IN THE DISPUTE RESOLUTION CENTRE OF THE MOTOR INDUSTRY BARGAINING COUNCIL

(HELD AT RANDBURG)

In the consolidated disputes between:

NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA (NUMSA) Applicant

MOTOR INDUSTRY ASSOCIATION (MISA) Applicant

RETAIL MOTOR INDUSTRY ORGANISATION (RMI) Applicant

and

FUEL RETAILERS ASSOCIATION (FRA) Respondent

NATIONAL EMPLOYERS' ASSOCIATION OF SOUTH AFRICA (NEASA)
Respondent

MOTOR INDUSTRY BARGAINING COUNCIL (MIBCO)
Respondent

AWARD

INTRODUCTION

1. The three disputes originally referred by NUMSA, MISA and RMI in this matter were consolidated in terms of a ruling dated 18 May 2020. The history of the disputes is well-documented and need not be repeated.[1]

2. This award is issued pursuant to hearings by way of video conferencing on 8, 9, 10, 21 and 22 July 2020, following a postponement on 25 June 2020. NUMSA was represented by Adv C Orr SC. RMI was represented by Adv R Grundlingh.

[1] See Rulings dated 19 April 2020, 17 May 2020, 3 June 2020 and 26 June 2020; Directives dated 20 April 2020, 8 May 2020, 21 May 2020 and 27 May 2020. Points *in limine* raised by FRA were dealt with in a Ruling dated 13 May 2020. A further dispute referred by NUMSA was withdrawn.

MISA was represented by Dr G Ebersohn. FRA was represented by Ms A Ranchod.

3. NEASA, after initially opposing NUMSA's claim, withdrew from the matter and, together with MIBCO, will abide by the outcome.

4. Closing arguments were presented in writing by NUMSA, RMI, MISA and FRA on 17 August 2020. The hearing was electronically recorded and a transcript was made to assist parties in the preparation of closing arguments.

5. The evidence and arguments covered a wide terrain in much detail. Although I have considered the evidence and arguments in their entirety, this award will concentrate on aspects which I consider to be dispositive of the issues in dispute.

ISSUES TO BE DECIDED

6. Different parties have identified the issues in different terms. I find the list submitted by RMI to be the most comprehensive and inclusive of the issues identified by other parties.[2] Slightly abbreviated, it reads as follows:
   - 6.1. whether NEASA's membership of MIBCO has been terminated on the basis of:
     - 6.1.1. the Ngubane report (which includes its status); or
     - 6.1.2. the MIBCO membership statistics;
   - 6.2. whether MIBCO is improperly constituted by retaining NEASA as a member, including the proper interpretation of clause 6.1.3 of the MIBCO Constitution and the criteria for determining and/or verifying parties' membership:
   - 6.3. whether proper constitution of MIBCO is a prerequisite for the submission of audited membership figures by parties;
   - 6.4. whether the MIBCO Constitution allows for an alternative method of verification of membership and review of representatives on MIBCO; and

[2] RMI Closing Submissions, para 2.

6.5. how the number of representatives on MIBCO should be reviewed when a party to MIBCO fails or refuses to submit audited membership figures.

7. For further clarity, I also note (again in an abbreviated form) the relief sought by the different parties:

7.1. NUMSA seeks an award that NEASA is no longer a party to MIBCO;[3]

7.2. MISA seeks an award to the effect that –

7.2.1. The Ngubane report is not final and binding;

7.2.2. The status quo in respect of the parties' representivity as at November 2017 applies;

7.2.3. In terms of clause 6.1.3 of the MIBCO Constitution the parties must annually submit their audited membership numbers as at 31 December;

7.2.4. NUMSA and FRA have breached the MIBCO Constitution by not submitting their membership numbers as at 31 December 2019;[4]

7.3. RMI seeks an award to the effect that –

7.3.1. membership for purposes of clause 6.1.3 means numbers of members "as confirmed by the external auditors of the respective parties" as opposed to "membership numbers allocated by MIBCO based on returns submitted to MIBCO";

7.3.2. if any party fails to comply with clause 6.1.3, MIBCO's membership numbers will be used in respect of that party for purposes of clause 6.1.4;

7.3.3. the Ngubane report is not final;

7.3.4. the Ngubane report cannot be relied on because it determined parties' membership as at 30 June 2018 as opposed to 31 December;[5]

7.4. FRA seeks an award to the effect that –

[3] NUMSA Heads of Argument para 1.1.
[4] MISA's Written Submissions, para 74.
[5] RMI Closing Submissions, para 72.

7.4.1. The Ngubane Report is final and binding;

7.4.2. External auditors may be used for membership verification for the purposes of seat allocation;

7.4.3. NEASA is no longer a party to MIBCO; and

7.4.4. MIBCO is currently not properly constituted.[6]

8. Three of the parties also seek cost orders against opposing parties.

9. Two further claims by RMI can be disposed of at the outset. These can be summarised as follows:

   9.1. the existing provisions of clauses 6.1.3 and 6.1.4 of the Constitution remain binding on the parties until amended;

   9.2. such verified membership be used to determine the numbers of representatives of employer organisations and trade unions for purposes of clause 6.1.4;

10. These claims are in my view redundant. It is self-evident that clauses 6.1.3 and 6.1.4 must remain in force until they are amended and there is accordingly no need for a declaratory order to this effect. What is at issue is the interpretation of clause 6.1.3 in particular and, given the disputed composition of the council, whether it is possible to implement the provisions of clauses 6.1.3 and 6.1.4 as matters stand.

11. To the extent that various parties place reliance on the MIBCO agreement of 6 August 2013 setting out "principles and criteria" for verification of parties' membership,[7] this is again uncontentious. The agreement is binding and has not been challenged and in my view, as set out below, it forms part of the solution.

12. The award will deal with the disputed issues referred to in paragraph 6 above by addressing three central questions, in the course of which all disputed issues will

[6] FRA Heads of Argument, page 25.

[7] Incorporated in Scope Statement for the verification of Parties Representativity in terms of the requirements of the Department of Labour and the Labour Relations Act, Act 66 of 1995: RMI Bundle, pages 33ff.

be disposed of and a basis will be provided for determining the appropriate relief in respect of the parties' claims. The questions are the following:

12.1. Whether NEASA is a party to MIBCO, in light of:

12.1.1. the Ngubane report, and

12.1.2. the MIBCO membership statistics;

12.2. whether MIBCO is properly constituted, with reference to

12.2.1. the interpretation of clause 6.1.3 of the MIBCO Constitution; and

12.2.2. the criteria for determining and/or verifying parties' membership; and

12.3. whether a properly constituted MIBCO is a prerequisite for the submission of membership figures in terms clause of 6.1.3 of the MIBCO Constitution.

13. Before doing so, it will be useful for reference purposes to provide an overview of the background, most of which is not in dispute.[8]

THE BACKGROUND

14. The dispute originated in 2013 when RMI questioned the membership figures submitted by FRA. Membership figures are important *inter alia* because seat allocation on the Council – in this case as between RMI and FRA – is determined on his basis.

15. The Department of Labour declined to resolve the dispute, stating that the parties must do so themselves.

16. The MIBCO Annual General Meeting (AGM) in 2013 resolved to appoint external auditors to verify the parties' membership figures. Implementation of the decision was delegated to MIBCO's Governing Board (MGB) and KPMG was appointed to carry out the verification process.

[8] See Pre-Arbitration Minute: NUMSA Disputes, 6 July 2020, para 1; NUMSA Heads of Argument para 17; MISA Written Submissions para 2; FRA Heads of Argument pages 1 to 4.

17. In 2014 NEASA was admitted to membership of MIBCO and was awarded two seats on the council as an interim measure pending completion of the verification process. The MIBCO Constitution was amended at the instance of the Department of Labour to include NEASA's name.

18. The KPMG report was released in August 2015. FRA and NEASA accepted its outcome but RMI did not.

19. The MIBCO AGM in 2017 again referred the verification dispute to the MGB to determine a process for resolving it on the basis that "*the criteria to be used for the validation process be based on the rules set in the MIBCO Constitution as well as the circular from the Department of Labour as the starting point*", and "*the status quo with regards to the current numbers of representivity will remain until the validation process is finalised*".[9]

20. On 15 February 2018 the MGB again decided to appoint external auditors for the purpose. In doing so it resolved inter alia that "*a report to be issued by the independent auditor must be final and binding to all*", and "*the status quo with the current numbers of representivity remains until the audit is finalised*".[10]

21. The auditing firm Ngubane & Co (hereafter "Ngubane") was appointed to conduct verification[11] of parties' representativity in terms of a letter of engagement dated 23 August 2018.[12] Ngubane issued a draft report on 1 March 2019, which NUMSA and MISA accepted but RMI and NEASA did not.[13]

22. After certain changes were made in consultation with parties – inter alia an upward adjustment of RMI's membership total – and following a second draft report, Ngubane issued their final report on 22 August 2019 (hereafter "the Ngubane report").[14] Again RMI and NEASA did not accept it.[15]

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[9] MIBCO, Minutes of Sixty-Fifth (65th) Annual General Meeting, 9 November 2017, AGM.0049 (pages 10 to 11).
[10] FRA Bundle, page L10; RMI Bundle pages 70 to 71.
[11] The term "validation" is also used in the documentation. In this award the two terms are seen as interchangeable.
[12] RMI Bundle, pages 70 to 72.
[13] Minutes of Ad Hoc Advisory Committee (AAC), 1 March 2019: RMI Bundle page 73.
[14] RMI Bundle, pages 65 to 69.

23. The result is that, despite the MGB decision that the report should be "final and binding", it was not acted upon. This has led to the present arbitration proceedings in which MISA, having accepted the first draft report, joined RMI and NEASA in challenging the final report.

24. The dispute has prevented the annual review of the representation of employer organisations in terms of clause 6.1.3 and resulted in a breakdown of reporting of membership numbers by parties during 2018 and 2019. Part of the dispute is whether the improper constitution of the council, as alleged by NUMSA and FRA, justifies parties in failing to report membership numbers for purposes of clause 6.1.3 of the MIBCO Constitution.

25. The dates and periods for the submission of membership reports were also called into question. The evidence indicates that prior to the breakdown, and at least during 2016 and 2017, parties submitted their reports for the periods and on the dates reflected in Annexure Q of the FRA Bundle (reproduced below).[16]

26.

Party	Period	Date of submission
MISA	31 December 2019 1 July 2015 to 30 June 2016	28 January 2020 12 December 2016
NUMSA	1 July 2016 to 30 June 2017 1 July 2015 to 30 June 2016	11 August 2017 15 February 2017
NEASA	31 December 2019 1 July 2015 to 30 June 2016	30 January 2020 13 December 2016
RMI	31 December 2019 1 July 2016 to 30 June 2017 1 July 2015 to 30 June 2016	03 February 2020 03 August 2017 27 July 2016
FRA	1 July 2015 to 30 June 2016 1 July 2016 to 30 June 2017	23 August 2016 03 August 2017

[15] AAC Minutes, 12 September 2019: RMI Bundle, page 74. The Minutes reflect that "the employer parties were still in dispute in respect of the final figures" but, given FRA's express endorsement of the Report, this evidently does not refer to FRA.
[16] Pre-Arbitration Meeting Minutes in respect of the MISA-Dispute, para 1.7: MISA Bundle of Pleadings, page 66. Confirmed as being accurate in respect of RMI: Transcribed Record 1 page 336 lines 1 to 4.

27. It can be seen that RMI, NEASA and MISA once again submitted membership reports in 2020. However, their reports were not for the period 1 July to 30 June, as in previous years, but in respect of 31 December 2019.

28. Against this background I turn to consider the central questions referred to in paragraph 12 above. Given the number of parties to the dispute, it is inevitable that the same ground will be traversed by different parties, albeit at times in somewhat different terms. To avoid repetition I seek to confine the analysis to the essence of each issue rather than dealing separately with each party's formulation thereof.

IS NEASA A PARTY TO MIBCO?

29. NUMSA argues that NEASA cannot be a party to MIBCO because it does not meet the representivity criterion implicitly set by clause 5.2.1 of MIBCO's Constitution – that is, that employer organisations must represent at least 5% of all employers within MIBCO's jurisdiction and, if it falls below this level, its membership ceases.[17]

30. NUMSA states that NEASA's failure to meet the 5% criterion as at 30 June 2018 is demonstrated by the Ngubane report or, alternatively, by MIBCO's monthly membership statistics from August 2018 to May 2020.[18] I deal with these two measurements in turn.

The Ngubane report

31. RMI and MISA reject the validity of the Ngubane report on various grounds. NUMSA has identified five grounds relied on by RMI,[19] which largely overlap with the reasons given by MISA.[20] I summarise the grounds as follows:

    31.1. Ngubane did not carry out its mandate;

    31.2. The report is not final;

[17] See Ruling dated 3 June 2020. Clause 5.2.1 reads: "The applicant must represent at least 5% of all employers or employees engaged or employed in the sector and area as defined in 2.12 hereof."
[18] The significance of August 2018 is that an improved computerised system for administering MIBCO's membership base became operational in that month.
[19] RMI Closing Submissions paras 18 to 46.
[20] MISA Written Submissions paras 6 to 23.

31.3. Ngubane audited parties' membership as at the wrong date;

31.4. Implementing the report would be contrary to MIBCO's Constitution; and

31.5. The MGB decided on further steps to resolve the objections raised by RMI and NEASA before the AGM.[21]

32. To this, MISA adds that the Ngubane report does not demonstrate in a factual sense that NEASA failed to meet the 5% threshold as at 30 June 2018.[22]

33. These six grounds in my view cover all relevant aspects and I shall consider the issue under these headings.

A. ***Did Ngubane carry out its mandate?***

34. This issue was canvassed at great length and formed a major focus of the proceedings. It is also central to the award.

35. The members of employer organisations consist of businesses.[23] In essence, the dispute relates to the fact that RMI's method of identifying a business for purposes of RMI membership differs from the method used by MIBCO, and that Ngubane followed MIBCO's method.

36. The difference is exemplified by the phenomenon of "duplicates". In assessing the membership of employer organisations, MIBCO allocates a membership number per employer or business linked to the premises where the business is carried on. Where two alleged businesses share the same premises, these will generally be regarded as "duplicates" and counted as a single business although, in exceptional cases, two independent businesses may operate from the same address. Thus, in the case of RMI Ngubane counted 501 duplicates and in the

[21] Draft MGB Minutes, 10 October 2019: RMI Bundle, page 75. See also page 74.
[22] MISA Written Submission, paras 24 to 34.
[23] Various other terms are also used, such as "establishments". For the sake of simplicity I refer to "business" throughout.

case of FRA it found 31 duplicates. Ngubane also found 267 RMI members and 40 FRA members with no MIBCO membership numbers.[24]

37. RMI's Chief Operations Officer, Mr Schoeman, testified that in many cases the "duplicates" were in fact separate businesses which should have been counted as such. He also testified that a business with different branches which should be counted as separate businesses are in some cases given a single membership number because MIBCO levies are paid in a lump sum on behalf of all branches. The result, according to RMI, is that by following MIBCO's method based on membership numbers Ngubane undercounted its membership by approximately 10%. The report is thus incorrect and, by providing an incorrect report, Ngubane failed to execute its mandate.

38. On the other hand MIBCO's Information Technology and Business Intelligence Manager, Mr van Zyl, stated that he believed MIBCO's membership statistics to be accurate and was perturbed by the claim that the same membership number could be allocated to multiple employers.[25] While conceding under cross-examination that the possibility could not be excluded, it was evident that he did not regard it as a widespread phenomenon. A much-cited example of alleged undercounting by MIBCO was Autozone, an RMI and NEASA member with 230 branches which, according to Mr Schoeman, was counted as one.[26] However, both Mr van Zyl[27] and Ms Scheepers,[28] who is responsible at MIBCO for liaising with party organisations about queries with regard to verified membership figures, testified that this was not the case.

39. Correctness in this context cannot be equated with mathematical accuracy, nor was this required of Ngubane. While the letter of engagement erroneously refers to the University of Venda instead of MIBCO as the client,[29] it is evidently a standard letter based on the International Standard on Related Services 4400, *Engagements to Perform Agreed-upon Procedures Regarding Financial*

[24] RMI Bundle, page 68.
[25] Transcribed Record 1, page 53 lines 1 to 6.
[26] Transcribed Record 1, page 102 lines 8 to 21.
[27] Transcribed Record 1, pages 41 line 15 to 42 line 5.
[28] Transcribed Record 2, page 8 lines 13 to 25.
[29] RMI Bundle, page 70.

Information[30] to which it expressly refers. What this standard requires in such engagements is –

(a) "Integrity;

(b) Objectivity;

(c) Professional competence and due care;

(d) Confidentiality;

(e) Professional behaviour; and

(f) Technical standards."[31]

40. The letter of engagement stipulates that the verification exercise is not an "audit".[32] Even in the case of audits, however, the relevant technical standard requires auditing firms to provide clients with "reasonable assurance" in respect matters under investigation, which is defined as "a high, but not absolute, level of assurance".[33]

41. The letter of engagement not only gives no warranty of absolute accuracy but states explicitly that "no assurance will be expressed". Read with the report, it conveys that factual findings made on a basis of "professional competence and due care" will be presented for MIBCO to use as it sees fit.

42. In assessing whether Ngubane met this standard, a number of factors should be considered:

    42.1. Almost 10 000 employer parties across the whole of South Africa belonging to RMI, FRA and NEASA required verification. Among these, 501 RMI members were found to be duplicates.[34]. It is unclear what Ngubane could have done to establish the true position in respect of each with absolute

[30] Available at https://www.ifac.org/system/files/downloads/b015-2010-iaasb-handbook-isrs-4400.pdf
[31] Ibid, pages 371-372.
[32] Despite this, parties have frequently referred to the verification carried out by Ngubane as an "audit", and where the term occurs in this award it is used in this non-technical sense.
[33] International Standard on Quality Control 1: Quality Control for firms that perform audits and reviews of financial statements, and other assurance and related services engagements, page 40 (available at https://www.ifac.org/system/files/downloads/a007-2010-iaasb-handbook-isqc-1.pdf)
[34] RMI Bundle, page 68.

certainty short of inspections *in loco.* Ngubane's terms of engagement, however, did not provide for anything more than a desktop exercise based on records provided together with engagements at the offices of MIBCO and those of its party organisations.

42.2. There are conflicting views as to the manner and thoroughness with which Ngubane went about its task of engaging with parties in analysing data, addressing queries and rectifying errors. Whereas RMI found the process less than adequate, FRA did not.[35] The investigation extended over the better part of a year. After issuing a draft report in March 2019, Ngubane engaged in further consultations with parties that had queries and produced a second draft report in June 2019 before submitting its final report on 22 August 2019. The evidence shows that changes were made to its original findings in the course of these engagements and, in the case of RMI, its membership number was adjusted upwards. Mr Schoeman stated that Ngubane "attempted to rectify the problem that arose with the original audit, hence the increase in numbers".[36] It is not possible on the available evidence to conclude that Ngubane failed to act with professional competence and due care in its overall conduct of the exercise.

43. The crux of RMI's claim, as noted above, is that Ngubane erred in applying the criteria relied on by MIBCO rather than those of RMI in identifying RMI members, thus producing inaccurate results and failing to execute its mandate. Here, too, different factors should be considered:

43.1. Allowing for errors in its verification process, which MIBCO readily concedes and seeks to correct as explained by Mr van Zyl and Ms Scheepers, there is no clear indication of the prevalence or extent of any inaccuracies in membership numbers that may have persisted. In particular, there is no clear evidence that such inaccuracies are substantial enough to justify discounting MIBCO's membership statistics in their entirety. Evidence was also led of errors in the membership totals of employers' organisations. I can find no basis for concluding that, on a balance of probabilities,

[35] Compare Transcribed Record 1 pages 126 line 5 to 127 line 4; Transcribed Record 2 page 51 lines 7 to 25.
[36] See, e.g., Transcribed Record 1 page 137 lines 10 to 14.

membership numbers provided by the employers' organisations are inherently more accurate and must be preferred over MIBCO's verified figures.

43.2. Specifically, it is unclear whether the external auditors appointed by RMI, FRA and NEASA investigated the issues that have been central to this dispute, namely whether certain activities included by MIBCO under a single membership number should be counted as separate members or businesses as claimed by RMI. A letter from RMI's auditors entered as part of the record deals in detail with verification of the payment of membership fees but does not shed light on the validity or otherwise of the criteria used for defining members as opposed to MIBCO's criteria.[37]

43.3. Given that all three employers' organisations were assessed in the same way and were found to have duplicated members or members without MIBCO membership numbers on their books, it is noteworthy that RMI's concern is not shared by FRA. Instead, FRA endorses the Ngubane report whereas RMI's attack on it is supported by MISA, a trade union which cannot be expected to have detailed knowledge of employers' internal business arrangements.

43.4. Even if there were differences between MIBCO's membership criteria as opposed to those of party organisations, any verification must still involve using one or the other as point of reference. Ngubane's letter of engagement does not deal with the issue expressly but does record Ngubane's task as including the following:

> "Verify the members in the premises of the parties and confirm they qualify as members <u>in terms of the Council's constitution.</u>"[38]

This suggests that Ngubane was required to use MIBCO's frame of reference rather than those of individual party organisations. The alternative – accepting the validity of party organisations' statistics as a given – would have rendered the Ngubane process largely pointless: it would have meant little more than double-checking the work of each organisation's auditors and, in all

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[37] MIBCO Bundle, pages 83 to 85.
[38] RMI Bundle, page 70; emphasis added.

probability, arriving at the same disputed numbers that lie at the root of this dispute.

43.5. The Ngubane report also indicates that Ngubane considered itself bound to follow the system used by MIBCO in order to execute its mandate. The much-quoted second challenge identified by Ngubane reads as follows:

> "One MIBCO number used for more than one sites/organization therefore had to count them as one member for MIBCO purposes" (underlining added).

This is also in line with the Department of Labour Circular of 2014, which provides inter alia the following criteria for companies to be counted as members of an employer's organisation:

> "That company must be in !he list of the registered firms according to the Council database and must have a Firm Number"[39] (underlining added).

As noted already, the AGM resolution that set the Ngubane process in motion expressly stipulated that the external auditor must use the criteria set out in the circular from the Department of Labour "as the starting point".[40]

44. Leaving aside the merits or demerits of different systems, which are not the issue here, what emerges is that RMI and MISA are in essence blaming Ngubane for doing what it was bound to do. The evidence showed that different organisations have different membership criteria, which may diverge from MIBCO's criteria, and that RMI has questioned the audited figures submitted by FRA. In these circumstances, it was to be expected that an external audit based on uniform criteria might lead to outcomes in conflict with the parties' internal systems.

45. It must also be recognised that, in a dispute such as this, no outcome is likely to satisfy all parties. It is not the first time that MIBCO has undertaken a costly, time-consuming exercise to resolve the membership issues on an objective basis. The evidence indicates that the KPMG report arrived at similar findings and was

[39] RMI Bundle, page 63.
[40] Para 19 above.

rejected by RMI for similar reasons. In the present matter, RMI's witness testified in almost so many words that RMI would not accept any finding by an external auditor to be "correct" or binding unless it agreed with it.[41]

46. What RMI appears to be contending is that, notwithstanding the above, Ngubane should have used RMI's system for counting its members instead of MIBCO's system. This much is indicated by its claim that membership must be determined based on "actual membership numbers" and "membership as confirmed by the external auditors of the respective parties" as opposed to membership numbers allocated by MIBCO based on returns submitted to MIBCO".[42]

47. Yet Mr Schoeman, testifying for RMI, accepts that after submission of parties' audited membership figures "MIBCO will then verify that membership".[43] Either this is a contradiction in terms, or "verify" is understood as an exercise more akin to double-checking data that has been signed off by auditors in compliance with professional standards.

48. In my view, RMI's position amounts to claiming that MIBCO must desist from verification of membership figures based on its own system of membership numbers and/or must do so only in the formal sense outlined above. I do not find that a case has been made out for ruling to this effect.

49. Verification in my view must involve going beyond the <u>number</u> of members in good standing to verify also that the <u>criteria</u> used for identifying members are consistent with the criteria applied by MIBCO across different organisations. If this were not so, party organisations could inflate or deflate their membership by changing their membership criteria.[44]

50. The Scope Statement further records that subsequent to 2013 "it was agreed that the Council should formally audit the figures of the parties thereafter the seat allocation should follow the principle of proportional representation every three year or when a need arise" (sic).[45] What is meant by "audit" is not explained.

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[41] See passages cited in NUMSA Heads of Argument, paras 24 and 25.
[42] RMI Closing Submissions, para 72.1.
[43] RMI Closing Submissions, para 52.
[44] See also the purpose of the Scope Statement (fn 7) above: RMI Bundle, page 34.
[45] RMI Bundle, page 36.

However, at very least I understand it to mean a substantive interrogation of parties' membership figures based on criteria determined by MIBCO rather than the criteria adopted by each party.

51. The issue is considered further in relation to the interpretation of clause 6.1.3 of the MIBCO Constitution (paragraphs 115 and following below).

52. MISA adds that MIBCO's instructions to Ngubane were not to "eliminate" duplicates (i.e. not count them) and that, by eliminating duplicates, "Ngubane did not comply with their mandate".[46] The argument is based on the fact that those words do not occur in Ngubane's letter of engagement or in the MIBCO documents and minutes referred to by MISA.

53. I find the argument singularly unconvincing. It must go without saying that no auditor can "verify" membership numbers if, in the auditor's view, members are counted twice. Doing so would distort the total and the auditor, who is bound to exercise due care, would surely be remiss for ignoring it. It is trite that, when interpreting a legal term, preference must be given to a meaning that is business-like and sensible.[47] I find the meaning ascribed to "verification" as excluding the elimination of duplicates to be neither sensible nor business-like.

54. Based on the available evidence, I find that Ngubane did what could reasonably have been expected within the confines of its terms of engagement.[48] It is relevant also that Ngubane was acting on MIBCO's instructions, and MIBCO has neither challenged the report nor given any indication that it considers the report defective. I therefore cannot find that, on a balance of probabilities, Ngubane failed to carry out its mandate.

Is the report final?

55. This question is important because the continuing applicability of the status quo clause[49] depended on it. Based on its plain meaning, the clause must be interpreted as providing that the status quo would continue up to the time that the

[46] MISA Written Submissions, para 22.
[47] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).
[48] Transcribed Record 2, page 108 lines 18 to 25.
[49] See para 19 above.

external audit was finalised, and the audit would be finalised when the final report was submitted.

56. It is common cause that the Ngubane report of 22 August 2019 was its final report in that Ngubane had completed its work and would not be making any further changes or engaging further with the parties.[50] Despite this, RMI and MISA argue that it is not truly final because the audit is not yet complete.

57. Two main reasons emerge for this argument. First, the report notes that certain "challenges" were experienced while doing the audit and makes recommendations as to how these could be addressed. Second, MIBCO's Ad Hoc Advisory Committee (AAC) and MGB resolved on further internal processes to "address all areas of concern" and "find an amicable way to resolve this matter before the next AGM".[51] The MGB also spoke of steps "to allow this process to be brought into finality" [*sic*].[52]

58. The *first reason* is unsustainable. There can be few complex tasks where no challenges are encountered, and diligent professionals will seek to assist their clients in avoiding those challenges in future. This cannot mean that every mandate remains incomplete until any unforeseen challenges have been eliminated. Yet this appears to be the meaning that RMI and MISA are ascribing to "finalised". However, "finalising" the audit in this sense is not mentioned in Ngubane's terms of engagement. By submitting its report on 22 August 2019 Ngubane fulfilled its obligations to MIBCO's satisfaction and, with that, the audit was complete.

59. This is not altered by the fact that Ngubane makes certain recommendations to address the challenges. In particular, it recommends that parties must consider registering each site independently to ensure consistency with MIBCO's database as well as ensuring "the accurate representation of the party in the council".[53] This does not amount to stating that the report is inaccurate or incomplete. Given the standard of diligence required of auditors, it is to be

[50] See, e.g., RMI Closing Submissions, para 23.
[51] RMI Bundle, pages 74 and 75.
[52] RMI Bundle, page 75.
[53] RMI Bundle, page 68.

expected that any inaccuracies will either be corrected or expressly identified. A general statement contained in a recommendation can more probably be interpreted as advice on how to avoid any recurrence of the problem in the future by placing the accuracy of membership figures beyond dispute.

60. Ngubane also does not state that its report is conditional on its recommendations being implemented; indeed, it would hardly have made sense to do so. A report is what it is, and recommendations may or may not be acted upon. It could not have been the parties' intention that Ngubane's mandate would remain unfulfilled until such time as MIBCO had implemented all its recommendations.

61. The *second reason* is also unconvincing. The actions of the AAC and MGB after presentation of the final Ngubane report cannot alter the nature of that report. The status quo clause clearly reflected an intention to resolve a long-standing dispute by accepting the final and binding nature of the external auditor's report. Given the parties' opposing positions, it was always to be expected that one side or the other would be unhappy with the outcome. In the event, RMI and NEASA[54] were reluctant to accept its findings. However, sooner than considering steps to enforce what should have been a binding outcome, MIBCO's governing bodies were at pains to seek an amicable solution. This is reflected, among other things, by the manner in which the AAC and MBG referred the problem back and forth to each other to find a way forward.[55] But that did not make the report less final.

62. A sensible and business-like interpretation of "finalise" in this context leads to the conclusion that it must be given its ordinary meaning, that is, completion of the agreed task. It cannot be accepted that an audit remains complete for as long as any affected party questions the outcome (except, of course, to the extent that it can be shown that the auditors failed to perform their legal duties). For the reasons already given I do not find that RMI and MISA have established that Ngubane failed to finalise its audit or to deliver a final report.

C. ***Did Ngubane prove that NEASA fell below the 5% threshold?***

[54] It is unclear at which point MISA joined RMI and NEASA in opposing the report.
[55] RMI Bundle, pages 74 and 75.

63. It is convenient at this point to examine whether the Ngubane report did, as NUMSA claims, demonstrate on a balance of probabilities that NEASA represented fewer than 5% of the total number of employers (party and non-party) in the sector as at 30 June 2018.

64. NUMSA notes that the MIBCO statistics reflect a total of 21 745 employers in the industry as of June 2018. According to the Ngubane report, NEASA had 948 members as at 30 June 2018. This represents 4,4% of 21 745.[56]

65. RMI, on the other hand, argues that Ngubane makes no finding as to the total number of employers in the industry. Its report therefore does not indicate what percentage of employers NEASA represented and does not show that it was below 5%.[57]

66. I do not find this argument material. The issue was not whether Ngubane had found NEASA to represent less than 5% of the total number of employers but whether, based on its membership as verified by Ngubane, NEASA's membership was below the 5% threshold. This is a very simple calculation (as indicated in paragraph 64 above) which Ngubane was not asked to make.

67. One purpose of appointing Ngubane was to resolve the disputed question of NEASA's continued membership. The fact that Ngubane was not asked to make the division sum is explained by the fact that, once NEASA's membership figure was established by Ngubane, the parties could do it themselves. They had done the same when resolving to admit NEASA based on its membership figure as a percentage of the total number of employers at the time according to MIBCO's statistics. Ngubane was merely asked to ascertain NEASA's verified membership figure as at the given date, which could then be turned into a percentage of the total employer number. To suggest that the question of NEASA's membership percentage remains unanswered because of this is, in my view, artificial and unsustainable.

[56] NUMSA Heads of Argument, para 37. MISA erroneously uses NEASA's June 2018 membership figure in calculating NEASA's representivity as at 31 December 2019: Written Submissions, para 29.
[57] RMI Closing Submissions, paras 6 to 8.

68. MISA disagrees with NUMSA's calculation on two grounds. It claims that (a) according to FRA's witness, Mr Sibiya, MIBCO's total number of employers "was not reliable as it had to be adjusted", and (b) MIBCO's number of NEASA members for June 2018 represents more than 5% of its total number of employers.

69. These arguments are more substantial but ultimately no less problematic.

70. The first ground, even assuming that the evidence of Mr Sibiya on this point is admissible, runs into six difficulties:

    a. It is no more than an opinion from a non-expert witness which, as such, can hardly be treated as proof;

    b. It is contradicted by the – in my view more authoritative – testimony of Mr van Zyl as to the accuracy of MIBCO's statistics, referred to in paragraph 38 above;

    c. The latter evidence, and that of Ms Scheepers, explains in detail the process of "adjustment" which essentially comes down to MIBCO's internal verification process aimed at rendering the numbers more "correct";

    d. Mr Sibiya cannot be understood as saying that MIBCO's membership numbers must be rejected out of hand but is evidently referring to that same process of internal verification; and

    e. Given that the employer total in question is one provided in June 2020 in respect of June 2018, and given that the numbers are updated on a monthly basis, it seems probable that the total for June 2018 must at this stage represent the "adjusted" number – i.e., that arrived at after carrying out the verification and corrections described by the various witnesses, rather than an "uncorrected" total.[58]

71. The second ground does not address the present issue. The question is not whether <u>MIBCO's</u> membership total for NEASA as at June 2018 represented more than 5% of the total number of employers at that time. As MISA

[58] MISA's Written Submissions suggest a similar view: see para 27.

demonstrates, it did. However, the question is whether NEASA's membership total as verified by Ngubane represented 5% of the total number of employers. As seen in paragraph 64 above, it did not.

72. For these reasons I find that MISA's arguments cannot be accepted.

73. Three further considerations reinforce my finding. First, for NEASA to reach the 5% threshold would have required an additional 140 members over and above those whom Ngubane was able to verify. Even if the numbers arrived at by Ngubane are not mathematically accurate, there is insufficient evidence for concluding that, on a balance of probabilities, Ngubane made an error of this magnitude. NEASA itself withdrew from the matter without providing such evidence.

74. Secondly, RMI's argument suggests that any errors made by Ngubane amounted to underestimating RMI's membership and, had such errors not been made, the total number of employers in the sector should have been higher. If so, the difference between NEASA's verified membership and the number required to meet the 5% threshold would have been correspondingly greater. The argument presented by RMI and MISA therefore does not assist in shifting the balance of probabilities in their favour in resisting NUMSA's claim.

D. ***Ngubane audited parties' membership as at the wrong date***

75. RMI states that Ngubane "conducted the verification exercise on the parties' membership figures as at 30 June 2018", that "the relevant date" for such an exercise is 31 December in terms of clause 6.1.3 of the MIBCO Constitution and that "[a] verification of figures as at 30 June is thus not constitutionally permissible".[59]

76. On this issue, too, much conflicting evidence was led and, again, I shall confine myself to what I regard as the decisive aspects.

[59] RMI Closing Submissions, para 28. See also paras 51 to 62; MISA Written Submissions, para 57.

77. The first and most obvious question is why, if verification as at 30 June was not constitutionally permissible, the parties with apparent unanimity[60] instructed Ngubane to carry it out as at that date and not 31 December.

78. The Pre-Arbitration Minute of the NUMSA Disputes records the following as common cause:

    78.1. MGB on 15 February 2018 resolved that external auditors be instructed to verify the parties' representation as at 30 June 2018;[61]

    78.2. On 17 May 2018 a Committee of Party Officials meeting took a resolution to further the process, again with apparent unanimity;

    78.3. On 28 August 2018 MGB authorised the President of MIBCO to sign off on the letter of engagement for Ngubane to conduct the verification as at 30 June 2018;

    78.4. Ngubane's letter of engagement recorded the date for "the verification of parties' representativity relating to the Motor Industry Bargaining Council" as at 30 June 2018.

79. It thus appears that the argument that this process was constitutionally invalid is one that occurred to RMI and MISA after the event. Nevertheless, if it is well-founded it must be given due weight.

80. I do not consider it to be well-founded. The interpretation of clause 6.1.3 of the MIBCO Constitution, which RMI and MISA rely on, is considered more fully later on. At this point it is sufficient to note its wording. It states that the Council

    "[s]hall review the number of representatives on the Council as at 31 December each year based on the verified membership of the employer organisations and trade unions in the Regions respectively and as confirmed by the individual Parties to the Council via their external auditors".

81. Without going into further detail, it is clear that the Constitution requires the Council only to review <u>the number of representatives on the Council as at 31</u>

[60] MISA Written Submissions, para 41.
[61] Pre-Arbitration Minute, paras 1.4.1 and 1.4.7.

December. It does not state when the review itself must take place, nor does it state as at which date party organisations must verify their membership for the year in question. It also does not prohibit verification as at any date. The probable reason why the parties chose 30 June as the date of reference for Ngubane's verification is because it is the end of MIBCO's financial year and the date as at which membership figures were calculated in the past.[62]

82. RMI's and MISA's argument implies that, because clause 6.1.3. exists, any other form of verification is implicitly prohibited. As noted above, this flies in the face of the parties' conduct. Furthermore, there is no legal basis for the proposition that any action not expressly required by MIBCO's constitution is by implication prohibited. This can only be the case if that action is in conflict with a requirement of the constitution. However, I see no conflict between clause 6.1.3, sensibly interpreted, and the appointment of Ngubane to verify the parties' membership.

    82.1. Clause 6.1.3 in essence requires only that the parties' membership figures must be audited. It does not say when or how. For example, nothing would have prevented the parties, had they so wished, from appointing the same firm (such as Ngubane) to conduct an audit of each organisation's membership, whether on 30 June or a different date, for purposes of the review required by clause 6.1.3.

    82.2. However, the issue does not arise. It is self-evident that the Ngubane verification exercise was distinct and separate from the procedure set out in clause 6.1.3 and did not replace it. It was a once-off exercise that was decided on because the normal procedure had broken down and was intended to resolve the dispute which had caused it to break down. Once this was done, the normal procedure could resume. Achieving this was clearly in the interests of MIBCO and, at the time, all parties clearly saw it as such.

E. *Implementing the report would be contrary to MIBCO's Constitution*

83. This argument can be paraphrased as follows: assuming it was permissible for Ngubane to verify the parties' membership as at 30 June 2018, it was not permissible to treat the outcome as final and binding because doing so would be

[62] MISA Pre-Arbitration Minute, paras 1.33.3 to 1.33.5.

in breach of MIBCO's Constitution. Specifically, RMI argues that "the Ngubane report could only have been accepted as final and binding by MIBCO in the event of a constitutional amendment to such effect".[63]

84. On this issue, too, the opinions of various witnesses were placed in evidence as to the meaning of the relevant provisions. While instructive, such opinions cannot be determinative of what must be an objective exercise of legal interpretation. What follows is an attempt at giving a sensible and business-like meaning to the disputed principles.

85. RMI is correct in arguing that a constitutional amendment would be required to substitute the process set out in clause 6.1.3 with a new process.[64] <u>Permanently changing clause 6.1.3</u>, however, is not the same as engaging in a <u>once-off deadlock-breaking exercise</u>. The evidence does not remotely show that the Ngubane verification exercise was intended to replace clause 6.1.3. Although such a process was contemplated and may have been agreed <u>in principle</u> among the parties, it is clear that the necessary action to implement it had not been taken.

86. This leaves the question why a constitutional amendment should be necessary before the Ngubane report could be given final and binding effect even as a once-off exercise.

87. Once again there is the problem that this argument is raised long after the event. It is common cause that MGB decided on 15 February 2018 that "[the] that report issued by the independent auditor must be final and binding on all parties".[65] Once again, the entire process was conducted on this basis with the apparent assent of all parties. The objection to this fundamental aspect of the verification process was not raised until after Ngubane presented its report.

88. But, again, the real obstacle is that there is simply no legal basis for the proposition that parties are precluded from agreeing on a dispute resolution process with a final and binding outcome. Nothing in the MIBCO Constitution

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[63] RMI Closing Submissions, para 25.
[64] RMI Closing Submissions, para 59.
[65] Pre-Arbitration Minute of the NUMSA Disputes, para 1.4.2.

prescribes the way in which disputes over facts, such as the facts which Ngubane was asked to verify, must be resolved. Given years of deadlock and refusal by parties to accept the outcome of the KPMG audit, MIBCO decided to seek a final and binding outcome based on a verification by an "independent auditor" and contracted with Ngubane to perform it.

89. Following the route of seeking a final and binding decision from a designated third party as an alternative to legal proceedings is a widely-used mechanism which is legally unexceptionable. For example, ***IMATU v SA Local Government Bargaining Council & others***[66] an agreement to establish a re-grading forum in a municipality. provided that unanimous decisions of the forum would be final and binding. Pillay J held that this meant precisely what it said and that the parties had agreed to relinquish the right to approach the council with re-grading disputes. Similarly, chairpersons of disciplinary tribunals are frequently vested with the power to make final and binding determinations which can only be reviewed on grounds of irrationality, unreasonableness or procedural unfairness.[67]

90. Resorting to this mechanism is not confined to labour dispute resolution. Wilcox and Laubscher explain the meaning of "adjudication" in the context of the architectural profession as "an accelerated form of ADR whereby a neutral or independent third party makes a binding determination on the dispute, unless it is overturned by an arbitrator"[68]. Very much the same can be said of the basis on which Ngubane was appointed.

91. RMI also suggests that MGB *decided* that a constitutional amendment was required before the external auditor's determination could become "final and binding". However, there is little or no evidence of this. The mere fact that a number of constitutional amendments, including that referred to in paragraph 85 above, were under consideration at the time and that plans existed to hold a

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[66] [2010] 5 BLLR 536 (LC).
[67] Hendricks v Overstrand Municipality and another [2014] 12 BLLR 1170 (LAC); SAMWU obo Mahlangu v SALGBC & others [2011] 9 BLLR 920 (LC).
[68] T. Wilcocks & J. Laubscher "Investigating alternative dispute resolution methods and the implementation thereof by architectural professionals in South Africa" *Acta Structilia* 2017 24(2) 146 at 154.

workshop on the subject does not amount to a suspensive condition. On this point I agree with NUMSA that

> "[i]f the parties had in fact resolved on something as significant as a suspension of the effect of the external audited process pending constitutional amendment, this would have appeared in the minutes, particularly once they were approved".[69]

92. RMI's and MISA's interpretation of the MGB resolution of 15 February 2018 would give the Ngubane report no more than an advisory effect. In my view this would have been incompatible with MIBCO's purpose in appointing Ngubane. Having been unable to reach agreement on the determination of parties' membership for five years and having gone to great expense to appoint a firm of auditors to produce a "final and binding" outcome, RMI and MISA suggest that that outcome should once again be made subject to approval by parties with starkly opposing views. In my view it cannot reasonably be supposed that ongoing negotiations, based on the hotly-contested findings of the Ngubane report, should be or ever was seen as the proper outcome of the process set in motion on 15 February 2018.

93. It was suggested in passing that approval by MIBCO was a necessary precondition for giving effect to Ngubane's findings. I also cannot accept that this was contemplated. Given the balance of voting power on the council and that the composition of the council was at the centre of the dispute, this would have amounted to ensuring that Ngubane's findings would not be implemented and would leave the dispute unresolved, most probably at an even more acrimonious level than before.

94. However, I need make no finding on this point since MGB pre-empted the problem by deciding that Ngubane's determination would be final on binding. In ***NUM & another v Tokiso Dispute Settlement (Pty) Ltd & others***[70] it was held that the term "final and binding" in a settlement agreement denoted the parties'

[69] NUMSA Heads of Argument, para 34.2.
[70] [2010] 11 BLLR 1195 (LC).

intention to finally end the dispute. There is no reason why it should not mean the same in an agreement to appoint an external party for this very reason.

F. *The MGB decided on further steps to resolve the objections raised by RMI and NEASA*

95. The substance of this question has already been dealt with.[71] RMI and NEASA, and at some point MISA, were unhappy with the report and reluctant to accept its findings. MIBCO's governing bodies did not take steps to enforce what should have been a binding outcome. The reasons for this were not explained in detail but, from the available evidence, it is possible to understand the factors that probably played a role.

96. On the one hand, MIBCO had experienced an acrimonious and prolonged dispute over a five-year period which had, literally, paralysed some of its important functions such as the ability to hold an AGM. On the other, given the balance of voting power on the council, any attempt at seeking council approval for any course of action would have run into the same divisions that the Ngubane process had been intended to resolve. Furthermore, given the disputed nature of the council's composition, any decision would run the risk of legal challenge which would further impair MIBCO's ability to perform its role.

97. In my view, it was entirely to be expected that MIBCO and MGB would seek to avoid entering these waters and would go to great lengths to avoid a damaging confrontation. But this says nothing about the <u>status</u> of the Ngubane report, which was a matter between MIBCO and Ngubane, and could not have the effect of changing a final report into a provision one. To read that into the conciliatory efforts by the MGB and AAC would be to retrospectively alter Ngubane's mandate to require of them to produce an outcome that would be acceptable to all parties. The fact that the parties had conflicting positions was the very reason for appointing Ngubane. Even if rejection of its report is couched in terms of an attack on the method that was followed as the stated reason for rejecting the outcome, I cannot – for reasons already given – find a basis for concluding that Ngubane had failed to do what it had been required to do.

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[71] See para 61 above.

98. That being so, the submission of Ngubane's final report was the act that terminated the applicability of the status quo clause. The subsequent actions of the MBG and AAC could not alter that. The fact that going the extra mile failed to produce an agreed solution is the reason for the present arbitration proceedings as an alternative means of resolving the issue.

99. I therefore find no basis for rejecting the validity or finality of the Ngubane report. I further find that it demonstrates on a balance of probabilities that as at 30 June 2018 NEASA failed to meet the required threshold for membership of MISA and thereby ceased to be a member of MIBCO.

The MIBCO membership statistics

100. NUMSA claims, in the alternative, that MIBCO's monthly membership statistics show that NEASA's membership was consistently below 5% of the total number of employers in the sector as at August 2018 and all subsequent months up to and including May 2020. In the event that I was wrong in my finding in respect of the Ngubane report, set out in paragraph 99 above, I shall deal with the alternative claim. However, for purposes of this award nothing turns on whether NEASA's membership ceased as from 30 June 2018 or August 2018, since the remedy which it contemplates is prospective.

101. To the extent that the MIBCO statistics demonstrate what NUMSA claims they demonstrate, NUMSA's case is unassailable. I also note that at the time of NEASA's admission MIBCO's statistics were used as a point of reference for verifying NEASA's claimed membership without any apparent objection from any of the parties.[72] However, both RMI and MISA now object to the MIBCO statistics on a number of grounds.

102. RMI's objection is, in essence, that MIBCO's membership statistics represent figures arrived at after verification of the membership figures submitted by the parties rather than unverified figures. For reasons already given I cannot find that RMI's and MISA's objections justify a finding that MIBCO's membership statistics should be found invalid and substituted with parties' unverified or claimed

[72] Transcribed record 1, page 304 lines 8 to 23; Transcribed Record 2, pages 55 line 13 to 56 line 9.

membership numbers.[73] RMI's revival of the argument in the present context can lead to no different outcome.

103. In any event, NUMSA's claim is not that NEASA's claimed membership is less than 5% of the total number of employers but that the membership as verified by MIBCO was less than 5%. In addition, there is no evidence of NEASA's claimed membership for the months in question apart from December 2019. The point is therefore abstract.

104. MISA similarly starts from the uncontroversial fact that NEASA's membership figures in question "are MIBCO's figures for NEASA, and not NEASA's own figures",[74] a point that has already been dealt with. MISA further questions the reliability of MIBCO's figures on a number of grounds, namely (a) the sensitivity of MIBCO's computer programme; (b) the difference been NEASA's claimed membership figure and MIBCO's verified membership figure for NEASA as at December 2019; and (c) RMI's challenge to MIBCO's method of counting membership. These grounds are briefly considered in turn.

105. The argument concerning the sensitivity of MIBCO's computer programme is inconclusive. The witnesses spoke of it as a potential problem of which they are aware. This suggests that it is likely to be taken into account by those responsible for verifying queries as to membership numbers. Both examples of potential problems are preceded by "if".[75] It cannot be concluded on this hypothetical basis that MIBCO's membership statistics are necessarily flawed, let alone fatally flawed.

106. The difference between NEASA's claimed membership figure and MIBCO's verified membership figure for NEASA as at December 2019 is undisputable.[76] The question is what conclusions can be drawn from this.

106.1. MISA correctly points out that no evidence was led that the number submitted by NEASA's auditors was wrong. By the same token,

[73] See paras 38 to 42 and 70 above.
[74] MISA Written Submissions, para 26.
[75] MISA Written Submissions, para 28.
[76] MISA Written Submissions, para 29.

notwithstanding the attacks dealt with above, no convincing evidence was led to show that MIBCO's verified figures were wrong.

106.2. The letter from NEASA's auditors submitted in evidence merely gives a membership figure and no indication of how it was arrived at. This is in sharp contrast to the letter from RMI's auditors, referred to above, which runs to three pages without establishing the correctness of RMI's criteria for membership. The lack of detail in the letter from NEASA's auditors increases the difficulty of concluding on this basis that NEASA's figure is correct and MIBCO's is wrong.

107. Ms Scheepers, who is responsible at MIBCO for liaising with party organisations about problems with regard to verified membership figures, testified that, while parties regularly raise queries, she had no recollection of NEASA doing so either in respect of the contested MIBCO figure for December 2019 or for the months preceding December.[77]

108. The point is significant to the extent that NEASA's membership figures, according to MIBCO, remained practically the same from August to November 2019 and in a similar range for the preceding year.[78] If the verified MIBCO number consistently understated what NEASA believed its true membership to be, one would have expected this to have been conveyed to Ms Scheepers in the course of her interaction with parties. There is no clear evidence that this happened. On the other hand, the information which Ms Scheepers provided under cross-examination of her interaction with NEASA gives some indication why MIBCO's verification process could reasonably have resulted in a downward adjustment of NEASA's membership figures.[79]

109. MISA's attack on the accuracy of MIBCO's membership statistics is further qualified by the readiness with it relies on MIBCO's figure for the total number of employers in the sector as at December 2019.[80] In the absence of evidence as to an error in a specific instance, it is hardly consistent to reject MIBCO's statistics

[77] Transcribed Record 2, page 7 lines 12 to 16 and page 9, lines 7 to 10.
[78] NUMSA Heads of Argument, Annexure A.
[79] Transcribed Record 2, pages 14 line 20 to 15 line 11; page 16 lines 14 to 18.
[80] MISA Written Submissions, para 29.4.

for one purpose and accept them for another. I am left with the impression that, when all is said and done, MIBCO's statistics were not considered entirely unreliable and that any inaccuracies, real or perceived, are unlikely to have been substantial.

110. I therefore see no basis for finding that, on a balance of probabilities, NEASA's figure for December 2019 was correct and MIBCO's was wrong or, *á fortiori,* that the difference in December 2019 provides any basis for concluding that NEASA's membership in the period since August 2018 was not below the 5% threshold.

111. MISA further argues that RMI's challenge to MIBCO's method of counting membership must first be resolved, "in order to ensure that MIBCO and employer parties count employer-members the same",[81] before MIBCO's membership figures can be relied on. Given MISA's own reliance on MIBCO's membership figures (see paragraph 109 above) and my findings in this regard, I do not find this argument convincing.

112. In my view, getting to a situation where MIBCO and all employer organisations "count employer-members the same" – in other words, apply the same criteria – is something for MIBCO to bring about and should do so as part of the resolution of this dispute, to which I shall return in conclusion. The problem is that at present they do not do so. This is the reason why NEASA's membership (and RMI's) is in dispute. Presenting part of the solution as a precondition for solving the problem is putting the cart before the horse.

113. MISA further argues that, even if it is found that NEASA has fallen below the membership threshold of 5%, MIBCO's AGM in 2017 decided that "the status quo with regards to representivity would remain until the validation process is resolved".[82]

114. In fact, the AGM resolved that "the status quo with regards to the current numbers of representivity will remain until the validation process is finalised".[83] I have already found that the validation process carried out by Ngubane was

[81] MISA Written Submissions, para 30.
[82] MISA Written Submissions, para 37.2 (erroneously numbered 36.2).
[83] MIBCO, Minutes of Sixty-Fifth (65th) Annual General Meeting, 9 November 2017, AGM.0049 (page 11).

finalised when its final report was submitted on 22 August 2019.[84] The argument therefore cannot succeed. However, it is directly relevant to the next issue to be considered.

115. MIBCO's membership statistics show on a balance of probabilities that NEASA fell below the 5% membership threshold in August 2018 and has remained there at least up to May 2020. There is no evidence to indicate if there has been any change in the situation since then.

Is MIBCO properly constituted?

A. ***The interpretation of clause 6.1.3 of the MIBCO Constitution***

116. Answering the question whether MIBCO is properly constituted starts with considering the meaning of clause 6.1.3 of its Constitution. The question is important not only for MIBCO but also in the bigger scheme of the LRA. Reference may be made to the provisions for the determination of the representivity of bargaining councils in terms of s 49(4) of the LRA, which is similarly effective for a fixed period. For this reason, as well as the extension of bargaining council agreements to non-parties in terms of section 32, accurate determinations of the membership of party organisations are essential.[85]

117. I have already dealt with the wording of the clause and its relationship to the Ngubane verification exercise.[86] I now briefly consider the further arguments that have been advanced.

118. RMI contends that clause 6.1.3 requires "confirmation of the individual parties' membership through their external auditors <u>as at 31 December of each year</u>".[87] This interpretation is mainly based on the opinion of its witness, Mr Schoeman, which is contradicted by the opinions of other witnesses, and is not supported by the wording of clause 6.1.3.

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[84] Paras 50 to 58 above.
[85] See also Department of Labour Circular 3/2014: Representivity and Verification of Council Figures: RMI Bundle page 59 and following.
[86] Paras 75 to 76 above.
[87] RMI Closing Submissions, para 52.

119. RMI also relies on the testimony of Mr van Zyl.[88] In fact, Mr van Zyl's evidence is difficult to follow since the question to which he is responding is unclear. The transcribed version reads:

> "[Question]: Are you aware that the parties have to sit in on a yearly basis their auditor membership figure? Do you know that?"
>
> "[Answer]: Yes, on the last day of December; every month."[89]

It is not apparent what precisely Mr van Zyl is agreeing with. It may be that he understands the question to refer to the indisputable fact that the council must "review the number of <u>representatives</u> on the Council as at 31 December". The connection between "membership figure" and "last day of December" is not explained. However, the point is peripheral since no opinion expressed by Mr van Zyl or Mr Schoeman can change the meaning of clause 6.1.3, to which I return below.

120. MISA correctly points out that clause 6.1.3 implies three steps, which I paraphrase as follows:[90]

120.1. The parties submit their audited membership figures to MIBCO annually;

120.2. MIBCO verifies the submitted figures;

120.3. Based on the verified figures, MIBCO reviews the numbers of representatives of the parties as at 31 December of that year.

121. MISA, however, goes on to argue that "MIBCO must review the parties' <u>membership numbers</u> at 31 December each year" and, based on this, that "parties must submit their membership figures as at 31 December".[91] In fact, there is no basis for this argument. Clause 6.1.3 makes no mention of any review of membership numbers nor of a date as at which the numbers must be determined. 31 December is simply the date as at which the determination of the number of

[88] RMI Closing Submissions, para 54.
[89] Transcribed Record 1, page 37 line 25 to 38 line 3.
[90] MISA Written Submissions, para 56.
[91] MISA Written Submissions, para 57.

representatives on the council, following the review, is deemed to become effective for purposes of the year ahead.

122. NUMSA correctly notes that "[t]he date of 31 December is linked to the review of representatives not the date of the audit by the party's auditors".[92]

123. FRA submits the most detailed breakdown of the application of clause 6.1.3, based on its submissions as to past practice. It can be summarised as follows:

    123.1. Parties determine their membership figures as at 30 June each year, which is confirmed by their auditors. The date of 30 June is described as "the agreed date" for this determination among the parties "for many years".[93]

    123.2. The audited figures are normally submitted in or about July or August.

    123.3. Next, MIBCO conducts a verification process to match the figures in each party's submission against its own database.

    123.4. Based on the outcome of the verification process, MIBCO then reviews the number of representatives on the Council At its AGM in November.

    123.5. The reviewed number of seats and representatives on the Council take effect as at 31 December.

124. It will be noted that, but for the dates, this interpretation broadly corresponds to MISA's interpretation. The evidence also suggests that 30 June, being the end of MIBCO's financial year, was the date on which parties had previously been accustomed to determining their membership figures for auditing.[94] To suggest that it was the "practice" to submit figures as at 31 December is not supported by the evidence. I can find no logical reason for the switch by RMI, NEASA and MISA to 31 December as of 2019 for the first time. It appears that no party organisation, let alone MIBCO itself, had previously interpreted clause 6.1.3 as requiring this and, though amendments have been mooted, it has not been amended. As it stands clause 6.1.3 does not, and never did, stipulate a date for the determination of parties' membership numbers.

[92] NUMSA Heads of Argument, para 31.
[93] FRA Heads of Argument, page 5.
[94] See paras 25 and 26 above.

125. I accordingly interpret clause 6.1.3 to mean the following:

125.1. Party organisations must determine their membership numbers annually and have the numbers audited.

125.2. The audited numbers must be submitted to MIBCO for verification. The purpose of verification is to ensure that the numbers match those in MIBCO's database.

125.3. Verification implies using objective criteria for determining which entities qualify as members and applying those criteria consistently to different organisations. This aspect is developed under the next sub-heading.

125.4. The review of representation on the council among different organisations on the employers' and union sides, as well as membership of the council, takes place on the basis of the membership figures submitted by party organisations after verification by MIBCO.

125.5. Membership as determined on this basis takes effect on 31 December of the year in question and remains effective until 31 December of the following year.

125.6. Although no dates are stipulated for any of the steps referred to above, a reasonable interpretation is that past practice should continue until MIBCO decides to change it. This means:

125.6.1. Party organisations should determine their membership numbers as at 30 June; and

125.6.2. The AGM should conduct the review. This allows sufficient time for membership figures to be audited and verified before the AGM.

125.7. The parties are at liberty to regulate the process in more detail or to alter it, subject only to the requirement of clause 6.1.3 that membership numbers must be audited and the representation of parties determined based on the review must take effect on 31 December.

126. I do not find it reasonable to regard 31 December as the date when membership numbers must be determined. This implies the submission of

audited membership numbers in or around March, which is some nine months prior to the AGM which, presumably, should conduct or approve the review. If so, the effect would be that representation based on the review would take effect a full year rather than six months after the initial determination of membership. Given that much can change in six months, let alone 12 months, it is reasonable to shorten rather than prolong the process as much as possible. Alternatively, a special meeting would be needed. This, again, would introduce a needless complication.

B. *The criteria for determining and/or verifying parties' membership*

127. This question is crucial to the ultimate resolution of the underlying dispute. Prolonged though the present hearing has been, a great many issues were dealt with and not enough evidence was led to make it possible to determine the criteria definitively. Doing so is ideally a task for MIBCO and its party organisations. Should this prove impossible due to irreconcilable differences among parties, it would require a dedicated process – if necessary arbitration – and the presentation of detailed evidence in support of contending proposals to arrive at a sustainable resolution.

128. A framework for this is provided by the Council agreement of 6 August 2013.[95] Is The Department of Labour Circular of 2014[96] provides further guidance. In particular, it states:

> "For a company to be counted to the credit of an employers' organisation that is party to a council·
>
> (a) That company must be in the list of the registered firms according to the Council database and must have a Firm Number.
>
> (b) The number of employees as reflected by the Company registered with the Council must correlate with the Council database (in the scope of the collective agreement and in the registered scope of the council)".[97]

[95] RMI Bundle, page 36.
[96] Fn 77 above.
[97] RMI Bundle, page 63.

129. Based on what has emerged in these proceedings, it is evident that "company" (in the language of the Circular) will need to be carefully defined with regard to its legal personality, employment of staff, and criteria for distinguishing it from any other operation conducted on the same premises or other operations forming part of the same organisation.

130. Again this will in my view require a dedicated process which the parties will ideally be able to conduct amicably but, if this proves impossible, a binding resolution can be sought in terms of MIBCO's Constitution. Unless a resolution is reached along either of these routes, it is unlikely that the problem will go away.

131. This award seeks to set such a process in motion.

Is a properly constituted MIBCO is a prerequisite for the submission of membership figures in terms clause of 6.1.3 of the MIBCO Constitution?

132. I have found that NEASA has not qualified for membership of MIBCO since at least August 2018 up but nevertheless occupies two seats on the council subsequent to this date. It follows that MIBCO is not properly constituted.

133. MISA argues that even if NEASA's membership has ceased, the remaining four parties to MIBCO remain bound to submit their membership figures.[98]

134. RMI argues that the requirements of clause 6.1.3 of the MIBCO Constitution are not subject to MIBCO being properly constituted.[99] It is true that this is not stated and it is also true that MIBCO's proper constitution cannot be determined unless membership figures are submitted. However, clause 6.1.3 is premised on the assumption that the Constitution is correctly implemented. Even if it is assumed that all official acts are correctly performed until the contrary is proved,[100] in the present case it has been proved on a balance of probabilities that acts performed by the council as presently constituted will not be properly performed.

[98] MISA Written Submissions, paras 54 and 71.2.
[99] RMI Closing Submissions, para 64.
[100] I.e., *omnia praesumuntur rite esse acta*.

135. NUMSA, in contrast, argues that it is "under no obligation to submit its membership numbers to an improperly constituted MIBCO, particularly when seats would continue to be allocated to the non-party, NEASA".[101]

136. Similarly, FRA argues that "the key reason for the submission of figures is for the purposes of determining the number of representatives on the Council i.e. seat allocation" and asks for

> "an order to implement the findings of the Ngubane report and that such finding in terms of seat allocation be retained for a minimum of one year from the date of implementation before submission of any new figures. Thus, the FRA requests that the next time parties are requested to submit membership figures as at 30 June 2021 by 15 August 2021 in order to give stability to the newly constituted MIBCO structure".[102]

137. The arguments put by RMI and MISA have merit to the extent that MIBCO has legal personality which does not depend on the proper constitution of its council. However, the same cannot apply to acts by the council itself. Acts taken by an improperly constituted council are vulnerable to challenge on review.

138. This will not necessarily affect past decisions of the council which, as administrative acts, may continue to have legal effect until set aside on review.[103] But it must affect future acts by the council. As both NUMSA and FRA point out, reporting membership figures is linked to the allocation of seats on the council. To the extent that the AGM plays a key role in the process in terms of clause 6.3.1,[104] any review of the membership of the council conducted by a council that is improperly constituted would be fatally flawed.

139. Over and above this, the principle of legality constrains me to ensure that this award brings about a result that is in accordance with law. This means, first and foremost, that it would not be appropriate to order the continuing operation of an improperly constituted council. This being so, I cannot order NUMSA and FRA to

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[101] NUMSA Heads of Argument, para 40.
[102] FRA Heads of Argument, page 11.
[103] See, for example, Khumalo and another v Member of the Executive Council for Education: Kwa-Zulu Natal [2012] 12 BLLR 1232 (LAC).
[104] MIBCO Constitution, clause 10.1.

submit membership figures to serve as a basis for the review of representation by and on an improperly constituted council, nor is it competent for any party to do so. It follows that this claim by RMI and MISA falls to be dismissed.

140. It is equally clear that the current deadlock needs to be resolved. The award sets out a means of doing so. But, before that, the question of costs must be addressed.

Costs

141. It is trite that costs in labour disputes do not follow the result.[105] In the case of arbitration proceedings conducted under the auspices of MIBCO's Dispute Resolution Centre, an order of costs may be made according to the requirements of law and fairness and in accordance with rules made by the CCMA.[106] Rule 39 of the CCMA sets out a range of factors that must be taken into account when weighing up the requirements of law and fairness, of which "the measure of success that the parties achieved" is one.

142. My findings indicate that, in my view, the cases put forward by RMI and MISA had very little merit. I have found their claims as well as their defences to NUMSA's claims unsustainable.

143. In addition, NUMSA makes the following arguments which are borne out by the record:

> "MISA has never explained their departure from their position in March 2019 when they accepted the Ngubane report to their opposition to its implementation now. Furthermore, the cross examination of Scheepers and Sibiya by MISA's attorney focused almost entirely on the NEASA dispute and appeared to be undertaken purely in NEASA's interests".[107]

144. More importantly, NUMSA argues that RMI "sought to frustrate the agreed upon dispute resolution process, the Ngubane audit, purely because the outcome of that process would grant FRA a Council seat at RMI's expense" by raising

[105] Long v South African Breweries (Pty) Ltd and others [2019] 6 BLLR 515 (CC).
[106] MIBCO DRC rule 38(1) read with s 138(1), LRA.
[107] NUMSA Heads of Argument, para 42.1.

defences that lacked merit and that, "insofar as MISA has decided to associate itself with these defences, they should also bear the consequences thereof".[108] Leaving aside RMI's motives, I find the obduracy with which RMI has persisted with raising objections to the implementation of an agreed-upon solution that were lacking in legal merit, and MISA's support for those objections, to be nothing less than obstructive.

145. FRA goes further, echoing submissions made by NUMSA to the effect that aspects of the case put forward by RMI were lacking in candour and asking that a punitive costs should be granted against RMI.[109]

146. I cannot dismiss these concerns. I am mindful of the fact that any resolution of this dispute must require constructive interaction by all parties as well as the purpose of the LRA of promoting the effective resolution of labour disputes.[110] However, I cannot ignore the fact that the two-year-long resistance put up to implementation of the Ngubane report had been preceded by RMI's resistance to the implementation of the KPMG report which had similarly been intended to resolve the dispute. It is therefore necessary to make the point that, while constructive engagement is to be encouraged in every possible way, obstruction thereof must be discouraged.

147. Taking these factors into consideration, and having regard to the fact that both RMI and MISA were legally represented, I find it consistent with the requirements of law and fairness to order that RMI and MISA pay the costs of NUMSA and FRA jointly and severally and in accordance with CCMA rule 39(4).

Award

148. Based on the findings set out above the award is as follows:

148.1. the Ngubane report submitted on 22 August 2019 is final and binding;

148.2. NEASA is not a party to MIBCO since it failed to meet the criterion for membership in terms of clause 5.2.1 of the MIBCO Constitution as at 30 June 2018, alternatively as from August 2018 to May 2020;

[108] Ibid, para 42.2.
[109] FRA Heads of Argument, page 25.
[110] LRA, s 1(d)(iv).

148.3. given the presence of two NEASA representatives on MIBCO's council, the council is currently not properly constituted;

148.4. the numbers of representatives of employers and employees that prevailed prior to NEASA's admission are restored pending the next review of the number of representatives on the council in terms of clause 6.1.3;

148.5. all party organisations are required to submit membership figures as at 30 June 2020, or any alternative date that the parties may agree on, within 45 days from the delivery of this award;

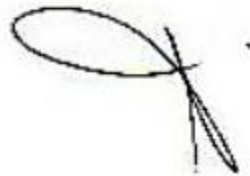
148.6. MIBCO is at liberty to use external auditors for purposes of its verification of parties' membership numbers;

148.7. NEASA is at liberty to apply for membership of MIBCO at any time;

148.8. MIBCO must within six months put in place definitive criteria for membership giving effect to the general principles and criteria agreed on 6 August 2013 as contained in the Scope Agreement;

148.9. RMI and MISA are ordered, jointly and severally, to pay the costs of NUMSA and FRA in accordance with CCMA rule 39(4).

DATED AT CAPE TOWN THIS 27th day of AUGUST 2020.

Signature: 

Private Arbitrator: **Darcy du Toit**