THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

Reportable
Case no. JR 2038/20

In the matter between:

INTASOL TAILINGS (PROPRIETARY) LIMITED	Applicant
and	
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	First Respondent
BARGAINING COUNCIL FOR THE CIVIL ENGINEERING INDUSTRY	Second Respondent
WERNER PAUL KRUGER *N.O.*	Third Respondent
ASSOCIATION OF MINEWORKERS AND CONSTRUCTION UNION	Fourth Respondent
NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	Fifth Respondent

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NATIONAL UNION OF MINEWORKERS	Sixth Respondent
MINERALS COUNCIL OF SOUTH AFRICA	Seventh Respondent
THE DIRECTOR GENERAL OF THE DEPARTMENT OF MINERAL RESOURCES	Eighth Respondent
SOUTH AFRICAN FORUM OF CIVIL ENGINEERING CONTRACTORS	Ninth Respondent

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JUDGMENT

VAN NIEKERK J

Introduction

[1] The applicant's business comprises three activities. It deposits tailings onto what are known as tailings dams or tailings storage facilities, it engages in hydro-mining and provides advisory services in respect of both. The second respondent (the bargaining council) is a bargaining council registered in terms of the Labour Relations Act (LRA) for the civil engineering industry. The bargaining council contends that the applicant's activities fall within its registered scope as defined by the council's main agreement, and that the applicant is obliged to comply with its collective agreements. The applicant disputes that it falls within the registered scope of the bargaining council. It contends that it does not fall within the definition of the civil engineering industry. Alternatively, the applicant claims that its business falls within the exclusion of the mining industry as that industry is defined in the main agreement, because it operates tailing storage facilities with the primary focus of winning a mineral for and on behalf of its clients, *qua* mineral rights holders, through hydro-mining activities.

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[2] After the bargaining council sought to enforce registration and compliance with its main agreements, the dispute between the parties was referred for a ruling in terms of section 62 (1) of the LRA. After a protracted hearing, the third respondent (the arbitrator) held that the applicant's employees fell within the registered scope of the bargaining council and that the applicant was bound by the council's main collective agreement. In these proceedings, the applicant seeks to review and set aside that demarcation.

The evidence

[3] The pre-arbitration minute concluded by the parties recorded the facts agreed between them. These include the fact that when the bargaining council sought to be registered, what was then the Chamber of Mines gave notice of its objection on the basis that the definition of 'civil engineering industry' was too broad and general, and that it covered activities that fell within the scope of the mining industry. In consequence, the definition of 'civil engineering industry' was revised by inserting an exclusion covering the mining industry as defined.

[4] There is no dispute about the bargaining council's registered scope. That scope is defined in the main agreement in the following terms (with own emphasis):

> 2.1 The Civil Engineering Industry means the industry in which employers (other than local authorities) and employees that are associated for the purposes of carrying out work of a civil engineering character normally associated with the civil engineering industry and includes work in connection with any one or more of the following activities:
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> …
>
> (b) Excavation and bulk earthworks; bush clearing and de-stumping; topsoil stripping; drilling and blasting; preparation of pension areas, drilling pre-split holes and blast holes lasting and/or cast blasting; secondary blasting; loading; hauling and dumping of mineralised and/or waste material to waste dumps or processing plant feed (ROM Pad) stockpiles; production dosing of topsoil,

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inter-burden or waste material; pumping and dewatering of storm and/or contaminated water, construction and maintenance of; access and hall roads, ramps; waste and processing plant feed (ROM Pad) areas; safety beams; high wall; benches; storm water systems; catch drains, bund walls, surge dams, trimming, scaling or chain dragging of batters, heap- leach pads, tailings dams, dust suppression of loading areas, haul roads and dumping areas; rehabilitation of work areas or waste dumps; topsoil spreading, hydro-seeding and watering; …

(f) … but excluding:

…

(iv) The Mining Industry which is defined as an industry where employers and employees are associated for the purpose, directly or indirectly, for the winning, extracting, processing and refining of the material in, on or under the water or from any residue stockpile all residue deposit (own emphasis).

[5] Insofar as the facts relevant to the present case are concerned, the pre-arbitration minute reflects agreement on a broad range of facts relating to the applicant's activities. The parties agreed that tailings are a form of residue or stockpile deposit from mining operations, specifically, as part of the metallurgical extraction of minerals or metals from mined ore. Tailings are discharged, typically as slurry, into an impoundment or storage area known as a tailings storage facility and regulated by the Department of Mineral Resources in terms of the Mineral and Petroleum Resources Development Act, 2002. Tailings may thus be regarded as a form of waste (although retaining some value in the form of water contained in them, along with any minerals not extracted during refining), requiring waste management and control from an environmental perspective and are categorised as 'hazard waste' by the Department of Environmental Affairs. Tailings dams are geographically located in close proximity to mining activities and are associated with those activities. The applicant's work is of a continuous long term nature, and is subject to the oversight of the inspectorate of the DMR in the safe management of its activities that are mining-related. Following the processing of material from

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underground sources, and the extraction or winning of minerals, the remaining material, known as tailings, is pumped in slurry form to a tailings storage facility. Tailings storage deposition management present inherent risks, and proper and efficient management is required. The process of deposition includes the ongoing expert safe distribution of received slurry, surface water control and bond positioning, controlled water decanting, hazard indicators and performance indicators measuring recording and reporting, hazard management and performance risk evaluation, dust control, revegetation, return water management and the ancillary management of tailings. The applicant utilises five deposition methods. These include paddocking by way of day wall paddocks, the spigotting method, the cyclone method, the open-end method and the hybrid method. Further, the applicant is contracted to ensure maximum clear water recovery from the tailings deposition activity and any water recovered from the tailings is reused in the process of winning minerals at the processing plant.

[6] Mr Aidan Gotz, the applicant's chief executive officer, in his evidence, drew a distinction between the role of civil engineers and his own business activities in relation to tailings dams. He testified that the planning of new mining operations incorporated the process plant and the tailings facility. The mining company would typically approach a civil engineering company to design the tailings storage facility. This is a complex process, involving the life of mine plan, an environmental and stability study, before a site area is selected. A detailed design is then undertaken. The design process encompasses the infrastructure of the tailings dam itself, drainage, access roads, the piping network supporting the facility, water outlet structures, return water facilities, and the like. All of this is undertaken by specialist civil engineering companies, usually by geotechnical engineers. After regulatory and client approvals, this infrastructure is constructed, usually after the installation is put out to tender. Most often, an engineering company will be appointed to oversee the construction process, and to ensure that it complies with the design. None of these activities, either the design of tailings storage facilities nor their construction, are undertaken by the applicant. After the construction of

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the tailings storage facility has been completed, the mining company will decide either to operate the tailings storage facility themselves, or to outsource that operation to a specialist operator such as the applicant. The arbitrator fully appreciated the distinction drawn by Gotz, confirming for himself that:

> … the design is done by the civil engineer and the construction is done by the construction company that is not Intasol and then once the dam is constructed then you become involved with the storage of the tailings. Is that what you have said?
> MR GOTZ: That is correct Mr Commissioner. Yes, that is typically how it would run.
> COMMISSIONER: Okay. So I have got it…

[7] Gotz explained further that the applicant would be contacted to receive the tailings in a slurry format from the process plant after processing through a primary thickener to reduce the volume of water to engage with the process plant, to distribute the tailings using the infrastructure built, distribute the tailings within the facility. The applicant would then extract water by decanting the water from the tailings storage facility to a return water facility, and to pump it from there to the process plant system. In a nutshell, Gotz's evidence was that the applicant would be responsible for receiving, distributing and placing the tailings with in a storage facility, decanting water from the tailings (water being a scarce resource, and the water often retaining in the case of a gold plant, soluble gold) and returning the water to the process plant.

[8] Again, the arbitrator confirmed his understanding of Gotz's evidence. He said the following:

> COMMISSIONER: Can I just quickly interrupt there, I just want to make sure I got your evidence. So you said the storage facility is now designed by the engineers, what you are doing is you are receiving the slurry, you engage with the project plant then you distribute the slurry into the storage facility, you extract the water and you pump the water back, that is basically what you are doing.

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MR GOTZ: it is the basis of it, yes, yes Mr Commissioner.

[9] Gotz continued:

MR GOTZ: … I can elaborate if you would like in saying that you know our task in distributing and placing it in the storage facility is where the skill and knowledge is involved, this is the skill, operating skill that has been carried across from one generation to the next. How do you distribute that tailings there, how do you place it in such a manner that it sits safely, it delivers the engineers, these external engineers, that it delivers their specifications and that it lays in such a manner that you distribute and that you achieve slope and beaching towards where the pool needs to sit at the decant structure. These all our skills.

[10] Gotz also described the extent of the continued involvement of the specialist engineer:

MR GOTZ: That is correct, as you will recall earlier I mentioned before we broke, I mentioned that the, during the initial phases of the tailings dam and the storage facilities infrastructure being set up, the mining client will engage a consulting specialist engineer to design, a specialist engineer in a hierarchical status will appoint a contractor to undertake that construction work, that is not Intasol, those are other companies, other civil engineering companies. Post the commissioning where Intasol has now become involved in this tailings operation that engineer will most often continue being employed by the client in that they review this tailings complex and review it against their set design, review it stability, monitor it stability and report accordingly to the client as well as to the authorities. So they stay involved. Invariably there will be an engineering company appointed whether it is that initial one that design or one another that the client may appoint later, there is an engineering company involved. So they are specialists who do that, the engineering. So they are involved, the client is obviously involved as the owner and the specialist operator as Intasol is involved. They form what we like to refer to as a tripartite in that process, it is no longer a hierarchical setup. You now have a tripartite way specialist operator or engineer in your own working together to

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> deliver the objectives of this tailings storage facility to such an extent that the engineer … [interjects]

And further:

> MR GOTZ: So the engineering party is employed by the mining client and I may just mentioned there at the mining client I'm referring to is the manager of the process plant. They are responsible, that person is responsible for the tailings facility and as a consequence he/she appoints this engineering company to the extent that they employ that engineering company and appoint them under the mines health and safety act, as a 2.6.1 appointment. So that engineer will then provide the technical, ongoing technical review and technical monitoring and reporting of the tailings facility. The contractor, the specialist operations contractor is also appointed by the metallurgical plant manager as a partner in this plant in order to receive the slurry, distribute it down on the tailings facility, place it in a manner that is within the specifications of the engineer, ensure that all the other skills are applied such as generating, segregation, allowing the materials to settle out when they have to, allowing water to be decanted and then returning that water to the process plant. So where all the while the owner with the mining client then will be in this tripartite as the sponsor of this lot. Paying for it, overseeing it, as they remain responsible in the end of the day when all legislation involved…

[11] The 2.6.1 appointment to which Gotz referred to is an appointment of the engineering company (an individual employed by the engineering company). The manager of the tailings facility is also appointed in terms of the same paragraph with separate safety related responsibilities. Typically, Gotz testified, the applicant's operators would be on site on a daily basis and communication between the relevant civil engineer appointed to the tailing and the applicant would extend to daily reports on any significant events, but more fundamental is a monthly report in which the applicant will provide the engineer with information extending to piezometer levels, drain flows, density of the tailings received, weather conditions, climatic conditions, rainfall, temperature and the like. That information is in turn utilised by the engineer, amongst other things, to review the

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stability of the tailings facility and more generally to discharge legal obligations related to the stability of the facility.

[12] Gotz went on to testify that the main focus of the applicant's business is hydro-mining tailings. He explained that hydro-mining is the application of high pressure water to an existing tailings facility. In this manner, the tailings are reduced to slurry and that slurry is then moved to a process plot from where minerals would be extracted. The nature of the applicant's involvement in the hydro-mining process is dependent on the nature of its contract, typically with a mining house which would identify a tailings facility in which it is thought that mineral deposits are present. After initial assessments, the applicant would become involved to assist the client in establishing how the slurry can be mined and how the minerals contained in the slurry could be accessed. There were various methods to mine a tailings facility by hydraulic means which Gotz described. In essence, hydro-mining envisaged the reduction of an existing tailings dam to slurry, using what Gotz described as hydro mining units (owned by the applicant) to move the slurry (in some cases with the addition of oxygen and lime and other chemicals) to and through a processing plant, and then to deposit the tailings onto an existing or a new tailings facility. Certain mining companies (Gotz gave the example of DRD Gold) operate only using hydro-mining, feeding a process plant with slurry from tailings dams. Again, in an exchange with Gotz, the arbitrator tested his understanding of the process:

> COMMISSIONER: just to help me with wording sorry, I just need it for my purposes of my award. If you are going to, this high-pressure water on the tailings dam. I know what you did but how do you say it in simple English? You're using that water to, I say destroy the previous dam so what do you day (sic)?
> MR GOTZ: Well it's to mine it, we mine the previous dam.
> COMMISSIONER: So you use the water to mine the previous dam so that you can get, so that you can extract the minerals and, yes, okay, I've got it.

And further:

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> COMMISSIONER: I have just got to interrupted once more. So I am correct if my notes reads as follows, hydro-mining is the application of high pressure water to mine the existing TSF and then to deposit it in a new TSF?
> MR GOTZ: if I may suggest Mr commissioner, just to include that between the two say it's the application of the high pressure water to mine the existing TSF two, in order to then send that slurry that is produced via a processing plant. It goes to a processing plant faced with and then to the new tailings facility.
> COMMISSIONER: Okay. Yes, it must go to a processing plant, okay, all right.
> MR GOTZ: Yes.
> ADV SNIDER: And then the processing plant wins minerals from the slurry is that correct?
> Mr Gotz: Yes, that is correct.

[13] Of some significance is Gotz's evidence regarding the nature of the applicant's business. As I have indicated above, his evidence was that the applicant is contracted both to undertake deposition in the form of the safe placement and distribution of tailings, and to conduct hydro-mining works. In a hydro-mining operation, the applicant produces the mining plan, which would necessarily take into account existing and projected commodity prices, and projected revenue streams. Under cross-examination, Gotz made clear that the decision to proceed with the operation was that of the mineral rights holder – the applicant provided information on which the decision to proceed was based. Civil engineers are not engaged in this process; their role was confined to deposition. When asked in his examination-in-chief where the focus of the applicant's business was, Gotz replied as follows:

> MR GOTZ: So it's hydro-mining, there is no doubt about it. As I mentioned yesterday, excuse me, as I mentioned yesterday, South African mining industry and the gold industry specifically is in its twilight era. Internationally the mining in South America's large surface resources, tailings dams filled with commodity thanks to bad operations in the past by extraction of minerals in the past, technology being less developed at the time and then in South Africa as well, we

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> have huge quantities of surface resources sitting around the landscape as you have seen and so our focus business has been to exploit the value that are in the minerals in those tailings facilities. We see the future companies being successful in this country and mining to be those who have this ability to hydro-mine and to do that better than others and therefore the strategies that we have followed and therefore this proprietary element that we have been talking about it sits in our hydro-mining.

[14] Gotz gave evidence in relation to the advisory services offered by the applicant. Outside of South Africa, the applicant provides such services, on site, in Brazil and in Chile, Zimbabwe, Canada and Australia. Gotz testified further that the applicant's competitors are other businesses engaged in tailings operations, and that the applicant does not compete with civil engineering firms for the work since. Specifically, civil engineering firms do not tender to undertake the placement of tailings (since they did not have the expertise to undertake this work) and the applicant did not tender nor did it undertake to do work that related to the construction of the tailing storage facility. Gotz regarded the applicant's competitors as the mines themselves, which traditionally had undertaken the operation of tailings storage facilities as part of the process plant. Further, the applicant has no contractual relationship with the consulting engineers. Rather, the applicant works in a tripartite relationship together with the consulting engineer and the client.

[15] Further, the applicant does not employ people with civil engineering qualifications, and typically employs people who have worked in a mining environment, some with metallurgical experience. The applicant has some 800 employees, split equally between the deposition and hydro-mining operations. The organisational structures flat with only two designations (team leader and general worker) outside of the managerial level. All of them are permanent employees, most with long service. The applicant engages in plant level bargaining with the NUM and AMCU in the different regions in which it operates. The applicant operates on a fixed rate basis. The majority of the applicant's cost is labour-based and rates at which it is

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paid are linked directly to the mining industry. Gotz testified that he had had discussions with clients at a very senior level and that the indication was very clear that if the applicant was obliged to pay significantly higher remuneration the result would be insourcing, '… it would probably lead to us losing work which eventually would lead to our demise'.

[16] Gotz disputed that the applicant's activities fall within the scope of the civil engineering industry as defined in paragraph 2.1 of the bargaining council agreement. In his view, the applicant does not engage in the construction and maintenance of tailings dams for the purposes of subparagraph (b). It was put to him in cross-examination that the distribution and placement of tailings was nothing more or less than part of the construction of a tailings dam. Gotz disputed this on the basis that the applicant's primary task was to distribute tailings within a structure designed and constructed by an engineer but that it's functions did not extend to construction. In this sense, the distribution and deposition of tailings within an existing structure did not amount to the construction of that structure.

[17] The applicant's expert witness, Mr Danie Brink, is a civil engineer specialising in geotechnical engineering, and engaged in what was referred to as the tailings industry. Brink testified that as a geotechnical engineer, he had two main roles, the first being involved and when a mining client sought to develop a new tailings storage facility. In this instance, he would design all the pre-deposition works, what he described as 'all the civil engineering works required to set up the infrastructure for a TSF'. He would be engaged in putting that work out to tender and assist in the supervising and managing of the contract for the construction of the pre-deposition works. Prior to any deposition, he would further set up the parameters and the specifications for the operating contractor to take over the facility and commence with deposition on the facility. He described that function as the preparation of the necessary specifications and guidelines for the operation of the tailings facility, and an ongoing function of assessment of the stability of the facility, regulatory compliance and other specifications laid down in terms of what he

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referred to as the ‘dam geometry’. The latter function was one of the analysis and monitoring based on data collected by the tailings operator. Brink testified that in most instances, an engineer such as himself would visit a tailings dam on a three monthly basis, and carry out an inspection together with the mine and the tailings operator. The function of the tailings operator is to operate all deliveries around the dam, depositing tailings in a sequential pattern ensuring that the outer wall is raised so that it is at a predetermined minimum height above the basin of the dam, cycling the deposition in such a way that a drying out cycle is set up to ensure the necessary drying out on the outer wall. The operator must further deposit in such a way that there is a proper beach development (i.e. sloping surface achieved by correct deposition), ensure that supinated water is located around the penstock and that the pool size is kept at a minimum so as to achieve water savings. The operators further responsible for decanting clear water and finally, to collect data in the form of train flow readings, freeboard readings, and the density of the slurry. In Brink’s view, the activities conducted by the tailings operator are unique; he had experienced none of them in what he referred to as normal civil engineering construction projects.

[18] In relation to hydro-mining, Brink testified that there were certain instances with which he was familiar where mines undertook hydro-mining themselves, but typically, the activity was undertaken by tailings operators. The tailings operators prepare the mining plan to ensure that slurry is pumped back to the plant in an efficient manner. The planning accounts for the fact that in gold mining operations, the distribution of grades within the tailings dam is such that the lower portion of the dam has higher grades. It may be necessary thus to access certain parts of the deposit earlier on in order to achieve a more efficient cash flow. For this reason, during the course of an operation, there is a continual review an adaptation of the mining plan. The process of hydro-mining is conducted using high pressure hydro-mining equipment to wash down and pop the tailings to achieve the required slurry density at the required production rate. Slurry may have to be screened to filter out any vegetation and it is also possible that chemicals in oxygen may be added at

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the pump station. In Brink's view, hydro-mining was similar to underground mining in the sense that in an underground operation, a selected portion of the wall is mined, and transported to the plant. He testified that he had never seen the process of hydro-mining being undertaken in civil engineering in what he referred to as 'normal civil engineering projects'. Further, the civil engineering contract based on its SABS 1200 is not relevant to the execution of deposition or hydro-mining; the measurement methods and specifications for the execution of work contemplated by that contract is not applicable and never used on a tailings deposition. In response to the proposition put to him during cross-examination that the slurry received from the plant is used for the purposes of building a structure, brink explained that the main aim of an operator such as the applicant is the safety position of the tailings. He acknowledged that in consequence of the deposition 'you end up with a structure' but that this was not the aim. He drew the analogy of a municipal landfill site where the intention is not to go out and build a structure, rather than deposition. Any structure that emerges is a consequence of the activity of the safe deposition and management of waste material. In response to a proposition that it seemed appropriate that civil engineers are involved in monitoring what happens in the development and maintenance of the tailings deposition facility because civil engineers have the special expertise to ensure that the work is done appropriately and safely, Brink replied as follows:

> MR BRINK: No, I think that is perhaps where the misunderstanding comes in. What the engineer is responsible for is actually monitoring the performance of the facility and that is basically looking at the free attic (sic) surface, how the free attic service (sic) develops in the dam, the drain flows, the seepage that may be experienced. That is our role is to actually monitor the performance of the facility to make sure that it remains safe and it complies to the design intent. It's not a question of supervising the contractor and his activities.

And further, at p 855 of the record:

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> …There is a lot of aspects that the operating contractor basically has to do as part of his daily activities that is not monitored by the engineer and that would be the areas where his got more expertise in doing that. And that would typically the setting up of the cyclones, the design of the cycle times, actually the pool management, the decant of the water and how you operate the decant system. These are things that fall outside the engineer's realm of real experience. So those are the things that is not directly monitored. Those are the activities that contractor case out that is not directly monitored by the engineer (sic).

[19] Brink also drew a clear distinction under cross-examination between the activities of tailings deposition and hydro-mining. He said the following at p 856:

> MR BRINK: Well can I put it to you this way? You are bringing now deposition together with hydro-mining and those are two totally separate things. You're quite correct when it comes to the TSF, the engineer's responsibility lies with ensuring the stability of that facility. When it comes to hydro-mining, the engineer very seldom has a direct appointment as he would at the TSF. On occasion when the mind or the operating contractor are concerned that there may be a stability issue at the hydro-mining site engineer may be called in to assess a specific issue like a certain snipe, is that celeb stable or how far can they advance with that slope. You might be asked to do that type of function but that is normally not part of the engineer scope is that involvement that same involvement at the hydro-mining is at the TSF.

[20] When cross-examined on the definition of 'civil engineering industry', Brink reiterated that the reference to 'tailings dams' should appropriately be contained in the definition but that it was a reference only to the 'civil engineering construction part of it', i.e. the initial construction of the tailings storage facility.

[21] Mr Ross Cooper, a professional engineer with experience as a geotechnical tailings engineer, was called by the bargaining council as an expert witness. Cooper testified that the tailings storage facility is a geotechnical structure which is built by means of the operations of the deposition contractor. He did not dispute

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Brink's evidence regarding the responsibility of the consultant civil engineer for the stability of the facility, and the reliance on information supplied by the operating contractor. He also did not dispute the visual inspection conducted on quarterly basis by the civil engineer. Cooper did not dispute the applicable standards regime, being SANS 102864 mine residue management, nor a number of international standards. In his view, tailings engineering fell squarely under geotechnical engineering because of the types of materials concerned, and the qualifications and experience of the persons involved in the design and operation of the facility. In essence, Cooper's expert opinion is premised on the basis that the applicant's activities result in the construction of a geotechnical structure. Further, and without proffering any cogent reasons as to why the applicant's hydro-mining operation should be considered to be of a civil engineering nature (other than to state that the applicant's activities assumed the form of a 'load, haul and place' of material; the reverse of tailings deposition), he concluded that the applicant's activities undertaken in respect of the hydro-mining of a tailings dam is of a civil engineering nature since it deals with the geotechnical structure.

[22] In cross-examination, it was put to Cooper that the essence of what the applicant does is not to create a structure. Cooper's response was that the process of deposition created a geotechnical structure above natural ground level. Cooper did not dispute the specialised skill of the operator of a tailings storage facility but maintained that it was a 'highly specialised skill [that] forms under civil engineering'. He conceded however that the functions discharged by a tailings storage operator were not to be seen elsewhere in 'the world of civil engineering'. In relation to the applicant's hydro-mining operation, Cooper acknowledged that the applicant had an obligation to produce a mining plan and the applicant's application to record and collect relevant information on a regular basis to substantiate and verify performance and compliance with relevant statutory requirements. He also acknowledged that in the South African gold mining industry, hydro-mining was becoming predominant, and that the process of hydro-mining involved blending scenes from different faces of a tailings storage facility to

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get consistent grades in the slurry pumped to the processing plant. This process is undertaken in conjunction with the mine's metallurgist to achieve what the mind wants to achieve in terms of grade recoveries.

[23] The bargaining council's final witness was Dr Annelie Gildenhuys, the council's former interim general secretary. She gave evidence regarding the establishment of the bargaining council and specifically, the definition of the council's registered scope. Of particular relevance to the present proceedings is the objection by the then Chamber of Mines to the proposed definition of the industry, on the basis of an overlap with what was traditionally considered mining activity. The matter was ultimately referred to NEDLAC. On 2 May 2012, NEDLAC published an amended scope for the civil engineering sector with three significant amendments. First, a further qualification was added to the definition of 'industry; secondly, two further exclusions were introduced, the first being that of work falling within the scope of any other industry, the second being the definition of 'mining industry'.

The award

[24] Despite the fact that the arbitration proceedings extended intermittently over some 11 days and a record that extends over some 23 volumes, the award under review is terse, and displays no real engagement with the evidence. Indeed, what might be referred to as the analysis of the evidence and the reasoning supporting the arbitrator's conclusion comprises only three paragraphs:

> [31] The Applicant argued that the scope must be read in the context of the activities of trimming, scaling or chain dragging. The Respondent argued that the word '*Tailings Dam*' can be seen as a stand-alone activity. The interpretation of the Respondent is more probable. In the first place Dr Gildenhuys testified at these proceedings and she gave an indication of what the intention of the drafters were. She testified about what was presented at NEDLAC and about the outcome. She understood the scope to mean that if a company was engaged in tailings it fell under the scope of the First

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Respondent. It would not make sense that the intention was to limit the scope to the trimming, scaling and chain dragging of tailing dams. She also correctly pointed out that I did not have the jurisdiction to change the scope of the First Respondent but only to determine if the Applicant's activities fell within the scope of the bargaining council and if the Applicant does tailings it fell within the scope.

[32] The facts in ***AMCU v EnviroServ Tailings*** were similar. Although I am not bound by this award it is worth noting that the Commissioner found that the activities of the Company fell within the scope of the bargaining council and that NEDLAC concurred with the award.

[33] Mr Cooper testified that the placing of tailings is an ongoing construction process. The tailings dam is constructed and maintained through the deposition of tailings. As the operator placed the tailings structure will grow, it became bigger and that is work of a civil engineering nature. The deposition of tailings will come from the mine after the extraction of the mineral. I agree that the work of the Applicant is not the actual mining but to provide support to the mining house. For that reason, the remuneration is not based on the actual winning of the material but on a fixed fee. Another consideration is that tailings dams is not only found in the mining industry but also with Eskom and in the steel industry. In these industries there are no mining activities.

[34] It is therefore my finding that the activities of the Applicant fell within the scope of the First Respondent.

[25] Reduced to its basics, the logic of the award is first that because the applicant's business activities relate to the construction of tailings dams, the activities are of such a nature so as to fall within the definition of 'civil engineering industry'; and secondly, that the applicant is not engaged in the mining industry because its activities were related to the provision of support to the mining operation.

Grounds for review

[26] The applicant raises a host of grounds for review. In essence, the applicant contends that the arbitrator came to a conclusion to which no reasonable

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commissioner could have come on the available evidence; that he perpetrated a number of gross irregularities and gross errors of law; that he misconducted himself in relation to his duties as an arbitrator; that he failed to analyse the evidence properly or at all; that he failed, in any sense, to interpret and apply the definitions of civil engineering and mining respectively (which the applicant contends was his principal task); and that he failed to take into account the evidence describing the activities of the applicant in relation to the definition.

Applicable principles

[27] Section 62 (1) of the LRA confers jurisdiction on the CCMA to determine, amongst other things, whether any employer is engaged in any sector or area, and whether the terms of any collective agreement is binding on any employer. The determination is to be made by way of arbitration proceedings conducted in terms of section 138. The starting point remains that established by *Greatex Knitwear (Pty) Ltd v Viljoen* 1960 (3) SA 338 (T) where the following was held at 344G – 345F:

> When the tribunal is called upon to determine whether a class of employers is engaged in a particular industry it is faced with a problem similar to that with which the Courts have often been faced, viz. to decide whether a particular employer is one of those other employers, not being parties to an agreement, engaged in a particular industry, upon which the Minister has declared an agreement to be binding (cf. sec. 48 (2) of the 1937 Act; sec. 48 (1) *(b)* of the 1956 Act). The cases seem to show that the matter is approached along the following lines:
>
> *(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 used in the definition. Although not specifically invoked, the mode of interpretation appears to be that applied in *Venter v R.*, 1907 T.S. 915 (cf. *Rex v Scapszak and Others*, 1929 T.P.D. 980; *Rex v Ngcobo*, 1936 NPD 408; *R v Goss*, 1957 (2) SA 107 (T) at p. 110).

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(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 arises: 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 (S.A.) Ltd.*, 1943 CPD 334); if they are ancillary to his other activities, he is not engaged in the industry (unless these ancillary activities are of such magnitude that it can fairly be said that he is engaged in the industry within the meaning of the definition (*A.G. Tvl v Moores (S.A.) (Pty.) Ltd.*, 1957 (1) SA 190 (AD)).

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

If the aforegoing is a correct reflection of the manner in which the Courts have approached the problem whether an employer is engaged in a particular industry, it is plain that the problem is only resolved by reference *inter alia* to the activities of the employer. Whether one uses the word 'activities' or 'work' seems merely a question of preference of language. As in the case of an individual it cannot be determined whether he is engaged in a particular industry without reference to his work, so also it cannot be determined in the case of a class of persons whether it is engaged in a particular industry without reference to the work it does. Whether that work is to be called merely 'work' or a class of work seems, again, to depend on linguistic preference or the degree of circumscription" (own emphasis).

[28] But a demarcation extends beyond a comparative exercise in the form of a determination of the extent to which a particular business's activities match up against a definition of a sector or industry. In *National Union of Metalworkers of SA*

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v Commission for Conciliation, Mediation and Arbitration & others (2020) 41 *ILJ* 1629 (LAC), Sutherland JA said the following:

> [12] The notion that, for the practical purposes of regulating employment conditions in economic activities, by assigning some enterprises to one or other bargaining council, proceeds from the foundational idea that 'grouping' like with more or less like is a sensible pragmatic approach. Central thereto is the attempt, by the use of words, to describe the supposedly distinguishable economic activities in definitions which are almost always complex, wordy and often hair-splitting. The task aims at describing the characteristics or attributes of industrial activities. Then the characteristics or attributes of a business enterprise are described and the two are compared. Just as it is not objectively possible to determine when night ends and day begins, and a practical answer depends on what you want to pinpoint that moment for, so it is with demarcation of so-called distinct 'industries'.

[29] Demarcations often involve considerations of fact, law and social policy (see *Coin Security (Pty) Ltd v CCMA & others* (2005) 26 *ILJ* 849 (LC); *National Bargaining Council for the Road Freight Industry v Marcus NO & others* (2011) 32 *ILJ* 678 (LC). As the Labour Appeal Court has made clear, the exercise of demarcation goes beyond the meaning of words in the defined scope of a bargaining council. In *National Union of Metalworkers of SA*, at paragraph 13 of the judgment, the court stated:

> Another dimension of the exercise that warrants acknowledgement is that the exercise is as much one of creation is of adjudication. The meaning of words in the defined scope of a bargaining council can indeed be adjudicated, but that is not always enough. The management of the reality that economic activities within the invented sectors, sometimes differently described, often overlap and, cannot therefore, in logic, be truly separated, means that a pragmatic policy decision to locate a given enterprise on one or other side of an imaginary fence is an inescapable aspect of the task of demarcation. It resembles, in some respects, and

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> interest arbitration. What is sought is what may usefully be called the ‘’best fit’ - an idea that defies precision and is axiomatically fact specific.

[30] A section 62 demarcation exercise is thus not an adversarial contest in the ordinary sense. The process has a *sui generis* character, and presupposes a broader investigative role by the arbitrator (see *SA Municipal Workers Union v Syntell (Pty) Limited and Others* (2014) 35 *ILJ* 3059 (LAC)). It requires the arbitrator to make factual findings as to the nature of the business or activities concerned and then to group ‘like with more or less like’ to determine the ‘best fit’.

Analysis

[31] The arbitrator’s primary task was to identify the applicant’s activities and by applying the above principles, determine the issue that was reduced in the pre-trial minute to a single sentence:

> 95 The Commissioner is required to decide-
>
> 95.1 whether or not the Applicant falls within the definition of the Civil Engineering Sector as set out in the pleadings.

[32] What the arbitrator’s award does, as I have indicated, is simply to prefer, without giving reasons, the evidence of Cooper (thus rejecting the evidence by Gotz and Brink) and conclude that the applicant is engaged in what he found to be an ‘ongoing construction process’ and secondly, that the applicant is not engaged in ‘actual mining’. Based on these conclusions, the arbitrator regarded the applicant’s business as one that falls within the registered scope of the bargaining council.

[33] The award discloses no meaningful attempt to define the applicant’s activities. While it is correct that the definition of ‘civil engineering industry’ contains an exclusion of the mining industry as defined, the first enquiry that the arbitrator was obliged to conduct was whether the applicant’s activities are such that the applicant and its employees can be said to be ‘associated for the purposes of carrying out

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work of a civil engineering character normally associated with the civil engineering sector...'. The definition is poorly drafted, but what follows the preamble are six subparagraphs, being descriptions of 'such work' (i.e. work of a civil engineering character normally associated with the civil engineering sector). In other words, what subparagraphs (a) to (f) describe is work that is 'normally associated' with the civil engineering sector in connection with the activity described. In other words, the threshold is not engagement in the activity described in subparagraphs (a) to (f) – for work to fall into the civil engineering industry, it must be work of a civil engineering character normally associated with the sector. This formulation leaves it open to an employer (such as the applicant) to contend (as the applicant does) that it is associated with its employees for a purpose other than carrying out activities or work normally associated with the civil engineering sector. The arbitrator failed to appreciate this nuance and in doing so, asked the wrong question. He assumed that the reference to 'tailings dams' in paragraph (b) and the applicant's engagement with tailings dams to be definitive of the applicant's engagement in the civil engineering industry. Put another way, his assumption was that any work connected with tailings dams is work of a civil engineering character, normally associated with the sector. This led the arbitrator to ignore the real issue that he was required to determine, i.e. the purpose for which the applicant and its employees are associated. The arbitrator's failure to deal with this issue constitutes a reviewable irregularity.

[34] Further, as I have indicated, the arbitrator preferred the evidence of Cooper and rejected the evidence of both Gotz and Brink without providing reasons for why the evidence of one should be preferred above the others. The record indicates that both Gotz and Brink gave comprehensive evidence, much of which was undisputed, regarding the nature of the applicant's activities as a tailings storage facility operator and its engagement in hydro-mining. The arbitrator simply fails to engage with this detailed evidence of what the applicant's activities actually comprise. Instead he appears to have considered that his function was to determine which of the competing interpretations of the definition was the most

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probable. Indeed, he makes a finding that the bargaining council's interpretation 'is more probable'. This failure properly to assess the evidence before him, together with the arbitrator's failure to give reasons for rejecting the evidence of the applicant's witnesses, constitutes a reviewable irregularity.

[35] To the extent that the arbitrator places emphasis on the evidence by Gildenhuys, he ignored the fact that she was unable to provide any factual detail on tailings dams, the construction, maintenance and operation of those dams and in particular, the precise nature of the applicant's activities. Indeed, Gildenhuys made no reference to the subject of hydro-mining which on the common cause facts, comprised the bulk of the applicant's activities. Insofar as the evidence was relevant to the drafting and approval by NEDLAC, it is apparent from her evidence that the concerns expressed by the mining industry about the overlap between the mining and civil engineering industries related to engineering activities conducted in open cast and open pit mines, activities in which the applicant is not involved. To the extent that Gildenhuys expressed the view that '*if a company was engaged in tailings it fell under the scope of the First Respondent'*, this cannot legitimately serve as the basis of any proper demarcation. Gildenhuys had no knowledge of the applicant's activities, and reduced to the most basic level, her evidence was no more than an expression of a personal view that '… *if the Applicant does tailings it fell within the scope*'. By regarding this evidence as conclusive, the arbitrator committed a reviewable irregularity.

[36] In summary: the arbitrator failed to consider the central dispute that served before him, he ignored relevant evidence, he failed to take into account the totality of the evidence, he failed to conduct a proper appraisal of the evidence, he accepted the version of the bargaining council's witnesses without any proper analysis and evaluation of their evidence, and he had regard to evidence that was irrelevant. All of these constitute material misdirections.

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[37] The relevant authorities indicate that misdirections of this sort invariably have the consequence that an award will be unreasonable in its result. Whether the award stands to be set aside is a second-stage enquiry which requires an assessment of the reasonableness of the outcome. A review court may intervene if and only if the outcome or result of the proceedings under review represents a decision to which no reasonable decision-maker could come on the available evidence. What this requires is the review court to determine whether on the evidence, and regardless of any reviewable irregularity committed by the arbitrator, the result should nevertheless be sustained because it represents a reasonable outcome (see *Head of the Department of Education v Mofokeng and others* [2015] 1 BLLR 50 (LC)).

[38] For the reasons that follow, I am not persuaded that the outcome of the proceedings under review can be sustained. What is not disputed in the present instance is that the initial work relating to the establishment of a tailings facility is conducted by a civil engineering contractor, and that a civil engineer has a role beyond construction in relation to the long-term integrity and stability of the structure. Put another way, the construction of the pre-deposition works is work of a civil engineering nature, as is the ongoing work related to the integrity of the structure, conducted by a geotechnical engineer. Gotz and both technical expert witnesses drew a clear distinction between the design and construction of a tailings storage facility, and the operation of the process in terms of which tailings are distributed, water is and pumped back to the plant.

[39] Turning first to the activity of tailings storage deposition, the high water mark of the bargaining council's case was the opinion expressed by Cooper to the effect that the deposition of tailings resulted in the 'construction' of a tailings storage facility, with the consequence that the activity was of a civil engineering character. Against that, there is the evidence of Brink, a civil engineer with specialist expertise on geotechnical engineering, a branch of civil engineering concerned with earth sciences. Brink confirmed that the design phase is overseen and conducted by a

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civil engineer, and that during the life of the facility, a geotechnical engineer would be responsible for the assessment of the stability of the facility and compliance with specifications laid down in terms of the dam's geometry. It was also the responsibility of a civil engineer to monitor data collected by the tailings operator and to make any recommendations necessary on the basis of the data. Brink did not consider the work done by the applicant as of a civil engineering character that would normally be associated with civil engineering, considering the activities undertaken by the applicant to be unique to the operation of tailings storage facilities. Brink expressed a similar view in respect of hydro-mining work, which he stated he had never seen being undertaken by civil engineers as part of any civil engineering project. Brink also gave extensive evidence as to the nature of domestic and international standards and specifications used in engineering work, none of which he testified were applicable in respect of the deposition of tailings and hydro-mining. As I have indicated, the only basis for the contrary opinion expressed by Cooper was that the tailings storage operation constituted a form of construction because walls are 'constructed' in the process. Put another way, he suggested that the activities undertaken by the applicant result in the construction of a geotechnical structure. The focus on the result of the applicant's activities loses sight of the enquiry into the nature of those activities, and the question whether the activities can properly be described as being of a civil engineering character normally associated with the sector. It also loses sight of the distinction drawn between the construction of a tailings storage facility and its operation. The essence of tailings storage operation (as opposed to the design of and exercise of geotechnical responsibility for the facility itself) is not construction of a civil engineering character, or in any sense normally associated with the industry. 'construction' is referred to in subparagraph (a) of the definition, with specific reference to bridges, harbours, piers, railways, wharves and the like. As Gotz stated clearly on more than one occasion, '*the aim is not to build anything. Our task in that process is to undertake the storing and placement'* and further, '*it is not our intention to build a structure. It is our intention to place and undertake the placement of the tailings*.

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[40] The conclusion to be drawn from the evidence is that the reference to tailings dams in paragraph (b) is limited to work ordinarily undertaken by civil engineers in respect of the design of a tailings dam and ongoing civil engineering work related to the maintenance of the integrity of the structure.

[41] Turning next to the applicant's hydro-mining activity, Gotz testified that this is the main focus of the applicant's business. The applicant was born out of a realisation that underground mining (particularly in the gold mining sector) was in its twilight error and that historic tailings facilities presented opportunities to extract gold using hydro-mining and improved extraction techniques. The service offered by the applicant, and I did not understand this to be disputed, ranged from initial studies, conceptualisation, feasibility studies to the design of the mining process. An integral part of the planning is to identify grades in different parts of the tailings facility and to develop a plan that provides best access to those grades. As saying is undertaken by specialist service provider and forms the basis of the mining plan developed by the applicant with its client. Although the client undertakes financial planning, it does so on the basis of the mining plan compiled and submitted by the applicant. Of some importance is the applicant's obligation to ensure that the client's process plant is able to efficiently extract the commodity concerned. In short, the applicant is obliged to provide its clients with or, to the correct specification in respect of grade, density and particle size distribution, at the correct flow rate and under the correct pressure. Brink confirmed this evidence, stating that he had never seen the process of hydro-mining undertaken in the civil engineering sector in normal civil engineering projects. Cooper conceded in relation to video-footage showing a hydro-mining operation that the nature of the operation was mining and that the activity was one that concerned the transportation of what amounted to an all body for processing, an integral part of the mining operation. Cooper also did not dispute the obligation on the applicant to undertake a mining plan, to ensure that the slurry produced by the hydro-mining process was blended so as to achieve the grades and values reflected in the

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mining plan. He also conceded that what is known as surface mining is predominant. Despite these concessions, Cooper persisted with his opinion that the applicant's activities in relation to hydro-mining constituted a civil engineering activity, in that it was akin to a 'removal and haulage' operation. What this perspective overlooks is the integral role played by the applicant in what in effect is a mining process. While the applicant may not share in the profits of the mining enterprise, its responsibilities extend to the compilation of a mining plan, feasibility studies based on assay results, and the delivery of a defined grade to the process plant. These activities reflect the process associated with the extraction of ore from underground deposits and extend beyond removal, haulage and dumping, work normally associated with civil engineering.

[42] The activities undertaken by the applicant aside, the evidence discloses strong indications which suggest that the applicant is not associated with its employees for the purposes of carrying out work of a civil engineering character. First, the applicant's competitors are not civil engineering firms. The applicant competes for tenders directly with other tailings storage operators. No civil engineering firms tender to operate tailings storage facilities, nor do they operate them. Secondly, the applicant does not employ civil engineers. The undisputed evidence is that the operation of a tailings facility requires specialised skills, none of which are taught as part a civil engineering curriculum. Thirdly, the applicant has plant level bargaining structures in each of the regions in which it bargains wages and conditions of employment with one or another of the country's largest mining unions. Fourthly, the operation of tailings dams was historically undertaken by mining companies themselves. Indeed, the skill of tailings management was largely developed within the South African gold mining industry, and the outsourcing of that function to specialist operators such as the applicant is a relatively recent phenomenon. Fifthly, the applicant's operations are subject to regulation by the Department of Mineral Resources, the department primarily responsible for the regulation of the mining industry. Finally, the applicant's operations are regulated by the Mine Health and Safety Act, 1996, and responsible

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persons are appointed from the ranks of the applicant's employees in terms of that legislation. None of these factors are determinative in themselves but viewed cumulatively, they suggest that the 'best fit' in the present instance is not the civil engineering sector.

[43] In summary: the main activities or business of the applicant is the operation of a tailings dam facility, hydro-mining and the provision of consultancy services in respect of both. Those activities are not work of a civil engineering character normally associated with the civil engineering sector. Although subparagraph (b) of the definition contained in the main agreement makes reference to 'tailings dams', the activities in respect of tailings dams that fall within the civil engineering sector are limited to those normally associated with that sector, i.e. the design and construction of tailings storage facilities.

[44] Given the conclusion to which I have come, it is not necessary for me to determine whether for the purposes of the exclusion contained in subparagraph 2.1 (f) ((iv), the applicant's activities fall within the mining industry as that industry is defined in that exclusion. As I have indicated, the definition is poorly drafted, and it is by no means clear that the exclusions in subparagraph (f), the mining industry being defined in subparagraph (f) (iv), extend to subparagraphs (a) to (f), or whether they apply only to the more limited activities described in the preamble to subparagraph (f). I would observe though that given Gotz's undisputed evidence that the focus of the applicant's business is on hydro-mining and the undisputed evidence regarding the nature of the hydro-mining process and its purpose (being the extraction of minerals), it is likely than not that the applicant is engaged in mining-related activities, broadly speaking. The fact remains that the evidence establishes that the applicant carries out work of a nature that is not of a civil engineering character, normally associated with the civil engineering sector. In the result, the only reasonable conclusion to draw on the available evidence is that the applicant's business falls outside the registered scope of the bargaining council.

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Remedy

[45] A review court has a discretion, when setting aside an arbitration award, to remit the matter for rehearing or to substitute the arbitrator's findings. In the present instance, both parties agreed that little point would be served by remitting the matter for rehearing before a different arbitrator. As I indicated above, the proceedings under review extended over some 11 days and produced a record extending to 23 volumes. To have the matter heard afresh would defeat the statutory purpose of expeditious dispute resolution. The court is in as good a position as any arbitrator would be to make a determination. For the reasons reflected above, the appropriate order is one in which the arbitrator's award is substituted by an award to the effect that the business of the applicant falls outside of the registered scope of the bargaining council.

[46] Given NEDLAC's interest in the matter, I intend to direct the registrar to forward a copy of this judgment to NEDLAC, for its information and records.

Costs

[47] Finally, in relation to costs, the court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness. None of the grounds which ordinarily dictate a departure from the rule that costs ought to follow the result apply in this instance. The requirements of the law and fairness are best satisfied by an order that costs follow the result.

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Order

I make the following order:

1. The award issued by the third respondent on 9 November 2020 under case number HO 534-19 is reviewed and set aside.
2. The award is substituted by the following:

   'The business of the applicant falls outside of the registered scope of the bargaining council for the civil engineering industry.'
3. The second respondent is to pay the costs of these proceedings, such costs to include any costs incurred in respect of the applicant's expert witness, and the costs of senior counsel.
4. The registrar is directed to forward a copy of this judgment to the director of the National Economic Development and Labour Council.

André van Niekerk
Judge of the Labour Court of South Africa

APPEARANCES
For the applicant: Adv A Snider SC, instructed by CDH Attorneys
For the second respondent: Adv AIS Redding SC, with him Adv P Maharaj-Pillay, instructed by CDH Attorneys

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