reportable

case no: 18/2000

In the matter between:

COIN SECURITY GROUP (PTY) LIMITED	Appellant
and	
THE MINISTER OF LABOUR	1st Respondent
INDUSTRIAL COUNCIL OF THE MOTOR TRANSPORT UNDERTAKING (GOODS)	2nd Respondent
ROAD FREIGHT EMPLOYERS ASSOCIASION	3rd Respondent
MOTOR TRANSPORT WORKERS UNION (SOUTH AFRICA)	4th Respondent
SOUTH AFRICAN TRANSPORT WORKERS UNION	5th Respondent
PROFESSIONAL TRANSPORT WORKERS UNION OF SOUTH AFRICA	6th Respondent
TRANSPORT AND GENERAL WORKERS UNION	7th Respondent
AFRICAN MINERS AND ALLIED WORKERS UNION	8th Respondent
TURNING WHEEL WORKERS UNION	9th Respondent

Coram: Hefer, ACJ, Schutz, Scott, Streicher, and Farlam JJ A

Heard: 10 May 2001

Delivered: 1 June 2001

The industrial court has exclusive jurisdiction to determine demarcation disputes in respect of industrial council agreements which remained in force in terms of item 12(1) of Schedule 7 to Act 66 of 1995

J U D G M E N T

STREICHER J A:

[1] The appellant,Coin Security Group (Pty) Ltd, sought a declaratory order in die Transvaal Provincial Division that certain industrial council agreements promulgated in terms of s 48 of the Labour Relations Act 28 of 1956 ("the old LRA") and an order published in terms of s 51A(3) of that Act did not apply to it. The court *a quo* dismissed the application on the ground that it had no jurisdiction to decide the issue, in that it had to be dealt with in terms of s 62 of the Labour Relations Act 66 of 1995 ("the new LRA").The appellant now appeals against that decision but only in respect of the agreement of the Industrial Council for the Motor Transport Undertaking (Goods) (the second respondent) published by way of Government Notice R1832 in Government Gazette No 17548 dated 8 November 1996 ("the agreement"). The appellant contends that the court *a quo* had jurisdiction to decide the matter in that jurisdiction to do so had not been assigned to another court. The first and second respondents, on the other hand, contend that the court *a quo* correctly decided that the

matter had to be dealt with in terms of s 62 of the new LRA, alternatively that the Labour Court established in terms of the new LRA or the Industrial Court established under the old LRA had exclusive jurisdiction to deal with the matter.

[2] The agreement was entered into between the Road Freight Employers' Association (the third respondent) of the one part and a number of trade unions (the fourth to ninth respondents) of the other part. At the request of the second respondent and in terms of the aforesaid notice, the Minister of Labour (the first respondent), declared the provisions of the agreement binding upon the parties thereto and upon the employers and employees who were members of these parties, as from 18 November 1996 until 31 December 1996. In doing so the first respondent was acting in terms of s 48(1)(a) of the old LRA. In the same notice the first respondent, acting in terms of s 48(1)(b) of the old LRA, declared the provisions of the agreement binding, as from 18 November 1996, upon all other employers and employees who were engaged or

employed in the “motor transport undertaking (goods)” in the areas specified in the agreement. The agreement prescribed minimum wages and other conditions of employment.

[3] “Motor Transport Undertaking” is defined in the agreement as the undertaking in which employers and employees are associated for the transportation of goods by means of motor transport for hire or reward. The appellant contends that it is not bound by the agreement in that the undertaking in which it is involved is that of the provision of security services rather than transportation, and that the items handled by it in the provision of its services are not “goods” within the meaning of that word in the agreement. The second respondent on the other hand insists that the appellant is bound to comply with the provisions of the agreement. It is this dispute, generally known as a demarcation dispute, which gave rise to the application in the court *a quo*.

[4] In terms of the old LRA the Industrial Court had exclusive jurisdiction in respect of demarcation disputes. S 76 of the old LRA provided as follows:

> "(1) The Minister may, if he deems it expedient to do so, refer any question to the industrial court for determination as to-
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> (a) whether any employer or employee, or class of employers or employees is or was engaged or employed in a particular undertaking, industry, trade or occupation; or
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> …
>
> (3) Any registered trade union, employers' organization, industrial council, or employer concerned in the matter, may apply to the industrial court in the prescribed form and manner for the determination of any question such as is referred to in sub-section (1)...
>
> (4) Whenever, in any court of law, a question such as is referred to in sub-section (1) is raised, and the court is satisfied that the question raised has not previously been determined by the industrial court and that the determination thereof is necessary for the purposes of the proceedings, it shall refer the question to the industrial court for determination, and shall adjourn the proceedings in which the question was raised until after the question has been so determined."

In terms of s 76(5) the Industrial Court, upon receipt of a reference as aforesaid, had to cause publication in the Government Gazette of a notice setting forth particulars of the reference or application and stating the period within which, the

officer with whom and the address at which any written representations could be lodged.

Section 76(6) provided as follows:

> "(6) After considering any written representations lodged in terms of sub-section (5), and after any further investigation (which may include the hearing of evidence or argument) which it deems to be necessary, the industrial court may determine the question and shall as soon as possible thereafter advise the Minister and the court which referred the question to it or the parties concerned in the application, as the case may be, of the terms of such determination. In determining a question under this sub-section the tribunal shall give such decision as it deems equitable having regard to the circumstances of each particular case."

It is thus clear that in terms of the old LRA the dispute between the parties had to be determined by the Industrial Court and that the High Court (previously the Supreme Court) had no jurisdiction to do so. Moreover, a special procedure, different from the procedure followed in the High Court, was prescribed for making a determination as to whether an employer was or had been engaged in a particular undertaking.

[5] However, the old LRA was repealed by the new LRA with effect from 11 November 1996 i.e. after publication of Government Notice R1832 but before it became binding on 18 November 1996. Section 62(1) of the new LRA provides as follows:

> "62(1) Any registered trade union, employer, employee, registered employers' organisation or council that has a direct or indirect interest in the application contemplated in this section may apply to the Commission in the prescribed form and manner for a determination as to-
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> (a) whether any employee, employer, class of employees or class of employers, is or was employed or engaged in a sector or area;
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> (b) whether any provision in any arbitration award, collective agreement or wage determination made in terms of the Wage Act is or was binding on any employee, employer, class of employees or class of employers."

A collective agreement is defined in s 213 as "a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand - (a) one or

more employers; (b) one or more registered employers' organisations; or (c) one or more employers and one or more registered employers' organizations".

In terms of s 62(3) the Labour Court must adjourn proceedings in terms of the new LRA if a question contemplated in ss(1) (a) or (b) is raised and refer the question to the Commission for Conciliation, Mediation and Arbitration ("the Commission") established as a juristic person in terms of s 112, if the court is satisfied that the question raised had not previously been determined by arbitration in terms of the section; that it is not the subject of an agreement in terms of s 62(2); and that the determination thereof is necessary for the purposes of the proceedings. The same applies to an arbitrator if a question contemplated in ss (1)(a) or (b) is raised about the interpretation of a collective agreement. Upon receipt of such an application or referral the Commission must appoint a commissioner to hear the application or determine the question in accordance with the provisions of s 138 (s 62(4)). If the Commission believes that the question is of substantial importance, the Commission

must publish a notice in the Government Gazette stating the particulars of the application or referral and stating the period within which written representations may be made (s 62(7)). Before making an award, the commissioner must consider any written representations that are made and must consult the National Economic Development and Labour Council ("NEDLAC") established by s 2 of the National Economic, Development and Labour Council Act 35 of 1994 (s 62(8)). In terms of s 138 the commissioner has a discretion as to the form of the proceedings which is appropriate (s 138(2)) but he must deal with the substantial merits of the dispute with the minimum of legal formalities (s 138(1)). If all the parties consent the commissioner may attempt to resolve the dispute through conciliation (s 138(3)). Provision is made for the representation of parties by legal practitioners and certain other persons (s 138(4)); the commissioner is enjoined to take into account any code of good practice that has been issued by NEDLAC or guidelines published by the Commission in accordance with the provisions of the new LRA and to issue an award within 14 days

(s 138(7)); and the commissioner may not include an order for costs in his award unless a party, or the person who represented that party in the proceedings acted in a frivolous or vexatious manner (s 138(10)).

As in the case of the old LRA it is clear that in terms of the new LRA the legislature was of the view that demarcation disputes required special treatment. Not even the Labour Court was given jurisdiction to determine such disputes.

[6] Schedule 7 to the new LRA contains certain transitional arrangements. Item 12(1)(a) thereof provides as follows:

> "12(1)(a) Any agreement promulgated in terms of section 48 ... of the Labour Relations Act and in force immediately before the commencement of this Act, remains in force and enforceable . . . for a period of 18 months after the commencement of this Act or until the expiry of that agreement . . . whichever is the shorter period, in all respects, as if the Labour Relations Act had not been repealed."

The schedule provides furthermore that any dispute contemplated in the labour

relations laws (which by definition includes the old LRA) which arose before the commencement of the new LRA must be dealt with as if those laws had not been repealed (item 21(1)); that in any pending dispute in respect of which the Industrial Court had jurisdiction and in respect of which proceedings had not been instituted before the commencement of the new LRA, proceedings must be instituted in the Industrial Court and dealt with as if the labour relations laws had not been repealed (item 22(1)): and that any dispute in respect of which proceedings were pending in the Industrial Court must be proceeded with as if the labour relations laws had not been repealed (item 22(2)).

[7] In *Bargaining Council for the Clothing Industry (Natal) v Confederation of Employers of Southern Africa & Others* (1999) 20 ILJ 1695 (LAC) the Labour Appeal Court decided that the mechanisms for the enforcement of the industrial council agreements concluded in terms of the old LRA survived the repeal of that Act

in respect of agreements which remained in force in terms of item 12(1)(a) of Schedule 7 to the new LRA. The Labour Appeal Court reached this conclusion on the basis that that was the plain meaning of the words "remains in force and enforceable . . . in all respects, as if the [repealed] Act had not been repealed" and that there was no indication in the new LRA that the legislature intended that the enforcement mechanisms provided for in the old LRA be abolished overnight.

[8] The court *a quo* was of the view that the Labour Appeal Court read too much into the words "remains in force and enforceable . . . in all respects, as if the Labour Relations Act had not been repealed". In its view the agreement and not the Act remained in force. Further, that from the wording of item 21 (to the effect that disputes contemplated in the labour relations laws that arose before the commencement of the new LRA had to be dealt with as if those laws had not been repealed), it followed that disputes arising after the commencement of the new LRA

had to be dealt with in terms of that Act. The court *a quo* proceeded to hold that inasmuch as the application was brought in December 1996 the dispute arose after the commencement of the new LRA; that the agreement was deemed to be a collective agreement; and that in terms of the new LRA a previously undetermined demarcation dispute fell within the exclusive jurisdiction of the Labour Court which was in turn, in terms of s 62, obliged to refer it to the Commission.

[9] Counsel for the appellant submitted that the court *a quo* erred in finding that the agreement was a collective agreement and that the Labour Court had exclusive jurisdicition to decide a previously undetermined demarcation dispute. They submitted furthermore, that the *Bargaining Council* case was also wrongly decided, in that item 12(1)(a) merely operated to keep in force subordinate delegated legislation, which would otherwise have lapsed on the repeal of the old LRA. It left questions of the interpretation of industrial council agreements promulgated in terms of s 48 of the old LRA and their application and enforcement to the provisions of the new LRA and the

ordinary courts of the land. As the new LRA did not make provision for the determination of the present dispute, the dispute had to be determined by the High Court which may, in terms of s 169(b) of the Constitution, decide any matter not assigned to another court by an Act of Parliament, so they submitted.

[10] The court *a quo* gave no reason for its findings that the agreement was deemed to be a collective agreement and that the Labour Court had exclusive jurisdiction in respect of previously undetermined demarcation disputes. It was wrong in both respects. It is clear from s 62 of the new LRA, to which the court *a quo* referred, that the Labour Court has no jurisdiction to decide a demarcation dispute. Furthermore, nowhere in the new LRA is it stated that an industrial council agreement promulgated in terms of s 48 of the old LRA would be deemed to be a collective agreement. Clause 1A of the agreement provided that it would come into operation on such date as might be fixed by the first respondent in terms of section 48 of the old LRA and that it would remain in force until 31 December 1996 or for such period as the first respondent

might determine. The first respondent could only act in terms of s 48 at the request of the second respondent, who could only request him to declare the agreement binding if authorised to do so by a decision to that effect voted for by not less than two-thirds of the representatives who were present at the meeting at which the decision was taken (s 27(2) to (7)). In *S v Prefabricated Housing Corporation (Pty) Ltd and Another* 1974 (1) SA 535 (A) this court held that such an agreement was not a contract in the legal sense. Trollip JA said at 539G-540B:

> "It is true that the type of document now under consideration is termed under the Act and in industrial parlance an 'agreemen', and it is said to be 'negotiated' or 'entered into', but technically it is not a contract in the legal sense. The parties to the industrial council are the employer(s) or employers' organisation(s) and trade union(s) or their representatives (see sec. 18). They do not contract *inter se* to produce the measure. They (or those of them concerned in the matter - cf. sec. 48 (1)) may 'negotiate' or 'enter into' 'the agreement', but it is the industrial council as the corporate body that decides (a majority vote of two - thirds of those present and entitled to vote sufficing - sec. 27 (2) to (7)) whether to adopt it and transmit it to the Minister for consideration and promulgation. Moreover, it only becomes effective if and when the Minister deems it expedient to declare it binding by notification in the Gazette (sec. 48 (1)). It is noteworthy, too, that it is the Minister who fixes the period of its duration, and that he can also declare it (or parts of it) to be

> binding on employers and employees in the industry other than those who entered into the agreement and for an area additional to the area for which the industrial council is registered (sec. 48 (1) (b) and (c)).
>
> From all those provisions it is clear, I think, that an industrial agreement is not a contract but a piece of subordinate, domestic legislation made in terms of the Act by the industrial council and the Minister. (See the clear and concise summary of the position given by DOWLING J. in *South African Association of Municipal Employees (Pretoria Branch) and Another v Pretoria City Council* 1948 (1) SA 11 (T) at p. 17)."

In the light of this decision the legislature would have made it clear in the new LRA if it intended the phrase collective agreement to include industrial council agreements such as the one we are concerned with. Not having done so the definition of a collective agreement in the new LRA should be interpreted so as not to include such agreements.

[11] In my view the ordinary meaning of the words "any agreement promulgated in terms of s 48 . . . of the Labour Relations Act . . . remains in force . . . as if the Labour Relations Act had not been repealed", is that all the provisions of the old LRA

relating to such an agreement would apply as if they had not been repealed.[1] Counsel for the appellant submitted that that meaning could not have been intended by the legislature and that for that reason the interpretation they contended for should be given to the words. In this regard counsel for the appellant referred to the criminal liability imposed by the old LRA in respect of a wide range of actions on the part of employers and employees contrary to the provisions of industrial council agreements which had been promulgated in terms of s 48. They submitted that it was apparent from the new LRA that the legislature wanted to decriminalize the labour law. That being so it was inconceivable, they submitted, that the legislature could have intended not only to preserve criminal sanctions for a transitional period but also to provide for the creation of new obligations which may give rise to criminal liability during the transitional period by providing that, if a request was made before expiry of six months after the commencement of the new LRA, an agreement entered into before the commencement of the new LRA could be promulgated as if the old LRA had not been

[1] I have omitted the words and enforceable as they do not add anything to the meaning of the

repealed.

[12] In my view the fact that the legislature to a large extent decriminalized labour law in the new LRA does not establish as a matter of probability that it was not prepared as a transitional arrangement for a period of 18 months to preserve the enforcement mechanisms of the old LRA.

[13] Counsel for the appellant also contended that if the aforesaid interpretation is given to item 12(1) it would mean that the legislature deliberately kept in force the reverse onus provisions in ss 74(3) and (8) of the old LRA and that such a result would be surprising in the light of Constitutional Court decisions in which similar provisions had been held to be unconstitutional. I do not agree, merely keeping the reverse onus provisions in force would not render them constitutional.

[14] There are other indications that the legislature intended that all the provisions

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words “in force”. In the premises I do not consider it necessary to deal with the appellant’s submission

of the old LRA relating to industrial council agreements which remained in force in terms of item 12(1)(a) should apply to such agreements as if they had not been repealed. In terms of item 12(1)(b) an agreement referred to in item 12(1)(a), which would have expired before the end of the 18 month period referred to in that item, could be extended, in accordance with the provisions of s 48(4)(a) of the old LRA, for a period ending before or on the expiry of the aforesaid 18 month period. Item 12(1)(b) specifically provides that if that is done all the provisions of the old LRA relating to industrial council agreements extended in terms of that subsection, will apply to the extended agreement as if they had not been repealed. If that is the case in respect of extended industrial council agreements it is inconceivable that the legislature could have had a different intention in respect of those agreements before their extension.

[15] In the light of the aforegoing I conclude that in terms of item 12(1) all the

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that their insertion by the first respondent in terms of s 207 of the new LRA was unconstitutional.

provisions of the old LRA relating to an industrial council agreement such as the one under consideration applies to the agreement as if they had not been repealed. In terms of s 76 of the old LRA the question whether a particular employer was engaged in a particular undertaking rendering the industrial council agreement binding on him had to be decided by the Industrial Court and not by any other court. Section 76 was therefore a provision of the old LRA which, among other things, related to agreements such as the one we are concerned with.

[16] It follows that the court *a quo* had no jurisdiction to decide the demarcation dispute; it has to be decided by the Industrial Court. In the light of the fact that the old LRA provided that demarcation disputes should not be determined by the High Court and that the new LRA provides that such disputes may not be determined by the Labour Court, the finding contended for on behalf of the appellant, that the legislature intended that disputes such as the present one should be determined by the High Court in accordance with the ordinary procedure of the High Court, would have been a very

surprising result. Even more so in the light of the fact that the Industrial Court survived the repeal of the old LRA (see items 21(1), 22(1) and 22(2) referred to above).

[17] Counsel for the appellant submitted that if we were to find that the dispute had to be determined by the Industrial Court then, in terms of s 76(4) of the old LRA, the court *a quo* should not have dismissed the application but should have referred the demarcation dispute to the Industrial Court for determination and should have adjourned the proceedings until after the dispute had been determined. However, s 76(4) deals with the situation where the demarcation issue is not the only issue to be decided. In this case it is the only issue to be decided. It would have served no purpose for the court *a quo* to have adjourned the proceedings before it until after the demarcation dispute had been determined by the Industrial Court. The proceedings should, therefore,in terms of s 76(3), have been instituted in the Industrial Court.

[18] For these reasons the appeal is dismissed with costs including the costs of two

counsel.

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P E STREICHER
JUDGE OF APPEAL

AGREE:

HEFER A CJ
SCHUTZ JA
SCOTT JA
FARLAM JA