

DEPARTMENT OF LABOUR

NOTICE 205 OF 2018

NOTICE IN TERMS OF SECTION 62 (11) OF THE LABOUR RELATIONS ACT 66 OF 1995 (AS AMENDED)



Arbitration Award Rendered

Case Number: HO3174-15Commissioner: Larry ShearDate of Award: 3-Oct-2017In the **ARBITRATION** between**Bargaining Council for the Civil Engineering Industry (BCCEI)**

(Applicant)

and

Andru Mining (Pty) Ltd and Chamber of Mines of South Africa(1st and 2nd Respondents)Applicant's representative: **Adv A Myburgh S.C. and N Coetzer**Address: **c/o Cowan-Harper Attorneys****PO Box 318****Gallo Manor****2052**Telephone: **011 783-8711, 011 048-3000**Telefax: **011 784-1641, 086 243-7318, 011 450-0089, 011 310-7271**E-mail: **ncoetzer@chlegal.co.za, gs@bccei.co.za**1st Respondent's representative: **Adv M Marcus and Adv Bernhardt**Respondent's address: **c/o Yusuf Nagdee Attorneys****P O Box 15048****Farrarmere****1518**Telephone: **011 395-0200, 011 339-2241**Telefax: **011 979-4481, 011 339-2242**E-mail: **joyce@andru.co.za, info@andru.co.za, ynagdee@mweb.co.za**

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ISSUE TO BE DECIDED

In terms of the Pre-Arbitration Minute signed by the parties on 18 September 2017, the issue to be decided is:-

- ** Whether the first respondent is engaged in a business or activities of a Civil Engineering character, normally associated with the Civil Engineering sector; which is disputed by the first and second respondent;
- ** Whether the First Respondent's business resorts under the jurisdiction of the applicant Bargaining Council; which is disputed by the first and second respondent.

The applicant seeks a Demarcation Award declaring as follows:-

- ** That the first respondent's activities are those of a Civil Engineering character; normally associated with the civil engineering sector, *and*
- ** That the first respondent's operations be declared to fall within the applicant's registered scope, and particularly part (b) thereof.

BACKGROUND TO THE ISSUE

1. In terms of the Certificate of Registration of the applicant, the Civil Engineering Industry is defined as (*inter alia*):

The industry in which employers and employees are associated for the purposes of carrying out work of civil engineering character normally associated with civil engineering sector and includes such work in connection with anyone or more of the following activities:-

- (b) *excavation and bulk earthworks; bush clearing and de-stumping, top-soil stripping, drilling and blasting; preparation of bench areas; drilling pre-split holes, blasting and/or cast blasting; secondary blasting; loading, hauling and dumping of mineralized and/or waste material to waste dumps or processing plant feed (ROM pad) stock piles; production, dozing of top soil, inter-burden or waste material; pumping and de-watering of storm or contaminated water, construction and maintenance of access and haul roads, ramps, waste and processing plant feed (ROM pad) areas; safety berms, high walls, benches, storm water systems, catch drain bond walls; surge dams, trimming, scaling or chain dragging of batters, heap leap pads, tailing dams, dust suppression of loading areas, haul roads and dumping areas; rehabilitation of earthwork areas or waste dumps; topsoil spreading, hydro seeding and watering and/or*

But excluding -

- (iv) *the Mining Industry which is defined as the industry where employers and employees are associated for the purpose, directly or indirectly, for the winning, extracting, processing and refining of a mineral in, on, or under the earth, or water, or from any residue stockpile, or residue deposit.*

SURVEY OF EVIDENCE

1. **Mr Ian Ferguson**, the managing director of the Mining Division of Steffanutti Stocks testified.
2. Steffanutti stocks comprises of a number of divisions, viz. building, mechanical and electrical, structural and geo-technical, roads and pipelines and mining services.
3. Mining services consists, *inter alia*:-

Contract mining;
Open cast mining;
Minerals handling;
Tailings;
Technical services and design
4. The mining division is involved with all facets of mining, including contract mining, which includes open cast mining. The company performs various services in respect of mineral handlings and performs the functions for and on behalf of the coal mine itself. Tailings concerns the management of tailings, dams, depositions and re-mining.

Technical services, including design and construction, building and design of mines, including planning of structures. Its other main business units include mechanical and electrical engineering work on behalf of the mines and construction and maintenance of roads and earthworks for the mines. Four years ago, 80% of the functions were performed on the mines, which has now been reduced to 20%.
5. Mr Ferguson was referred to the definition of civil engineering in the applicant's certificate of registration, and to sub-paragraph (b) thereof. He said that if one considers the activities contained in (b), many of these activities are only performed on mines. Excavation and bulk earth works are performed on most civil engineering functions, but, he said, when one refers to these activities in the coal mine industry, it is with reference to the preparation of infrastructure (civil engineering) and not mining, per se. Bush clearing is required prior to commencement of a mining operation and top soil stripping, drilling and blasting is a function of mining in order to "go down into the benches", which are steps leading into a mine pit. This is not a function normally associated with earth works, (engineering), but it is specific to mining.
6. Drilling pre-split holes can take place in any engineering activity, but cast blasting is specific to mining. Secondary blasting also only occurs on a mine.
7. Loading, hauling and dumping of mineralized waste materials or processing plant feed ROM pad stock piles which refer to Run of Mine only refers to mining activities.
8. In relation to any activity concerning contract mining, such activities would be carried out according to a mine plan. The contractor often agrees with the mine to work down to the benches so that the mine can inform the contractor in advance where and to what depth to excavate and to arrange to back-fill.
9. After excavation, mineralized material (coal) is placed on a ROM stock-pile and the mine will normally process this pile for coal production. Dozing is also part of the process of coal production but can occur in any other engineering sector.

10. When the contractor reaches the bottom of the coal seam, the remainder of the coal is dozed which is part of the mining process, as is the pumping of contaminated water. Safety burms can also be established elsewhere, but are usually found on mines, which he said, applied to benches which are generally also found on mines. Steffanutti stock also does construction of tailing, dams, dust suspension, top soil spreading and rehabilitation. These also can occur elsewhere but do also occur mainly on mines.
11. With regard to the exclusion and definition of the mining industry in sub-paragraph (iv), he said that winning is the extracting of coal for the purpose of processing, washing of minerals and waste material.
12. Stefanutti Stock also tendered for the same work as the first respondent in respect of its contracts with Exxaro Coal Mine and Anglo American Coal Mining at Goedhoop, North and South Colliery. The tenders are accompanied with a complete Bill of Quantities which price the work and services to be carried out. He said the mining contractor does not have an interest in the soil excavated, but merely gets paid in terms of the cubic measurement of coal excavated and removed.
13. Mr Ferguson considered the contract services between the first respondent and Exxaro Coal and Anglo American (Goedehoop) and said that reference to the measuring unit of SANS 1200D is a unit of measure for earthworks used specifically in the civil engineering industry.
14. With regard to the SCOPE OF WORK under the Exxaro Contract, Mr Ferguson pointed out that the services include the supply of equipment and that the contractor is obliged to provide an agreed mine plan detailing construction of access ramps, operating and haul road systems and other infrastructure requirements, including environmental issues. He said that in terms of the contract, the first respondent is responsible for excavating the coal and washing and loading to the run of mine and dumping all waste on designated stock piles. As part of the roll-over function, the contractor is obliged to attend to back-filling for the purpose of a rehabilitation plan. The contractor's principal obligation is to produce clean coal at agreed quantity and quality.
15. Mr Ferguson further testified that the mine owner is the holder of the mining rights, who has full responsibility in terms of the applicable mining legislation.
16. Many of the activities contained in the mine contracting agreements contain activities included in sub-paragraph (b) of the definition, which bring them directly under the definition of civil engineering.
17. Mr Ferguson said that his company, Steffanutti is registered with the first respondent Bargaining Council, including its mining division, which employs 1000 employees. The consequences, he said, to the business, should it be found, that the first respondent, does not resort under the jurisdiction of the applicant, would be that central bargaining through the Bargaining Council would be affected and undermined. The results could be chaotic.
18. It was put to Mr Ferguson that the first respondent, in terms of its contracts, is obliged to win and extract coal in terms of specific targets specified in the contracts. The first respondent is not paid for "moving earth" but rather to move coal. It was furthermore put to him that the purpose of moving the earth is merely to extract the coal in terms of its contractual obligations.
19. The first respondent will remove coal bearing material from under the over-burden and in terms of its roll-over mining obligations, will replace the earth into the void. These are activities associated with open cast mining. The first respondent is paid according to the coal tonnage extracted. If it does not meet the specified target it is subject to an agreed penalty. The first respondent is subject to the provisions of all mining legislation and all its employees have to be registered in terms of the Mines'

Health and Safety Act as does the Site Manager.

It was furthermore put to him that the loading, hauling and dumping of mineralised waste material is precisely the same activity as that done by the principal Exxaro Colliery.

In terms of the Goedehoop contract, the first respondent's obligations and scope of work are the operation and maintenance of Goedehoop Coal Discards, disposal facilities and handling at its North and South Collieries.

It was furthermore put to him that the first respondent is obliged to comply with all environmental requirements in terms of the rehabilitation obligations in terms of the principal's mining licence. Failure to do so, may incur penalties. It was furthermore put to him that reference to the SANS 1200 Civil Engineering Standard is also commonly used in the mining industry as a measuring unit. Reference to SANS per se does not bring the First Respondent, within the Civil Engineering Industry.

20. In reply to a question by Ms Shezi, Mr Ferguson said if an entity performs functions which are described in sub-paragraph (b), the entity would normally fall within the civil engineering industry – unless such activities specifically fall under the mining industry, as defined in sub-paragraph (iv). He said even if these activities are conducted exclusively in respect of mining, and fall within the definition under (b), they would still fall within the civil engineering industry. Ms Shezi asked him “where is the limit?”, and Mr Ferguson responded that if you are the owner of the mine, and you perform these activities, you would not fall within the civil engineering definition. He said that the purpose of the exclusion under (iv), was to exclude the mining houses / owners – but not contractors.
21. **Mr Douglas Troughton** testified. He has been a director of the first respondent since 1993. The current dispute arose from a compliance order obtained by the applicant against the first respondent.
22. Mr Troughton testified that the first respondent's activities are not of a civil engineering character. Its work has always been on mines. Currently, it is operating on 11 different mines. He said, that if the applicant had done a “proper investigation” and visited the mines, they would have noted that the first respondent is engaged in the removal of coal and other minerals. The central purpose of its relationship with Exxaro is the removal of coal – “if there was no coal – there would be no contract”.
23. 85% of its business is in the open cast mine environment, and the balance is in providing services to mine owners in terms of their obligations regarding running of the mines. In terms of its contracts with the mine owners, the first respondent performs their obligations, by running the mines, on their behalf.
24. Its activities in terms of the contracts relate to open cast activities and roll over obligations at Goedehoop.
25. With regard to the Exxaro contract, the first respondent he said, is only engaged in mining activities.
26. He referred to the contract between first respondent and Exxaro (clause 4.10) and said that the purpose of the contract is to “*produce clean coal at quantities as set out in clause 4.14 thereof*”. In terms of clause 4.11, the first respondent is *obliged to load and haul 4, 3 and 2 seam coal as ROM to the crusher feed plants or designated stock pile area which are located within the mine boundaries on and when a required basis*.
27. Mr Troughton referred to a series of photographs in bundle “C” which were taken at the Exxaro mine. These, he said, demonstrate the first respondent in the process of extracting coal. This, he said, is the act of “winning and extracting coal” at Exxaro. The first respondent uses its own equipment for this purpose. The extracted coal is placed in a dump truck, where it is then removed to a processing plant

and then to return for reloading. The processing of coal is performed by the mine house, Exxaro.

28. In order to extract the coal, the first respondent must remove the over burden to expose and to remove the coal. Once the over burden is removed, material is placed into the previous mining void as part of the mine owner's statutory and licensing rehabilitation obligations.
29. In order to extract the coal, it has to dig down to 4 seam, to remove the over burden and the underlying coal. This, Mr Troughton said is a mining activity, in terms of clauses 4.10 and 4.11 of the Exxaro contract.
30. He referred to clause 4.14 which sets out the estimated required production rate and to clause 4.17.1 which records the mining method to be *bench mining, incorporating truck and shovel operation. The coal is to be transported to the indicated crusher feed bin or nominated stock pile area.*
31. In terms of the contract, if the contractor (first respondent) fails to deliver the required quantities, it may incur a penalty. The penalty is imposed over the whole cost of all the activities and not just the cost of haulage. Mr Troughton testified that the first respondent is not merely delivering earth – it is delivering coal.
32. Mr Troughton referred to the first respondent's bill of quantities, which formed the basis of its invoices and testified that the items contained therein, have direct reference to its contractual obligations, and fall squarely within the mining industry. (Page 29 and 30 of bundle "C").
33. With reference to the Anglo American – Goedehoop contract, Mr Troughton said that the first respondent provided 3 primary services viz. removal of discards; product handling and management of discards. These are mining activities. In terms of the Goedehoop contract, the services include *the disposal of coal discards, slurry, coarse and fine discards, as well as the maintenance of the Goedehoop Coal discards disposal facilities and coal handling at Goedehoop, north and south.*
34. The discards are removed on a conveyer belt from a silo and placed in trucks. If the silo overfills, an alarm is activated and the entire production process has to be stopped. That is why the first respondent is contractually required to *load, haul and place discards within a free haul distance of 2 kms.* In terms of clause 6.2.1 the contractor *shall empty the silo to a temporary stock pile as necessary in order to keep ahead of production. Interruptions of process shall incur penalties at the rate of R4.00 per ton of loss production.*
35. Mr Troughton said that the removal of discards is inextricably bound to the coal production process. It is a mining activity.
36. He testified that the first respondent recognises two Unions at its various mines, and negotiates conditions and wages collectively at the work place. He said that the Unions have indicated that they are not in favour of registration with the applicant Bargaining Council.

ANALYSIS OF EVIDENCE AND ARGUMENT

1. Mr Myburgh submitted that the insertion of sub-clause (b) into the definition "*appears to have been an attempt to explicitly include open cast contract mining in the definition of the civil engineering industry. This is clear from many of the activities mentioned in (b) which can only be performed on a mine and/or part of the mining process. (See sub-clause (b) of the definition).*"

2. He further submitted that merely because an entity performs the activities in paragraph (b), it does not fall within the civil engineering industry. For this to be the case, the purpose of the activities *must be of a civil engineering character normally associated with the civil engineering sector*.
3. He further submitted that once it is accepted that some of the activities in paragraph (b) can only be performed on a mine, to interpret the mining industry exclusion to include open cast contract mining, as the first respondent contends, would leave paragraph (b) superfluous. He submitted that there is a general presumption against the enactment of “*meaningless*” provisions in legislation and that an interpretation must be adopted to give effect to paragraph (b) of the registered scope. The fact that paragraph (b) was not simply deleted by NEDLAC is, he submitted, telling.
4. The applicant submitted that “the “mining industry” exclusion may have to be read down to exclude the activities in paragraph (b) which appears to have been directed at opencast contract mining”.
5. The applicant submitted that the consequences of the present demarcation would have a direct impact on some 10 000 employees and that if it were to be held that the first respondent’s activities fall within the mining industry exclusion, this would serve to “dismantle an historical, orderly system of sectoral collective bargaining. He referred to *SBV Services (Pty) Ltd v NBCRFI* (2016) 37 ILJ (LC) wherein the court stated “..... *I have also had regard to the objectives of the LRA and to interpret it that gives effect to such objectives. One of the objectives is of course, collective bargaining and the establishment of bargaining councils.*
6. Mr Marcus submitted that the socio economic considerations are secondary considerations in a demarcation dispute. The primary consideration is to determine the appropriate industry in which an entity performs its functions. He submitted that these considerations might be important if it is difficult to determine the appropriate nature of the activities carried out and to identify the nature of the industry under which these activities take place. In any event, Mr Marcus submitted that the first respondent has adequate plant level bargaining institutions in place, and Ms Shezi submitted that most of the employers within the applicant’s structures are represented by employer’s organisations. Effective bargaining can take place outside the structures of the bargaining council.

CONCLUSION

1. The issue for determination is to determine whether or not the first respondent's business falls within the jurisdiction of the applicant bargaining council.
2. The starting point is the definition of the civil engineering industry, in terms of the certificate of registration of the bargaining council;

In terms of the Certificate of Registration the Civil Engineering Industry is defined as (*inter alia*):

The industry in which employers and employees are associated for the purposes of carrying out work of a civil engineering character normally associated with the civil engineering sector and includes such work in connection with anyone or more of the following activities:-

- (b) *excavation and bulk earthworks; bush clearing and de-stumping, top-soil stripping, drilling and blasting; preparation of bench areas; drilling pre-split holes, blasting and/or cast blasting; secondary blasting; loading, hauling and dumping of mineralized and/or waste material to waste dumps or processing plant feed (ROM pad) stock piles; production, dozing of top soil,*

inter-burden or waste material; pumping and de-watering of storm or contaminated water, construction and maintenance of access and haul roads, ramps, waste and processing plant feed (ROM pad) areas; safety berms, high walls, benches, storm water systems, catch drain bond walls; surge dams, trimming, scaling or chain dragging of batters, heap leap pads, tailing dams, dust suppression of loading areas, haul roads and dumping areas; rehabilitation of earthwork areas or waste dumps; topsoil spreading, hydro seeding and watering and/or

but excluding –

- (iv) *the Mining Industry which is defined as the industry where employers and employees are associated for the purpose, directly or indirectly, for the winning, extracting, processing and refining of a mineral in, on, or under the earth, or water, or from any residue stockpile, or residue deposit.*
3. It is common cause that many of the activities contained in (b) of the definition are specific to the mining industry, and others are common both to the mining and to the civil engineering industry. The applicant argued that the definition in (b) is broad enough to include activities incorporating the open cast mine industry activities. Many of these activities are also found in the contracts between the first respondent and Exxaro / Anglo American Goedeheop.
 4. Sub-paragraph (iv) of the exclusion (see above), is defined as the industry where employers and employees are associated for the purpose, directly or indirectly for the winning, extracting, processing and refining of a mineral from any residue stock pile or residue deposit.
 5. Mr Ferguson confirmed in his evidence that Steffanutti Stock's mining division conducts many of these activities and testified that in his opinion, such activities fell within the parameters of the civil engineering industry. Steffanutti Stock, including its mining division is currently registered with the bargaining council for the civil engineering industry, (the applicant).
 6. Mr Troughton, on the other hand, testified that the nature of the first respondent's activities can only be categorised as mining activities. He referred to several clauses in its contracts with Exxaro and Anglo American and said that the activities contained in those contracts were not of a civil engineering character, but strictly mining activities. He said that all the functions relating to extraction, hauling, dumping, removing, rehabilitation, cartage of discards are specific mining activities which do not include any activities of a civil engineering character. He also referred to the first respondent's bills of quantities and invoices which described claims for such activities.
 7. Mr Marcus referred to R v Sidersky 1928 TPD 109, and KVV v Industrial Council for the Building Industry (1949) (2) SA 600A) where Solomon J held *"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 common purpose. Once the character of an industry is determined, all the employees are engaged in that industry...."*
 8. In considering a demarcation determination, I have to consider the definition of the civil engineering industry, which is defined as the industry in which employers and employees are associated for the purpose of carrying out work of a civil engineering character normally associated with the civil engineering sector.

9. The words, “*of a civil engineering character and normally associated with the civil engineering sector*” require analysis. Whilst I appreciate that many of the activities contained in sub-paragraph (b) do relate to the mining industry, the question is - can such activities be described as those “*normally associated with the civil engineering sector*” and being work of a “*civil engineering character*”.
10. Mr Troughton testified that the first respondent’s activities at Exxaro and Goedehoop *are not activities of a civil engineering character, and those normally associated with a civil engineering sector*. If I have regard to the activities of the first respondent as characterised by Mr Troughton’s evidence and in terms of the contracts referred to above, I must conclude that the work carried out by the first respondent is not work normally associated with the civil engineering industry, despite the contents of sub-paragraph (b). The contracts clearly set out obligations of a mining character and the activities required to be carried out are more closely related to the mining industry. The first respondent is contractually committed to extract and win coal from under the earth, and to place such minerals on stock piles for the purpose of processing. This is a mining function which, but for the contract with the first respondent, would be carried out by the mine owner itself. There can be little doubt that these activities are mining activities. The contracts contain many obligations, which have been described above, and these obligations and functions, while some of them are described in sub-paragraph (b), directly form part of a mining process. Mr Troughton testified that the first respondent is not merely engaged in the excavation and transportation of earth – it is engaged in the extraction and transportation of coal. This distinguishes that function from the civil engineering industry, and brings it squarely within the mining industry.
- In determining the character of the industry, in which the first respondent is engaged, I hold that the evidence (verbal and documentary) determine that the “nature of the enterprise” in which both the employer (first respondent) and its employees are associated for common purpose, is the mining industry; and not the civil engineering industry, as defined.
11. In all the circumstances, it is my conclusion that the first respondent’s activities do not fall within the definition of the civil engineering industry as defined in the applicant’s certificate of registration, and that it rather falls within the scope of the exception contained in sub-paragraph (iv) which is *the engagement, directly or indirectly for the winning, extracting, processing of a mineral from under the earth or a residue stock pile or deposit*. This precisely describes the activities of the first respondent in terms of its contractual obligations and as described by its witness, Mr Troughton.

AWARD

For all the reasons set out above, I find that the first respondent’s, Andru Mining (Pty) Limited’s activities do not fall within the scope of the bargaining council for the civil engineering industry.

Signature: _____



Commissioner: Larry Shear