providing security services. In the result she did not apply her mind in the issues in accordance with the behests of the statute.

39.2 The award is unreasonable, in that no proper reasons have been provided for the conclusion it reached. Further that the award is unreasonable in that insufficient reasons exist for the conclusion reached. Further that the award is unreasonable, in that insufficient regard has been taken of relevant evidence and information placed before the commissioner and irrelevant information has been taken into account.

39.3 The commissioner imposed an onus upon the applicant in regard to the demarcation, which, she states, it failed to discharge. In so doing, the commissioner erred and acted in excess of her powers.

39.4 The commissioner considered that the main business of the applicant is transportation, security, she held, was ancillary to this business. In so doing, she failed to determine that where a business has features common to two different industries the demarcation tribunal must decide with which industry the employer and its employees are most closely associated.

39.5 The commissioner also took into account that the applicant has been 'demarcated' since 1984 in the motor transport industry. This is incorrect. The applicant has not been demarcated before.

39.6 The commissioner also found that the applicant would obtain a competitive advantage if not demarcated into the Road Freight Industry which was an irrelevant consideration.

Analysis of the facts and arguments raised

40. The applicant's review application is regulated by section 158(1)(g) of the Act. The Promotion of Administrative Act 3 of 2000 ("PAJA") does not apply to the review of CCMA arbitration awards in this Court. The applicant's grounds of review relate to certain of the findings of the commissioner and the approach that she adopted in her award under the heading "determination". The commissioner is charged with having made errors of fact and law, and having failed to satisfy the threshold requirement of rationality. The applicant submitted that the demarcation award ought to be reviewed and set aside as it fails to satisfy the threshold requirement of rationality and it is based on errors of law and which led the commissioner to ask herself the wrong question and apply the wrong test. In the result it was submitted that she failed to apply her mind to the relevant issues in accordance with the behests of the Act.

41. The grounds of review chosen by the applicant are those found in common law. A commissioner exercises a public power or performs a public function under the Act in conducting demarcation proceedings. The commissioner's decision must be rationally related to the purpose for which the power was given. At common law, errors of fact ordinarily do not give rise to a review unless the error relates to a jurisdictional fact and even then the approach is a conservative one, as appears from the following *dictum* of Corbett J in *SA Defence and Aid Fund v Minister of Justice* 1967(1) SA 31 (c) at 34-35:

"Upon a proper construction of the legislation concerned, a jurisdictional fact may fall into one or other of two broad categories. It may consist of a fact, or state of affairs, which, objectively speaking, must have existed before the statutory power could validly be exercised. In such a case, the objective existence of the jurisdictional fact as a prelude to the exercise of that power in a particular case is justiciable in a Court of law. If the Court finds that objectively the fact did not exist, it may then declare invalid the purported exercise of power .... On the other hand, it may fall into the category comprised by instances where the statute itself has entrusted to the repository of the power the sole and exclusive function of determining whether in its opinion the prerequisite fact, or state of affairs, existed prior to the exercise of the power. In that event, the jurisdictional fact is, in truth, not whether the prescribed fact, or state of affairs, existed in an objective sense but whether, subjectively speaking, the repository of the power had decided that it did. In cases falling into this category the objective existence of the fact, or state of affairs, is not justiciable in a Court of law. The Court can interfere and declare the exercise of the power invalid

on the ground of a non observance of the jurisdictional fact only where it is shown that the repository of the power, in deciding that the prerequisite fact or state of affairs existed, acted male fide or from ulterior motive or failed to apply his mind to the matter."

42. In the context of administrative action, a material mistake of fact may constitute grounds for a review, but not to the extent that the distinction between a review and an appeal is blurred. This was made clear in *Pepcor Retirement Fund v Financial Services Board* 2003 (6) SA 38 (SCA) at paragraphs 46 and 47:

"In my view, a material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should .... be reviewable at the suit of inter alia, the functionary would made it - even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in Fedsure, Sarfu and Pharmaceutical Manufacturers requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, ie on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as ultra vires.

Recognition of a material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate,

the fundamental distinction in our law between two distinct forms of relief: appeal and review. For example, where both the power to determine what facts are relevant to the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary (be it a person or a body of persons), it would not be possible to review and set aside its decision merely because the reviewing Court considers that the functionary was mistaken either in its assessment of what facts were relevant, or in concluding that the facts exists. If it were, there would be no point in preserving the time-honoured and socially necessary separate and distinct forms of relief which the remedies of appeal and review provide."

43. The function of a CCMA commissioner in a demarcation dispute is a classic case of the legislature entrusting a functionary with the power to determine what facts are about the making of a decision and the power to determine whether or not they exist. It is fundamental to the effective operation of the Act that the commissioner must be a repository of such power.

44. At common law, the position in regard to errors of law was stated as follows in *Goldfields Investments Ltd & another v City Council of Johannesburg and Another* 1938 TPD 551 at 560 - 561:

"And if from the magistrate's reasons it appears that his mind was not in a state to enable him to try the case fairly this will amount to a latent gross irregularity. If, on the other hand, he merely comes to a wrong decision owing to his having made a mistake on a point of law in relation to the merits, this does not amount to a gross irregularity. In matters relating to the merits the magistrate may err by taking a wrong one of several possible views, or he may err by mistaking or misunderstanding the point in issue. In the latter case it may be said that he is in a sense failing to address his mind to the true point to be decided and therefore failing to afford the parties a fair trial. But that is not necessarily the case. Where the point relates only to the merits of the case, it would be straining the language to describe it as a gross

irregularity or a denial of a fair trial. One would say that the magistrate has decided the case fairly but has gone wrong on the law. But if the mistake leads to the court not merely missing or misunderstanding a point of law on the merits, but to it misconceiving the whole nature of the enquiry, or of its duties in connecting therewith, then it is in accordance with the ordinary use of language to say that the losing party has not had a fair trial."

45. The overall common law position was summarised as follows by Corbett CJ in *Johannesburg Stock Exchange v Witwatersrand Nigel Ltd* 1988 (3) SA 132 (A) at 152 A-E:

"*Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice'..... Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or male fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated.... Some of these grounds tend to overlap."*

46. Turning to rationality, Chaskalson P held, as follows, in *Pharmaceuticals Manufacturers Association of SA: In re Ex Parte President of the Republic of South Africa & others* (2) SA 674 CC at paragraphs 85 and 90:

"It is a requirement of the rule of law that the exercise of public power by the Executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our Constitution for such action.

Rationality in this sense is a minimum threshold requirement applicable to the exercise of all public power by members of the Executive and other functionaries. Action that fails to pass this threshold is inconsistent with the requirements of our Constitution and therefore unlawful. The setting of this standard does not mean that the Courts can or should substitute their opinions as to what is appropriate for the opinions of those in whom the power has been vested. As long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the functionary's decision, viewed objectively, is rational, a Court cannot interfere with the decision simply because it disagrees with it or considers that the power was exercised inappropriately. A decision that is objectively irrational is likely to be made only rarely but, if this does occur, a Court has the power to intervene and set aside the irrational decision."

47. In *Bel Porto School Governing Body & others v Premier, Western Cape & another* 2002 (3) SA 265 (CC) at paragraph 89, Chaskalson P found, with reference of *Carephone (Pty) Ltd v Marcus NO & Others* (1998) 19 ILJ 1425 (LAC), that *"for a decision to be justifiable .... it should be a rational decision taken lawfully and directed to a proper purpose."*

In *Carephone,* Froneman DJP decided at paragraph 37 that the test for justifiability is as follows:

"Is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion that he or she eventually arrived at?"

The Court held at paragraph 32:

"According to the New Shorter Oxford English Dictionary 'justifiable' means 'able to be legally or morally justified, able to be shown to be just, reasonable, or correct; defensible.' It does not mean 'just', 'justified' or 'correct'. On its plain meaning the use of the word 'justifiable' does not ask for the obliteration of the difference between review and appeal. Neither does the LRA itself: it makes a very clear distinction between reviews and appeals."

48. The notion of justifiability gives rise to a range of reasonable decisions. The question in a review is thus whether the decision falls within "the bounds of reasonableness".

49. Where the reasoning in an arbitration award is unsustainable, this Court has, nevertheless, adopted a flexible approach. In *Shoprite Checkers (Pty) Ltd v Ramdaw NO & others* (2001) 22 ILJ 1603 (LAC) at paragraph 101, Zondo JP held:

"In my view it is within the contemplation of the dispute-resolution system prescribed by the Act that there will be arbitration awards which are unsatisfactory in many respects but which nevertheless must be allowed to stand because they are not so unsatisfactory as to fall foul of the applicable grounds of review, without such contemplation, the Act's objective of the expeditious resolution of disputes would have no hope of being achieved. In my view the first respondent's award cannot be said to be unjustifiable when regard is had to all the circumstances of this case and the material that was before him".

50. Similarly, in *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA & others* [2003] 7 BLLR 676 (LAC) at paragraph 19, Goldstein AJA held:

"Although the reasons that the commissioner gave for the result that the dismissal was too harsh were unreasonable, there are, in my view, ample reasons within the material that was properly before the commissioner which render that finding and result justifiable."

51. Where, in administrative law, a decision-maker relies on both permissible and impermissible reasons for acting, Baxter, Administrative Law (1984) at 521 postulates the following review test:

"It is submitted that the test might be formulated in the following way: would the authority, had it not been actuated by bad reason or reasons, have reached - and been legally entitled to reach - the same decision upon the basis of the remaining permissible reasons? The question is hypothetical and its answer involves some speculation. Nevertheless, by characterizing it in this way the public authority is not penalised for insignificant errors when it would have decided anyway. If permissible reasons for the decision exist, and they would still have dictated the decision, no prejudice has been suffered."

52. The approach advocated by Baxter accords with the approach adopted in the event of a finding of a gross irregularity on review. In *SA Veterinary Council & another v Veterinary Defence Association* 2003 (7) BLLR 697

(SCA) at paragraph 40, the Supreme Court of Appeal held that in such circumstances the proceedings can be saved if it is apparent that despite the irregularity the applicant was not prejudiced because the finding would have been the same if the correct approach had been applied.

53. It is not disputed by the applicant that the commissioner applied her mind to and correctly recorded in the first 12 pages of her award the background to the dispute; the issues to be determined; the point *in limine* raised by the Road Freight Bargaining Council and her findings in that regard; the reference to the applicant's statement of facts; a summary of TGWU's argument; a summary of the applicant's argument; a summary of the bargaining council's argument and a summary of Fidelity representations.

54. 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. In this regard see *Kohler Brothers v Pio* 1929 EDL 369 and *R v Sidersky* 1928 TPD 109 at 112. 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. The following was said by Solomon J in *R v Siderksy* at pages 112 to 113:

"Dr Reitz .... argued that the character of an industry is determined, not by the kind of occupation in which the employees are engaged, but by the nature of the enterprise in which both employers and employees are associated for a common purpose. Once the character of the industry is determined, all the employees are engaged in that industry, whatever the actual work may be which the employer allots to them. I think this argument is sound."

55. It is possible for the same employer to be engaged in two or more industries at the same time, and for the employer to be an employer in each one. The question is one of fact and where it arises each of the two enterprises is to be treated as separate from the other. See *R v Sidersky , supra,* at 113 and *R v Giesken & Giesken* 1947 (4) SA (AD) at 566. The two or more industries may be utterly distinct, or the one may be ancillary to the other. Where the one industry is ancillary to another, it is a matter of degree whether a person who carries on one particular industry is also carrying on another industry. It is a question whether the activities were of sufficient dimensions to justify the conclusion that the employer carries on and is associated with its employees with its employees in more than one industry. See *KWW v Industrial Council for the Building Industry and Others* 1949 (2) SA 600 (A) at 608 to 610.

56. The question whether an employer is engaged in a particular trade or industry is one of fact to be decided in the light of all the surrounding circumstances and having regard to any relevant evidence which is put before the Court. See *R v Ngcobo* 1936

NPD 408 and *R v Goss* 1957 (2) SA 107 (T) at 110 A - B. The following was said by Centlivres CJ in *Attorney-General, Transvaal v Moores (SA) (Pty)* Ltd 1957 (1) SA 190 (A) at 197 A - B:

"I think that it is clear from the above case [KEV v Industrial Council for the Building Industry] that the mere fact that the lithography part of the respondent's business is ancillary to its main business is not per se conclusive in favour of the respondent; if it is ancillary, one must go a step further and decide on the proved facts whether the lithography part of the business is of such magnitude that it can fairly be said that the respondent is carrying on more than one industry (ibid p 609). Such a decision must be made where one industry is ancillary to another and only then does a question of degree arise: It obviously cannot arise when a person carries on two or more distinct industries."

57. The method used to determine whether a class of employers is engaged in a particular industry was summarised as follows by Jansen J in *Greatex Knitwear (Pty) Ltd v Viljoen and Others* 1960 (3) SA 338 (T) at 344 H - 345 D:

"(a) The meaning of 'industry' as used in the agreement, is determined. This usually requires the interpretation of some definition appearing in the agreement. It seems that a restrictive interpretation is often applied, cutting down the scope of the general words in the definition. Although not specifically invoked, the mode of interpretation appears to be that applied in Venter v R 1907 TS 915 (cf Rex Scapszac and Others 1929 TPD 980; Rex v Ngcobo 1936 NPD 408; Rex v Goss 1957 (2) SA 107 (T) at 110).

(b) The activities of the employer (personal and by means of his employees) are determined.

(c) The activities and the definition (as interpreted) are now compared. If none of the activities fall under the definition, caedit quaestio; if some of the activities fall under the definition, a further question arised: Are they separate from or ancillary to his other activities? If they are separate he is engaged in the industry (unless these activities are merely casual or insignificant - Rex v C.T.C. Bazaars (SA) Ltd 1943 CPD); if they are ancillary to his other activities, he is not engaged in the industry (unless these ancillary activities are of such a magnitude that it can fairly be said that he is engaged in the industry within the meaning of the definition (AG Tvl v Moores SA (Pty) Ltd 1957 (1) SA 190 (A).

(d) Inherent in this approach is the possibility that an employer may be such in more than one industry (Rex v Giesken & Giesken 1947 (4) SA 561 (A) at p 566), despite the difficulties that may arise from such a situation (cf. Rex v Auto-Parts (Pty) Ltd and Ano 1948 (3) SA 641 (T) at 648)."

58. The approach referred to in paragraph 57 above is not the only approach capable of surviving a review application. There are two additional points that stand to be made. The first relates to the issue of ancillary business operations. In resolving the question of whether operations are ancillary, it should be borne in mind that "ancillary to" has a specialized meaning in the context of demarcation. Ancillary business operations are business operations rendering services to existing customers or clients of the main business. Whilst what is ancillary is a question of degree that is not the only enquiry. Ancillary business is also required as a matter of both language and law to be performed as ancillary to or, put differently, to support existing business within a

defined customer base. (*R v Goss* 1956 (3) SA 194 (T) at 196).

59. Most of the decided cases relate to the position to the coming into operation of the Act on 11 November 1996. Under the Act, demarcations need to be seen in the context of the system of bargaining councils established thereunder aimed at achieving the primary objects of the Act, including the promotion of orderly collective bargaining and collective bargaining at a sectoral level. These statutory imperatives require the demarcating tribunal to enquire, beyond mechanistic comparison of jobs, into the relevant collective bargaining practices and structures.

60. NEDLAC was established in terms of the National Economic, Development and Labour Council Act, 35 of 1994. Section 5 thereof defines its objects and purposes as including striving *" to promote the goals of economic growth, participation in economic decision-making and social equity", amd " continually evaluate the effectiveness of legislation and policy affecting social and economic policy".*

61. Under these statutory imperatives:

61.1 In the event of an objection to the registration of a bargaining council (either at the outset or in the event of a variation of scope) NEDLAC is obliged in terms of section 29(8) of the Act to:

"(a) consider the appropriateness of the sector and area in respect of which the application is made;

(b) demarcate the appropriate sector and the area in respect of which the bargaining council should be registered; and

(c) report to the registrar in writing."

In terms of section 28(10), in complying with section 29(8), NEDLAC must

seek to give effect to the primary objects of the Act.

61.2 In the event of a dispute arising about demarcation between sectors and areas, under section 62(9) before making an award the commissioner *"must consult with NEDLAC"*.

62. NEDLAC plays a presiding role over demarcations in both the prospective sense (that obtains at registration) and the *ad hoc* sense (that obtains when demarcation disputes arise). The socio-economic intentions and effects of a demarcation accordingly range far beyond a mechanical comparison of jobs, as mere reliance on pre-1996 authorities would suggest. There are two phases under the Act to a demarcation: the first phase is the mechanistic stage (comparison of jobs); and the second phase involves a consideration of collective bargaining practices and structures and socio-economic considerations.

63. 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. This approach will not only be consistent with these principles, but also consistent with the need for the Act to be administered

effectively.

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

65. The applicant contended in its heads of argument that the correct approach for the commissioner to have adopted was as follows:

65.1 to start with the proposition that the applicant's business was in the security industry;

65.2 to enquire into what occurred when that business was expanded to include the AIT division - which would, it was argued, have revealed that while the AIT division continued to provide security services and these services provided the reasons for clients employing the applicant to undertake this work, *"some of the activities fell within the definition of the road freight industry";*

65.3 to enquire then into whether those activities that fall within the Road Freight Industry are separate from the business or ancillary thereto - which, it was argued, *"the only possible answer being that the activities of the AIT division are ancillary to the other activities of the applicant's business";*

65.4 to conclude that the AIT division does not fall within the Road Freight Industry *"unless it can be said that the magnitude of those activities is such that it can fairly be said that it has gone over to that industry in respect of those activities"* - which enquiry, it was argued, was never made.

66. The applicant adopted the following approach before the commissioner:

66.1 The applicant operates its AIT business as a separate division *"as a semi-autonomous entity"* within the security industry.

66.2 The security industry offered by the AIT division is a service which *"includes but is not exclusive to the transportation of goods"*.

66.3 These are the activities of two separate industries - they fall directly within

two industries.

66.4 From there the argument developed -

"So what does one do? How does one deal with that kind of situation? And here the approach of the court [in] R v Gearing is to say: well we must see under which particular industry that case appropriately falls. And the submission that we make and it was a similar submission that Coin made to the Supreme Court of Appeal in the dispute that went there and that was decided [in] 2001 was that one must look at the industry in which the employers and employees ate most closely associated because that is the only way of breaking the tie".

66.5 The commissioner was then referred to paragraph 37 of the applicant's arbitration heads namely that

"The only appropriate method, it is submitted, for dealing with the current situation where a business or a definable portion of a business has features common to two different industries, the commissioner must decide with which industry the employer and its employees are most closely associated."

The balance of counsel's argument involved him taking the commissioner through the applicant's arbitration heads under the heading *"closer association security or freight",* which conclude with the submission that

"the operations of Coin AIT are closer to the security industry than they are to the road freight industry".

67. The approach advocated by the applicant at the review proceedings is flawed. It was not the approach advocated before the commissioner. It was implicit in the applicant's argument before the commissioner based on the "close association" test

that the applicant accepted that the focus of the enquiry was the AIT division and not the whole of the applicant's operation. The applicant argued, in conclusion, that because the AIT division was more closely associated with the security industry than the Road Freight Industry, it should not be demarcated into the latter industry. The commissioner followed this mode of analysis, but came to a different conclusion on the facts. Her approach was perfectly rational. The applicant's change of tack on review is impermissible.

68. Even if the *Greatex* approach is a correct approach *non constat* that the commissioner's approach is reviewable. The test on review is not whether the commissioner's approach was correct, but rather whether it was rational. It must be assumed in an enquiry such as this that there is more than one acceptable mode on analysis. It is thus both purposeless and fruitless to debate the merits of alternative approaches. If it were an appeal, it could be argued that the *Greatex* approach is wrong and that the correct approach was that adopted by the commissioner. The *Greatex* matter was which was decided in 1960 does not take into account the divisionalisation and the objects underlying the Act.

69. The approach now advocated by the applicant does not actually accord with the *Greatex* approach. The applicant's point of departure and consideration of what happened to the business when it commenced AIT operations in 1983 is not consistent with the dictum of Jansen J. The commissioner must be judged not simply with reference to *Greatex*, but rather with reference to her duties and functions under the Act. She was tasked with determining, under section 62(1)(a) of the Act, whether a

particular class of employees engaged in the applicant's AIT division is employed in the road freight industry. Her approach was that the AIT division was a separate business and that its activities were more closely associated with the road freight industry than the security industry and thus fell to be demarcated within the former industry. In so doing, she properly discharged her statutory function.

70. The commissioner's award was properly based on the evidence before her, reflects a application of the mind to all the relevant facts and considerations including those dealt with in argument by the applicant and is clearly rational and justifiable, and indeed correct. It is trite that a decision that is objectively irrational is likely to be made only rarely, that the question is not whether the award was correct but whether it is justifiable, that this Court cannot interfere with the decision simply because it disagrees with the functionary, and that this is a case that calls for judicial deference. Anything short of this would obliterate the distinction between a review and an appeal.

71. The notion of rationality comprehends more than one reasonable outcome. It also comprehends more than one method of analysis or approach. It cannot be said that the approach and result arrived at by the commissioner is incapable of justification. Ultimately, the question is whether the decision of the commissioner is one that a reasonable commissioner could not reach. The review application, which focuses its attack on the approach adopted by the commissioner, falls short of this test.

72. The commissioner did not in her award place an onus on the applicant. She went no

further than to comment that the applicant has failed to establish in evidence a contention raised by it in argument that the transportation of assets by its AIT division is ancillary to the securing of such assets. The commissioner concluded that the main business of the AIT division of the applicant is the transportation of assets of reward and that ancillary to such transportation is the security element. She did so not by default and operation of the onus, but rather by having proper regard to all the facts placed before her. There is no basis for the applicant's complaint.

73. The applicant's points of criticism fall short of the grounds of review. The applicant's contention that the award is not justifiable is wholly without merit.

74. I find it necessary to conclude by referring to the following *dictum* of O'Regan J in *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism & others* 2004 (7) BCLR 687 (CC) at paragraphs 44, is particularly apposite in the present context:

"..... a court should be careful not to attribute to itself superior wisdom in relation to matters entrusted to other branches of government. A court should thus give due weight to findings of fact and policy decisions made by those with special expertise and experience in the field. The extent to which a court should give weight to these considerations will depend on the character of the decision itself, as well as on the identity of the decision-maker. A decision that requires an equilibrium to be struck between a range of competing interests or considerations and which is to be taken by a person or institution with specific expertise in that area must be shown respect by the court. Often a power will identify a goal to be achieved, but will not dictate

which route should be followed to achieve that goal. In such circumstances a court should pay due respect to the route selected by the decision-maker."

75. The application stands to be dismissed. There is no reason why costs should not follow the result. This includes the costs of the two counsel employed by the third respondent and the two counsel employed by the fourth respondent.

76. In the circumstances I make the following order:

1. The application is dismissed with costs including the costs of the two counsel employed by the third respondent and the costs of the two counsel employed by the fourth respondent.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT	: MJD WALLIS SC WITH AIS REDDING INSTRUCTED BY MACROBERT INC
FOR THIRD RESPONDENT	: AA BAVA WITH R G RAM INSTRUCTED BY HOFMEYER HERBSTEIN & GIHWALA INC
FOR FOURTH RESPONDENT	: PJ PRETORIUS SC WITH AT MYBURGH INSTRUCTED BY BOWMAN GILFILLAN INC
FOR FIFTH RESPONDENT	:

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DATE OF JUDGMENT : 26 April 2005