

•IN THE LABOUR COURT OF SOUTH AFRICA

(Held at Johannesburg)

Case no: J 2612 / 00

In the matter between:

Applicant

and

THE MOTOR INDUSTRY

Respondent

JUDGMENT

LANDMAN J:

1. The Fuel Retailers Association (FRA), a registered employers' organisation, applied on two occasions to join the Motor Industry Bargaining Council (MIBCO). The applications were not refused out right. MIBCO was dissatisfied with the membership figures supplied by FRA and refused to admit it as a party. But MIBCO is deemed to have refused the application. See s 56(3) of the Labour Relations Act 66 of 1995 (the LRA). FRA then applied to this court in terms of s 56(5) for an order admitting it to the council.

2.The application was launched in June 2000. MIBCO's principal objection to the admission of FRA is that MIBCO does not know the strength of FRA's membership and therefore is unable to establish whether FRA meets the threshold for admission which is set out in the council's constitution. However, MIBCO also opposes the application on other grounds.

3.Although the papers are voluminous and exceed 1000 pages, the issues are narrow. The bad blood which prevails between FRA and Retail Motor Industries (RMI), the dominant employer party in the council, has permeated these papers. I do not intend dealing with their antagonism or the results of their fall-out save where it is germane to the central issues of this application.

4.One of the issues which I must decide is whether the FRA is sufficiently representative of the sector and the industry to be allowed to join MIBCO. I intend to explore first whether FRA meets the threshold set by MIBCO. This threshold, although passed during the period of FRA's bid to become a member, is the clearest indication of the threshold which the members of the council, employers and trade unions, believe is sufficient for a party to join them. It may be set too high. But, if FRA's membership meets this requirement caedit quaestio.

5.The criteria for admission are set out in clause 5.2. of MIBCO's constitution as amended. It reads:

Any employers' organisation or trade union applying for admission in terms of Clause 5.1 hereof shall at least comply with the following criteria.

The applicant must, in the opinion of the council, be sufficiently representative in all the provinces of the Republic of South Africa;

5.2.2 *The applicant must represent at least 5% of all employers or employees engaged or employed in the sector and area, as defined in 2.11 hereof.*

5.3.3 *Details of the applicant's membership figure shall be in the form of a certified statement signed by an auditor, registered to practice as a public accountant and auditor.*

5.3.4 *Membership figures provided for in terms of subclause 5.2.2 hereof, shall be limited to the properly registered and fully paid up voluntary individual members of the applicant.*

“Sector and area” is defined as follows in clause 2.11 of the constitution and means “*the sector and area in respect of which the Council is registered from time to time.*” I should observe that the main agreement provides for terms and conditions of employment in three divisions, being divisions A, B, and C. Division C is itself divided into 5 chapters representing various sectors within the industry. Chapter 1 enterprises are diverse. They comprise approximately 98% of the industry's employers and account for approximately 86% of employees in the industry. Chapter 1 enterprises include 9 functionally separate sectors. Fuel retailers constitute one such functionally separate sector.

6. MIBCO has been suspicious, and indeed RMI is still suspicious, of FRA's membership figures. The problem is compounded by some injudicious puffing which FRA has engaged in, particularly vis-à-vis the Minister of Labour. However, the parties put aside their differences sufficiently to agree, after several attempts, on the appointment of MIBCO's auditor's KPMG to audit FRA's membership figures. This audit was limited to those members described as individual members. Members who joined FRA through the medium of so-called dealer councils did not feature in the audit.

7. The parties agreed on 6 February 2001 that, for the purposes of this application, the relevant statistics and membership figures as at 14 November 2000 to be contained in the auditor's final report, are to be the

relevant statistics.

8. On 5 March 2001 Norman Ronne, a director of KPMG Services (Pty) Ltd, submitted a final report. The report describes the mandate of the parties, the inquiries made and the procedure followed including the verification exercise. The report, as regards the individual members, states:

“To date we found that:

The number of individual members complying with the criteria as set out in this report totalled 1 194.

These are summarised as follows:

Appendix 1- the individual members vouched in full.

Appendix 2- individual member of which a judgmental sample of approximately 25% of the 391 was vouched. The success rate of the sample was 100%.

We also found 3 individual members which appeared on the Debit Order list for the end of November 2000 for which the date of application could not be determined (Refer Appendix 3).

There are, in addition, payments received by FRA of SA which we have not traced to members, as the audit trail is weak. We have not attempted to follow up the audit trail in respect of these payments to ascertain whether they relate to members for which payments by monthly debit orders for November 2000 could be traced but for which payments for certain previous months are outstanding whether they are members in addition to any of those listed in this report. These payments will be traced upon specific instructions from the parties. See our comments in respect of the expected time and cost in tracing these payments.”

9. The report also states that:

“We determined the total number of employees employed by identified individual members of the FRA by calculating the totals as supplied by MIBCO (any individual members, and their respective employees, identified since 18 January 2001 are not included).”

10. When FRA presented its second bid for membership to MIBCO on 20 February 2001, it was agreed that FRA would assert its membership figures at 1 191 and not at 1194 members.

11. Unfortunately the report does not indicate how many employees were employed by the 1 194 members. The parties are agreed that the 1 029 FRA employers employ 14 067 employees.

12. One would have thought that the auditor's report resolved the dispute about the membership of FRA in accordance with the agreement between the parties. But it was not to be. RMI decided to audit the auditor and telephonically canvassed the members of FRA who had been identified by the KPMG audit. It seems that there was, prima facie, cause to be concerned about some alleged members who were known by RMI to be staunch members of its own organisation.

13. While these inquiries were being made information was obtained from Mr Sergio De Castro who worked on the KPMG project. He has provided an affidavit. It is not clear whether he reports on behalf of his employer or testifies in his personal capacity. In any event he says:

“Included in the 1 194 figure are those members who paid their membership subscriptions for the financial year ending 30 June 2000 but who had not by 14 November 2000 paid the subscription fee of R1 500,00 (or part thereof) for the year 1 July 2000 to 30 June 2001. The financial year of the applicant runs from 1st of

July to the 30th of June the next year.

Excluding the above category and the result is that there are 780 members of the applicant as at 14 November 2000. I enclose a list of the 780 members as Annexure “D”. Included, as members, are those members who made once off payments of R1 500,00 subscription or part thereof from the 1st of May 2000 to 14 November 2000.

Neither I, nor any other member of the team that conducted the exercise verified whether the 1 194 or 780 members still exist or fall within the registered scope of the respondent as this did not form part of our instructions.”

14.RMI conducted its own survey of the figures provided by KPMG. RMI’s findings are summarised in an affidavit by its Director of Labour. He says:

“The sample survey revealed the following:

15.1 77 managers / owners advised that they had not renewed their subscription with the Applicant for the current financial year;

15.2 65 establishments were either found to have ceased trading or could not be traced at all or are not registered with MIBCO;

15.3 41 managers . Owners advised that they were new owners of the business and that they had in fact not joined the Applicant;

15.4 30 of the establishments were found fell outside the scope of MIBCO’s jurisdiction;

15.5 9 was established to be non-fuel resale establishments;

15.6 6 were, on the face of the report itself, found to be duplications.”

and

20.1 30 managers / owners advised that they had not renewed their subscription with the Applicant for the current financial year;

20.2 35 establishments were either found to have ceased trading or could not be traced or are not registered with MIBCO;

rs / owners advised that they were new owners of the business and that they had in fact not joined the Applicant;

20.4 20 of the establishments were found fell [sic] outside the scope of MIBCO’s jurisdiction;

20.5 5 were established to be non-fuel resale establishments;

20.6 5 were, on the face of the report itself, found to be duplications.”

15.A pre-trial agreement is binding on the parties. **Shoredits Construction (Pty) Ltd v Pienaar NO and others** [1995] 4 BLLR 32 (LAC) and **Checkers Shoprite (Pty) Ltd v Busene** (1996) 17 ILJ (LAC). It cannot be retracted unless there are proper, recognised grounds for doing so. Moreover, where the pre-trial agreement permits the ascertainment of certain facts in a particular manner, which it is agreed will form the basis of a court’s judgment, the findings cannot be attacked, in this case, except on the basis of fraud. MIBCO does not allege fraud in this matter, merely that the results of KPMG’s audit are unreliable. I am not permitted to

reopen a factual issue which the parties have resolved.

16. Mr De Castro's affidavit is at odds with part of the report supplied by his Director. KPMG had regard to the qualification criteria for individual membership. Mr De Castro's affidavit is not admissible to gainsay the final report in the absence of fraud. MIBCO does not allege that the findings are vitiated by fraud.

17. In the circumstances I am obliged to proceed from the premise that the individual membership of FRA at 14 November 2000 ran to 1191 members. I leave out of account members who have joined FRA through the medium of dealer councils.

18. I must now establish how many employers are engaged in the area and sector covered by MIBCO. MIBCO states that there are 18 005 employers active in its area and sector. Of these 13 592 (or 13 067 as stated in the answering affidavit) pay their levies to the council. FRA, leaving aside its dealer council members, would have 6.6% of the total number of active employers and 8.7% of the employers who pay their levies. If one used Mr De Castro's figure of 780 individual members then one finds that the percentages are 4.3% and 5.7% respectively. But I am precluded from using the last mentioned figures.

19. The FRA employers are spread throughout the nine provinces but, as may be expected, the biggest concentration is in Gauteng. Mr Gerrit Pretorius SC, who appeared for MIBCO, conceded this.

20. In my opinion there are sufficient grounds for this court to hold that FRA's membership, leaving aside those members who hold their membership through dealer councils, exceed 5% of the employers in the sector and area. FRA would qualify for admission to MIBCO on the basis of its own criteria. This being so the proper order to make is that MIBCO admit FRA to its council as a party.

21. However, assuming that I am wrong and that the FRA lacks 0.7% membership to comply with clause 5, then it is necessary to repeat that this court is not bound by the threshold figure of 5% although proper cognisance must be taken of it. It must also be accorded appropriate weight when the basket of considerations is weighed. For this reason I will set out briefly the considerations which this court must take into account when considering an application for membership of a bargaining council.

22. Section 56 of the LRA deals with the admission of parties to a bargaining council. It provides that any registered trade union or registered employers' organisation may apply in writing to a council for admission as a party to that council. The application must be accompanied by a certified copy of the applicant's registered constitution and certificate of registration and must include-

- details of the applicant's membership within the registered scope of the council and, if the applicant is a registered employers' organisation, the number of employees that its members employ within that registered scope;
- the reasons why the applicant ought to be admitted as a party to the council; and
- any other information on which the applicant relies in support of the application.

A council has ninety days from the time it receives an application for admission to decide whether to grant or refuse the applicant admission. It must advise the applicant of its decision and the reasons for its decision. But if it does not, then the council is deemed to have refused the applicant admission. If the unsuccessful applicant wishes to take the matter further the applicant may apply to this court for an order admitting it as a party to the council. This court may admit the applicant as a party to the council, adapt the constitution of the council and make any other appropriate order. The proceedings in the Labour Court are in the nature of a de novo hearing. Cf **National Union of Textile Workers v Textile Workers Industrial Union (SA) and others** 1988 (1) SA 925 (A).

23. In **ACTWUSA v National Industrial Council of the Leather Industry of SA** (1989) 10 ILJ 894 (IC) at 898A-900H De Kock AM held that the following factors, amongst others, should be taken into account in determining whether the interests of the industry as a whole would be advanced if a party is admitted to the council: the representivity of the council, the representivity of the applicant, stability in the industry, the reasons advanced by the existing parties to the council for agreeing to or objecting to the admission of the applicant, other advantages to the industry, the council or the parties to the council. See also **PPAWU v Industrial Council for the Furniture Manufacturing Industry, Transvaal and another** (1994) 15 ILJ 1352 (IC) at 1354A.

24. Section 56(5) of the LRA must be interpreted to give effect to the primary purposes of the Act. See s 3. One of the primary objects of the LRA, in section 1(d) is the promotion of orderly collective bargaining. Collective bargaining through the medium of a bargaining council envisages a measure of self government. It is one of the few instances where corporate bodies also have a franchise. This self government, because of the ability to have collective agreements extended and made binding on employers and employees who are not parties to the council, permits the council to impose obligations, confer rights and levy fees on non-parties. It is understandable and in keeping with the legislative intent that those who are subject to the jurisdiction of a bargaining council should be elevated to the position of lawmaker or contracting party. The applicant should conform to the requirements of the council for admission but where admission is refused this court applies a slightly different test.

25. It has been suggested that, in determining whether a new party should be admitted to a bargaining council, the Labour Court should, *inter alia*, consider the attitude of the parties on the council, the extent to which a new party may disrupt the working of the council and the fact that the council should represent the organisational diversity within its sector and area. See Brassey et al **Commentary on the Labour Relations Act**, Vol 3, A3:119. To this one may add that the court must consider the council's reason for refusing to admit the

applicant. This flows from s 56(4) of the LRA. The constitution of the bargaining council should also be considered. Its provisions would not necessarily be decisive. See also the discussion in Du Toit et al **Labour Relations Act - a Comprehensive Guide**, 3rd ed, 130-134, and 188.

26. To sum up a court considering an application for admission to a bargaining council should take into account the following:

1. Whether the party seeking admission falls within the registered scope of the council.
2. The representivity of the council;
3. Whether the applicant is sufficiently representative to be an effective member of the council;
4. Stability in the industry;
5. The reasons advanced by the existing parties to the council for agreeing to or objecting to the admission of the applicant;
6. Other advantages to the industry, the council or the parties to the council.
7. Whether the admission of the applicant would contribute to the promotion of orderly collective bargaining.
8. The extent to which the applicant may disrupt the working of the council.
9. Contribution which the applicant could make to the organisational diversity of the council within its sector and area.
10. The threshold for admission and other requirements set out in the constitution of the bargaining council.

27.I proceed to consider FRA's application for admission to MIBCO on the basis of the approach which I have outlined above.

28.Mr Gerrit Pretorius argued that admission should be refused FRA, inter alia, because it is a break-away group from the RMI, there may well have been a measure of confusion between the identity of the applicant and the RMI, FRA purports to represent only a subsection within chapter 1 of the main agreement, FRA has deliberately misstated facts to the Minister of Labour and the general public, and the industry has been reasonably stable. He submitted that the admission of FRA will jeopardise the stability of the industry. The industry is far more than the fuel retailer sector. At present there is a fine balance in the industry and great stability. The admission of the applicant will endanger this. This is particularly so in view of the fact that the applicant has not been candid about its individual membership and has made scurrilous and unfounded allegations against MIBCO and RMI.

29.He also contended that there are no advantages to be gained by the industry, the council or the parties. The industry has been served well by MIBCO. MIBCO will not benefit if the applicant is admitted. FRA has an extremely antagonistic attitude and is likely to abuse its seat(s) on the council to attempt to extract concessions from the parties to benefit its members to the detriment of the industry as a whole.

30. The members of FRA and the employees employed by them fall within the registered scope of MIBCO. The fuel retail sector is, according to MIBCO, a functionally separate sector. RMI claims 1542 employer members in this sector. FRA has 1191 members. 780 members will nevertheless almost meet MIBCO's threshold. It is close enough. FRA will therefore represent something less than half the employees in this sub-sector. It is common cause that the sector is subject to unique retail price controls at the hands of the Government. The terms and conditions applying to the fuel retailer sector and its employees fall within a

discrete category of the main council agreement. This emphasises the uniqueness of this subsector and highlights the common interest of FRA and RMI. I believe that their common interests will overcome their mutual antagonism and enable them to work together for the benefit of the sector.

31. It is appropriate that FRA should be able to participate in the negotiations which take place in MIBCO and in the structures established by MIBCO as its members are bound by collective agreements entered into in MIBCO. FRA members pay various dues and contributions to the council. The admission of FRA as a party to the council would lend legitimacy to the council as it would make it more representative of the employers in the sector. A multiplicity of employers organisations, that would result from the admission of FRA, would be compatible with the general thrust of the LRA.

32. I am of the view that the application should be granted. As no debate ensued about the consequences of the admission of FRA to the council it would be best to allow the parties an opportunity to deal with this. If they are unable to come to an agreement then this court will grant the relief which it deems necessary.

33. In the premises:

1. The Applicant is admitted to membership of the Respondent.
2. The application is postponed until 6 August 2001 so that the parties may attempt to agree on allocation of seat/s on the basis of FRA's membership of 1 119 employer members (and the number of employees employed by those employer members) and the amendment of its constitution if so required.
3. If the parties do not reach agreement, representations regarding a suitable order must be filed by 25 July 2001.

4.The costs are reserved.

Signed and dated at BRAAMFONTEIN this 28th day of March 2001.

LANDMAN J

Judge of the Labour Court of South Africa

: 23 March 2001.

P J Pretorius SC, instructed by Moss Cohen and Partners.

: G C Pretorius SC, instructed by Hofmeyr Herstein and Gihwala Inc.