IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C553/2003

In the matter between:

GOLDEN ARROW BUS SERVICES (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

JAN THERON N.O. **Second Respondent**

THE TRANSPORT AND OMNIBUS WORKERS UNION **Third Respondent**

THE SOUTH AFRICAN BUS EMPLOYERS ASSOCIATION **Fourth Respondent**

THE MOTOR INDUSTRY BARGAINING COUNCIL **Fifth Respondent**

THE NATIONAL UNION OF METALWORKERS OF

SOUTH AFRICA **Sixth Respondent**

THE BARGAINING COUNCIL FOR THE ROAD PASSENGER TRANSPORT INDUSTRY **Seventh Respondent**

THE NATIONAL ECONOMIC DEVELOPMENT AND LABOUR COUNCIL **Eighth Respondent**

JUDGMENT

LANDMAN J:

Introduction

Golden Arrow Bus services (Pty) Ltd (Golden Arrow) applies in terms of section 158(1)(g), alternatively section 145 of the Labour Relations Act 66 of 1995 (the LRA) for the review and setting aside of the determination by Commissioner Theron, the second respondent, under case number WE 2672-01. The arbitration took place under the auspices of the Commission for Conciliation, Mediation and Arbitration, the first respondent. A determination under s 62 of the LRA is not an arbitration award contemplated by s 145 and so may be reviewed in terms of s 158(1)(g) of the LRA.

The Transport and Omnibus Workers Union (TOWU) referred the following question to the CCMA, namely whether:

"the employees of Golden Arrow Bus Service employed in the job categories referred to in Appendix E of the constitution of the SA Road Passenger Bargaining Council and Golden Arrow Bus Service, are:

> (1) engaged in the road passenger transport or the motor industry; and whether
> (2) the collective agreements of the SA Road Passenger Bargaining Council or the Motor Industry Bargaining Council are binding on Golden Arrow Bus Service (the employer and the employees)." (Commissioner's emphasis.)

The question concerns the employees employed in the "job categories referred to in Appendix E of the constitution of the SA Road Passenger Bargaining Council and Golden Arrow Bus Service". This description needs further explanation. The commissioner provides the background in paragraph 14 of his award which is quoted below. Essentially the employees on annexure E are divided between those employees whose terms and conditions of employment were negotiated for and who fell under MIBCO and other employees. I accept that the employees concerned are all employed in all the jobs reflected on Appendix E and not only those identified by the words "negotiated for" next to the jobs on that appendix. I shall refer to these employees as "the affected E employees".

The commissioner heard the evidence and representations of the parties, consulted with NEDLAC and handed down his award or determination. In his award he sets out the question to be decided, the facts, his survey of the evidence, his reasoning and his final award.

The facts

I reproduce the essential facts as set out in the commissioner's award:

“8. GABS is the successor in title to a company that has provided a commuter service in the city of Cape Town and its surrounds for a considerable period of time. The applicant Union was established in or about 1918, when the company was known as City Tramways. Until about 2000 it was organised exclusively at the company. Currently the bulk of its members are still at GABS. However it has also organised other employers in the transport sector.

9. At all relevant times the company has had its Head Office at Epping, where the workshop known as the Multimech division is located. Prior to 1982 this division was known as the central workshop. In that year it was decided to constitute the central workshop as a separate entity, which would fall under the jurisdiction of the bargaining council for the motor industry (the Second Respondent in these proceedings). However Multimech was not constituted as a separate legal entity distinct from GABS when these proceedings were instituted.

10. GABS also operates depots at different localities in the Western Cape where there are staff employed to perform certain maintenance and repair functions on the company[‘]s buses. The function of the Multimech division is in essence to perform more specialised maintenance and repairs.

SURVEY OF THE EVIDENCE AND ARGUMENT

11. The facts giving rise to this dispute are largely common cause, and what disputes of fact exist do not seem material to the issues to be determined. It is accordingly not necessary for me to deal with the evidence in any detail. What follows is a brief summary.

12. Mr Jacobs gave evidence that although there were other Unions recognised at GABS, TOWU represented 1,200 of the approximately 2 000 employees of GABS. It also had majority membership in the Multimech division, where there were 186 employees. It had represented employees in the Multimech division prior to 1982. But when the company declared that Multimech would become part of the motor industry in 1982, employees in the division were offered the option of being transferred to positions at the depots or remaining in the division. A number of the employees belonging to TOWU were transferred to the depots. Some remained with the Multimech division at Epping. As a consequence of remaining with Multimech, these employees were obliged to become members of the trade union NUMSA, which

entered into a closed-shop agreement with GABS. They nevertheless retained certain terms and conditions of employment which they had enjoyed as members of TOWU, such as membership of the medical and sick benefit funds. After the Labour Relations Act of 1995 came into effect, the closed-shop agreement with NUMSA lapsed, and employees were able to join or rejoin TOWU.

13. In 1995 TOWU together with certain other unions signed the constitution of a new bargaining council for the road passenger transport industry, namely the S A Road Passenger Bargaining Council ("SARPBAC"). The constitution was amended in 1998. TOWU also signed the amended constitution. The provisions of the constitution relevant to this application were the definition of the road passenger transport industry, and Annexure E. The definition of the industry reads as follows: it is "the industry in which employers ...and employees are associated for the purpose of conveying for reward on any public road any person by means of a power driven vehicle, intended to carry more than 16 (sixteen) persons simultaneously, including the driver of the vehicle, and includes all operations incidental thereto and consequent thereon." (Commissioner's emphasis.)

14. Annexure E lists certain jobs under the category engineering, including the job of artisan. The phrase "negotiated for" appears in parenthesis after the word artisan. This meant that if, at the time the constitution was adopted, the parties were negotiating for a category of artisans, this category of artisans would be regarded as part of the bargaining unit. The union would accordingly be entitled to continue to negotiate for such artisans. Such a provision was necessary because artisans performed various job functions, and in the case of GABS, were located both at depots and in the Multimech division. Accordingly, there were artisans covered by the MIBCO agreement as well as the SARPBAC agreement. The other job categories listed in Annexure E under the heading engineering included all jobs performed by employees in the Multimech division.

15. Agreements on substantive conditions of work (referred to as the "main agreement") had been concluded at SARPBAC on an annual basis. TOWU had continued to sign such agreements, even after workers employed in the Multimech division joined or rejoined TOWU. A note to the wage schedule in clause 2 of this agreement states as follows: "note that the employees and/or job categories for which terms and conditions of employment are determined/regulated by a registered

bargaining council other than SARPBAC are excluded from this agreement. It also excludes the following departments and, as such, employees in these departments will not be included in the bargaining unit and are not considered as eligible employees:

- human resources department
- finance department."

16. The majority of workers in the Multimech division joined TOWU in or about 2000. TOWU had continued to sign the main agreement even though it specifically did not apply to the Multimech division. If it had not done so, the union's other members would not have received the benefit of an increase in wages or salaries. The main agreement had never been extended to non-parties as provided in the Act. According to Mr.Jacobs this was amongst other reasons because of concerns expressed by the Department of Labour in their letter of 15th February 2002, in which it queries the exclusion in the main agreement of employees and/or job categories determined/regulated by a registered bargaining council other than SARPBAC.

17. Mr Dolf gave evidence that he was employed by the company since 1978 and had been a member of TOWU. He remained in the Multimech division after 1982, and was one of those who had rejoined TOWU in 2000. The Multimech division comprised a number of different departments, which he listed. Under cross-examination he conceded that some of the departments listed were merely on the same premises at Epping as the Multimech division. However, he did not concede that the radio room was not part of the Multimech division. His evidence that the tyre department was part of the Multimech division was not directly challenged, although GABS evidently does not regard it as such.

18. As well being a director of the company, Mr Gie is the president of SABEA and was party to the negotiations to establish SARPBAC. The employer parties had all previously had in-house collective agreements with trade unions, and only agreed to the constitution of a centralised bargaining forum in the face of the threat of industrial action. One of the problems with the constitution of such a forum was the variety of different ways in which employers and trade unions had been bargaining hitherto. This was overcome by an agreement that employers in those job categories for

whom unions had traditionally bargained were to be included within the bargaining unit of the council of SARPBAC. The parties endeavoured to identify these employees by job titles, using titles that would be particular to SARPBAC. However, there was some confusion about the job title of artisan, since there were artisans who had been traditionally negotiated for and those that had not. Hence the specific wording adopted in Annexure E.

19. Mr Gie described the work performed at Multimech as being of a "heavy engineering" kind, as distinct from the kind of repair and maintenance work done at the depots. The object of establishing Multimech as a separate division in 1982, according to Mr Gie, was to create a separate profit centre and to enable it to take on outside business.

20. Insofar as the parties Mr Gie represents are concerned, TOWU is party to a collective agreement that should be regarded as sacrosanct. The effect of the order TOWU is seeking is to reverse this collective agreement. Although the amount of outside work currently taken on by the Multimech division is not significant, this position could well change in the future. The future of the company is particularly uncertain, due to the restructuring that is taking place in the transport industry, as a result of which the company stands to lose a certain number of routes, and will have to tender with other transport businesses for the remaining routes."

The commissioner's determination

The commissioner concluded:

"56. My Award is thus as follows:

(a) I find that the Multimech Division of Golden Arrow Bus Service falls within the definition of the road passenger transport industry, in terms of the constitution of the S.A. Road Passenger Bargaining Council.

(b) I find that that employees of Golden Arrow Bus Service employed in the job categories described in Appendix E of the constitution of the S.A. Road Passenger Bargaining Council are engaged in the road passenger transport industry.

(c) I find that the collective agreements of the S.A. Road Passenger Bargaining Council are binding on Golden Arrow Bus Service and the employees referred to in paragraph (b) above.

(d) I find that the phrase "negotiated for" that appears in parenthesis after the job category of artisan, listed under the heading engineering in Appendix E of the constitution of the S.A. Road Passenger Bargaining Council, as well as the proviso to clause 2 of the Main Collective Agreement which reads "Note that the employees and/or job categories for which terms and conditions of employment are determined / regulated by a registered bargaining council other than SARPBAC are excluded from this agreement", to the extent that they are inconsistent with mv findings in (a) to (c) above, to be void and of no legal effect." (Commissioner's emphasis.)

Golden Arrow's challenge to the determination

Golden arrow abandoned the contention that NEDLAC was not made privy to the impact of the overall determination of the commissioner as it was only supplied with the provisional award.

Golden Arrow takes issue with the commissioner's finding that the Multimech activities fall within the scope of the bargaining council in the first place and that the finding that the employees are covered by the collective agreement. I intend to consider whether the "E" employees fall within the scope of the jurisdiction of SARPBAC before dealing with the second question.

The yardstick

Mr W R E Dumminy SC, who with Ms H Rabkin-Naicker, appeared for Golden Arrow, submitted that:

(a) the yardsticks in place in terms of this demarcation were the SARPBAC Constitution and the Main Collective Agreement of the parties to SARPBAC and the MIBCO collective agreements. He pointed out that both the SARPBAC documents contained clauses excluding from their scope precisely those employees that TOWU sought to bring under their ambit. These clauses, rather than being analysed by the commissioner to discern their meaning and import, were dealt with by way of the following finding:

> "I find that the phrase "negotiated for" that appears in parenthesis after the job category of artisan listed under the heading engineering in Appendix E of the constitution of the S.A. Road Passenger Bargaining Council, as well as the proviso to clause 2 of the Main Collective Agreement which reads "Note that the employees and/or job categories for which terms and conditions of employment are determined/regulated by a registered bargaining council other than SARPBAC are excluded from this agreement", to the extent that they are inconsistent with my findings in (a) to (c) above, to be void and of no legal effect."

(b) the commissioner ignored relevant evidence in coming to the conclusion that in essence the function of the work of the Multimech division was 'to perform more specialised maintenance work and repairs' than the work done in other depots of the Golden Arrow. This finding did not take into account the description of the work by Golden Arrow's representative as of "a heavy engineering kind" or the distinction given in evidence by Golden Arrow's representative as to the work carried out at Multimech and that carried out in Golden Arrow's other depots. Nor did the commissioner apparently consider the affidavit filed as part of the record of the demarcation proceedings by MIBCO which set out that the job categories in which

Multimech employees were engaged fell under the scope of MIBCO.

(c) although the terms of reference of the demarcation proceedings enjoined him to determine whether these employees fell under the collective agreements of MIBCO or SARPBAC, the commissioner did not consider it necessary to properly determine the nature of the Multimech industry in which the applicant and members of TOWU were associated for a common purpose. That such an enquiry is apposite is supported by authority. See **Rex v Sidersky** 1928 TPD 109 at 113 and **Kooperative Wynbouers Vereniging Van Zuid-Afrika Bpk v Industrial Council for the Building Industry and Others** 1949 AD 600 at 608.

(d) It is quite possible for an employer to conduct two or more industries at the same time and to be an employer in all of these. An ancillary operation can fall within the jurisdiction of a council that does not cover the main activity of the employer. The question is one of fact. The commissioner failed to heed this authority of the Appellate Division as well as a two judge Transvaal division decision in this regard. Instead he found that what was necessary to determine was "whether the operation performed by Multimech constitutes a separate industry or is ancillary to the main business of GABS". He then found that because the Multimech enterprise was ancilliary to the main business of Golden Arrow it would be "a contradiction in terms to consider it a separate industry". Such a conclusion it is submitted is materially defective in law and furthermore lacks rationality.

(e) the commissioner's reasoning was furthermore flawed and lacking in rationality when he considered the issue of the relevance of the size of the Multimech division. In so doing, he stated that the size of the division, whether measured in employee numbers or by turnover, is not the primary consideration in determining whether the Multimech division is ancillary to the main business or a separate industry. He then found, without explanation therefore, that the scale of the operation would be decisive, if an ancilliary operation could be regarded as a separate industry.

Mr Duminy submitted as regards para (d) of the determination that:

(a) the commissioner misdirected himself when he found the clauses void in relation to the affected E employees and Golden Arrow. The determination does not reveal on which basis in law the commissioner relied in making this finding.

(b) whether collective agreements are to be treated as contracts or as statutory instruments the commissioner exceeded his powers when he found certain clauses of the agreements in question to be void and of no legal effect and moreover his finding in this respect was materially defective in law.

(c) the commissioner laid no basis to find that the clauses in question were void for vagueness, against public policy, did not comply with statutory formalities or were impossible to perform and so severable from the agreement as a whole in terms of the law of contract. See **Vogel v Volkersz** 1977 (1) SA 537 (T). **Vernon v Schoeman** 1978 (2) SA 305 (D); and **Du Plooy v Sasol Bedryf (Edms) Bpk** 1988 (1) SA 220 (T). Even had he done so it would have been incompetent for him to find that the clauses were void only in so far as they affected some of the parties to the agreement, i.e. certain members of TOWU in their relation to Golden Arrow.

Golden Arrow asks this court to declare that its "employees employed in the job categories referred to in `Appendix E' to the Seventh Respondent's Constitution (i.e. artisans `negotiated for'), and the Applicant itself, are engaged in the motor industry, and that Golden Arrow and those employees are bound by the collective agreements of MIBCO". In the alternative Golden Arrow asks that the determination of the commissioner be reviewed and set aside and the questions referred to him in the demarcation be referred for determination de novo before another commissioner.

It is submitted that it is competent for the court to substitute its own decision for that of the commissioner whether the award is reviewed in terms of section 145 or section 158(1)(g) of the Act.

A collective agreement binds for the whole period of the collective agreement every person bound in terms of subsection (1) (c) who was a member at the time it became binding, or who becomes a member after it became binding, whether or not that person continues to be a member of the registered trade union or registered employers' organisation for the duration of the collective agreement."

It was submitted that in view of the binding nature of a collective agreement a commissioner deciding the demarcation de novo would only be in a position to find that the relevant employees and Golden Arrow are bound by the collective agreements of SARPBAC by declaring the clauses contained in such agreements (which exclude those employees from their ambit) void and of no force and effect in respect of the employees in question and Golden Arrow. If the determination of the commissioner is reviewed on the basis that such a decision to declare the relevant clauses void is not competent for the reasons submitted in Applicant's submissions or for any other reason, a commissioner hearing the determination de novo would be precluded from making such a finding.

It is submitted that absent such a decision by the commissioner the only determination that could be made de novo is that those employees and Golden Arrow remain bound by the collective agreements of MIBCO.

Evaluation

The determination or demarcation of a sector takes place in terms of the LRA in two distinct and separate situations. First a demarcation is performed when a bargaining council is in the process of being set up. NEDLAC, and if NEDLAC is unable to agree, the Minister of Labour demarcates the appropriate sector and area in respect of which bargaining councils should be registered. See s 29 of the LRA.

The second situation, provided for in s 62 of the LRA, deals with the case where a sector has already been authoritatively established in respect of a bargaining council, statutory council or statutory instrument such as a collective agreement and the

question is whether or not an employer or employees fall within the ambit of a particular sector and thereby also fall within the ambit of the council or legislative instrument. See **National Manufactured Fibres Employers Association & Another v Chemical Workers Industrial Union & Others** (1997) 18 ILJ 1359 at 1365 G-I.

The yardstick

(a) **SARPBAC**

In this case we have two scenarios as regards SARPBAC. We have:

i) the definition of the sector in the certificate of registration; and

ii) the definition of the sector in the definition section of the bargaining council constitution read with the obscure (save to the parties) exclusion in annexure "E".

The certificate of registration (as amended in 1998; supplied after the hearing) defines

> "Road passenger Transport Trade in the Republic of South Africa excluding the sector and area for which the existing Bargaining Council for the Passengers Transportation Trade is registered namely the Magisterial District of Durban as that area was constituted on 22 August 1967. `Road Passenger Transport Trade' means the trade in which employers and their employees are associated for the purposes of conveying for reward on any public road any person by means of a power-driven vehicle (other than a vehicle in the possession and under the control of Transnet or a local authority) intended to carry more than 16 Persons simultaneously including the driver of the vehicle, and includes all operations incidental thereto or consequent thereon."

The definition in the bargaining council constitution reads:

“Road passenger transport Industry means the industry in which Employers ... and Employees are associated for the purpose of conveying for reward on any public road any person by means of a power driven vehicle, intended to carry more than 16 (sixteen) persons simultaneously, including the driver of the vehicle, and includes all operations incidental thereto or consequent thereon."

The constitution also provides for the exclusion of the affected E employees.

(b) **MIBCO**

A copy of the definition of “motor industry” or “industry” as it appears in Division A of the main Agreement of the Motor Industry Bargaining Council (MIBCO) was subsequently supplied to me by the parties. I assume that this definition is the same as that set out in MIBCO’s certificate of registration. It reads:

> “**'Motor Industry'** or **'Industry'**, without in any way limiting the ordinary meaning of the expression and subject to the provisions of any demarcation, determination made in terms of section 62 of the Labour Relations Act, 1995, includes—
>
> *(a)* assembling, erecting, testing, remanufacturing, repairing, adjusting, overhauling, wiring, rewiring, upholstering, spraying, painting and/or reconditioning carried on in connection with—
>
> (i) chassis and/or bodies of motor vehicles;
>
> (ii) internal combustion engines and transmission components of motor vehicles;
>
> (iii) the electrical equipment connected with motor vehicles, including radios;
>
> *(b)* automotive engineering;
>
> *(c)* repairing, vulcanising and/or retreading tyres;
>
> *(d)* repairing, servicing and/or reconditioning batteries for motor vehicles;

(e) the business of parking and/or Storing motor vehicles;

(f} the business conducted by filling and/or service stations;

(g) the business carried on mainly or exclusively for the sale of motor vehicles or motor vehicle parts and/or spares and/or accessories (whether new or used) pertaining thereto, whether or not such sale is conducted from premises which are attached to *a,* part of an establishment in which the assembly of or repairs to motor vehicles is conducted;

(h) the business of motor graveyards;

(i) the business of manufacturing establishments in which motor vehicle pares and/or spares and/or accessories and/or components thereof are fabricated;

(j) vehicle body building:

(k) the sole of tractors, agricultural and Irrigation equipment (not connected with me manufacture thereof) in the Republic of South Africa, but excluding the Magisterial District of Kimberley, in respect of the sale of—

i) agricultural and irrigation equipment; and

ii) tractors, except when undertaken by establishments substantially engaged in the sale and/or repair of other motor vehicles."

What is the appropriate yardstick? Schreiner JA held, in respect of the Industrial Conciliation Act 36 of 1937, that:

"Where there is a definition of the industry in the certificate of a council the industry so defined is the only industry that is recognized for the purposes of applying the machinery of the Act."

See **Transvaal Manufacturing Association v Bespoke Tailoring Employers' Association** 1953 (1) SA 47 (A) 47 AT 57D-E. See also **Industrial Council, Building Industry (Western Cape) and others v Transnet Industrial Council** 1999 (1) SA 505 (SCA) at 510G-511B.

There are dicta that suggest that the certificate of registration must be read with the constitution of an industrial council. This seems to be a correct approach where the certificate refers to the constitution. The definition of the industry in the certificate and the constitution ought to be identical.

In my view the arbitrator was obliged to use the definition in the certificate as the only yardstick. He was thereafter required to determine the business activity in which the "E" employees and Golden Arrow were engaged. The commissioner went about his task by concentrating on the question whether the activity engaged in by Golden Arrow and the E employees was "ancillary" or "incidental" to the sector and found that it was.

Generally in determining which industrial or bargaining council has jurisdiction a commissioner is enjoined by case law to determine "the nature of the enterprise in which both employer and employee are associated for a common purpose". See **R v Sidersky** supra at 113.

What is Golden Arrow's business or businesses? Tindall J (as he then was) pointed out in **Weimers v Stinnes (SA) Ltd** 1928 TPD 695 at 696 that:

> "The question is one of fact, and the Court has to determine in the present case whether the respondents were carrying not only the business of selling machinery but, also that of engineering."

And as Tindall J pointed out in **R v Sidersky** supra at 115 an industry contemplates some enterprise carried on as a concrete whole by an employer with the aid of its employees.

In my view it is clear that Golden Arrow conducts two businesses. Its primary business is the conveying persons for reward on public roads by means of buses that carry more than 16 persons simultaneously including the driver of the vehicle. Golden Arrow also has a heavy engineering automotive service known as Multimech. This is

by design. Golden Arrow took a business decision to open a heavy automotive business and has secured some customers. It is perfectly legitimate for it to do so.

The affected “E” employees in the heavy engineering automotive workshop are there to service the busses and are an integral and central part of the business of conveying passengers by bus. The power driven vehicles need to be refitted and kept on the road. This work is done, inter alia, by the employees in the heavy engineering automotive service. The purpose of Golden Arrow and the affected E employees is to perform heavy automotive engineering for the purpose of servicing the Golden Arrow fleet and, as this is fundamental to keeping the fleet on the road, these employees and Golden Arrow are associated for the purposes of conveying for reward on any public road any person by means of a power-driven vehicle etc, ie the road passenger transport industry.

In addition to servicing the Golden Arrow fleet Multimech (Golden Arrow and the effected employees) do other work which brings in 2% of Golden Arrow’s income. This work falls within the definition of “motor industry”. The affected E employees and Golden Arrow are associated in this endeavour, not for the purposes of the road passenger transport industry but for purposes of the heavy engineering automotive industry.

It follows, in my opinion, that Golden Arrow and the affected E employees also carry on business in the motor industry and especially that part of it known as automotive engineering. It seems that as the Golden Arrow fleet is serviced and the automotive engineering is done at the same place by the same employees, that an unknown and unspecified number of the affected employees may be engaging in both the road passenger transport sector and the automotive engineering industry from time to time.

The parties were asked, after judgment had been reserved to submit written argument on, inter alia, the question: Does the LRA require that only one council have jurisdiction over the employer and employees?

Mr Kahanovitz, who appeared for the third respondent, submitted that it would not be in the interests of collective bargaining or sound labour relations for more than one council to have jurisdiction over the same set of employees. A demarcation dispute will arise when it is claimed that more than one council has jurisdiction and this is the problem that the arbitrator is then required to address.

Mr Kahanovitz pointed out that under the pre-1956 regime employers could be bound by industrial agreement made under the provisions of the Industrial Conciliation Act 36 of 1937 or a wage determination under the Wage Act 44 of 1934. The Legislature recognised that employers who participated in two or more businesses might fall under both an industrial agreement and a wage determination. Section 2(3)(a) of the Wage Act of 1944 was enacted to avoid "difficulties of classification". In **R v Sexbv** 1943 AD 222 the court stated as follows at 230:

> "Where the same men are simultaneously employed by one employer in two businesses of different types, the one falling under an agreement, and the other under a determination, there would be room for great uncertainty as to the position of such employees, and their rights might vary from week to week according to the varying extent to which their activities were from time to time required by on business or the other. In the case of these lorry drivers, for instance, the loads of their lorries might in one week include a larger proportion of goods from the store, and in the next week a larger proportion of articles from the mill."

For this reason the court pointed out section 2(3)(a) of the Wage Act provided that as long as the work they did was sufficient to bring them under the terms of an agreement, the Wage Act would not apply. Thus as long as they did some work in the mill the agreement would trump the determination.

The definitions contained in industrial agreements could have the effect that an employer would be required to pay levies for both enterprises at the same time (in respect of all or some of the employees because all or some participated in both). **See Rex v Giesken and Giesken** 1947 (4) 561 (A) at 566-567. In **R v Auto-Parts (Pty) Ltd and Another** 1948 (3) 641 (T) at 648 the court said the following about a similar problem postulated in this matter:

> "It may be conceded that the present state of affairs is fraught with some difficulties for an employer such as the appellant company. The appellant Rice claims to fall within the General Engineering Industry - those of his employees who gave evidence in this matter are ail members of the Amalgamated Engineers' Union - he has already been prosecuted for a technical breach of his duties under the Engineering Industry's Agreement. His counsel stressed the difficulty of observing the closed shop principle if the company is subjected to more than one industrial agreement. Even conceding these difficulties (and there is provision for relief in exceptional cases by securing from the council concerned exemption from the terms of the agreement) I am unable to uphold the appellant's argument. Difficulties cannot be avoided when the principle is recognised that employer and employee may at the same time be associated in more than one business."

Mr Kahanovitz submitted that it would not promote the objects of the LRA for more than one council to have jurisdiction over employees whose employer participates in two enterprises at any one time. But he said there may, however, be cases with different facts to the present where one might find that two councils should indeed have jurisdiction - but not at the same time over the same group of employees.

In **Superstone Mining (Pty) Ltd and National Bargaining Council for the Road Freight Industry** (2004) 25 ILJ 1567 (SCA) the company ran a number of diamond

mining operations. One operation was the haulage of gravel or decomposed kimberlite. This operation was divided into haulage for reward (for De Beers) and haulage for the company's own account. De Beers' requirements were communicated to the applicant at short notice. The haulage fleet might therefore be servicing its yard on certain days, and on others might only be servicing De Beers.

The applicant estimated that only 30% of its entire business, namely the haulage for reward for De Beers, fell within the ambit of the Road Freight Industry and its agreements. When the company was hauling for itself such haulage did not fall under the agreements. The company considered it impractical to distinguish between the two operations and to split the fleet into two divisions. To do so might lead to the financial failure of both divisions. It therefore applied for exemption from the agreements for a limited period, citing this factor as a 'special circumstance' that justified exemption. The company further argued that it was primarily involved in the mining industry and that it might be forced to negotiate with the NUM at plant level and with the National Bargaining Council for the Road Freight Industry in respect of the same workplace.

Rawat, Chairperson of the Exemptions Body, said in refusing the company exemption:

> “Once one chooses to operate within the road freight industry, the singular and necessary consequence is that one becomes bound to comply with its collective agreements. When making such a choice to enter this industry, one inherently chooses an association to the collective agreements and its concomitant rights and duties, thereby attaching the natural duty to make the necessary arrangements to meets such rights and duties. The employer who makes the choice to enter cannot later seek to dissociate from the natural consequences of his choice. The choice was obviously a business one, made by an assessment of the benefits which accrue from such choice. As an undivorceable partner is the collective agreements which governs the industry and its role-players.

> The granting of an exemption in the context of this set of facts would, by its very nature, not only result in an unfair competitive edge being afforded the applicant, but would set in place a declining bridge from the very principles which govern collective bargaining."

In my opinion the commissioner's findings that "(a) … the Multimech Division of Golden Arrow Bus Service falls within the definition of the road passenger transport industry, in terms of the constitution of the S.A. Road Passenger Bargaining Council and (b) … that employees of Golden Arrow Bus Service employed in the job categories described in Appendix E of the constitution of the S.A. Road Passenger Bargaining Council are engaged in the road passenger transport industry" is too narrow and wrongly ignores the fact that Multimech was intentionally established, inter alia, for the purpose of doing outside work. Therefore the finding is not a rational one. I am also of the opinion that the commissioner should have confined himself to the definitions of the industries or sectors contained in the registrations certificates of SARPBAC and MIBCO and not the broader definitions which he relied upon. I am furthermore of the opinion that as a matter of law orderly collective bargaining can be achieved even though an employer may straddle two or more sectors. But the employer may have to pay a price for structuring its business in this way.

The affected E employees fall within the definition of industry in the S.A. Road Passenger Bargaining Council certificate of registration when they perform work servicing the Golden Arrow fleet *and* they fall the definition of the motor industry when the perform work regarding other persons. It follows in my view the commissioner's finding that the collective agreements of the S.A. Road Passenger Bargaining Council are binding on Golden Arrow Bus Service and the affected E employees is not incorrect but it is too narrowly framed. It ignores the outside business of Multimech. His finding is to this extent not a rational nor justifiable one. Collective agreements of MIBCO may be binding on Golden Arrow and these employees depending on the ambit of the specific agreement.

I turn to consider the commissioner's findings that "(d) I find that the phrase "negotiated for" that appears in parenthesis after the job category of artisan, listed under the heading engineering in Appendix E of the constitution of the S.A. Road Passenger Bargaining Council, as well as the proviso to clause 2 of the Main Collective Agreement which reads "Note that the employees and/or job categories for which terms and conditions of employment are determined/regulated by a registered bargaining council other than SARPBAC are excluded from this agreement", to the extent that they are inconsistent with my findings in (a) to (c) above, to be void and of no legal effect." (Commissioner's emphasis.)

It does not follow that the collective agreement concluded by SARPBAC will be binding upon the affected "E" employees. They may well be. To ascertain whether it is binding or not one must have regard to the terms of the agreement. SARPBAC has signed a main agreement. This agreement does not purport to regulate the terms and conditions of the affected "E" employees. On the contrary it excludes them from the ambit of the agreement. This agreement is intra vires the constitutional powers of the council. The agreement, by its very terms, does not bind the employees in question. Should SARPBAC wish to conclude an agreement regarding the affected "E" employees it is free to do so once its has amended its constitution to bring it in line with the registered scope of the bargaining council. It seems to me to be lawful for a council to regulate in an agreement the terms and conditions of some employees and not those of other employees falling within its scope. In my opinion the commissioner exceeded his powers by deciding that the terms of the constitution are null and void.

What is to be done? In terms of s 158 I am free, in the circumstances, to make the award which the commissioner should have made.

Conclusion

I make the following order:

1. The determination of the commissioner is set aside and replaced by the following:

a) the employees of Golden Arrow Bus Service (Pty) Ltd employed in the job categories referred to in Appendix E of the constitution of the SA Road Passenger Bargaining Council fall within the definition of the road passenger transport industry of the S.A. Road Passenger Bargaining Council when they perform work servicing the Golden Arrow fleet and fall within the definition of the motor industry when they perform work regarding other persons.

b) The collective agreement (main agreement) of the SA Road Passenger Bargaining Council is not binding on Golden Arrow Bus Service (Pty) Ltd and the employees referred to in paragraph (a) above.

c) Collective agreements of the Motor Industry Bargaining Council may be binding on Golden Arrow Bus Service (Pty) Ltd and the employees referred to in paragraph (a) above depending on the ambit of the specific agreement.

2. I make no order as to costs.

SIGNED AND DATED AT PRETORIA THIS 30TH DAY OF SEPTEMBER 2004.

A A Landman

Judge of the Labour Court

Date of hearing:

Date of judgment: 30 September 2004

For applicant:	Adv W R E Dumminy SC (with him Adv H Rabkin-Naicker) instructed by Sonnenberg Hoffmann Galombik
For Third respondent:	Adv CS Kahanovitz instructed by Bernardt Vukic Potash and Getz Attorneys