

126/56

In the Supreme Court of South Africa  
In die Hooggeregshof van Suid-Afrika

(Appellant DIVISION).  
AFDELING).

APPEAL IN CRIMINAL CASE.  
APPEL IN STRAFSAAK.

Attorney-General, Transvaal

Appellant.

versus/teen

D. R. Goss Respondent.

A. E. J.  
Appellant's Attorney  
Prokureur van Appellant

Goodrick J. F.  
Respondent's Attorney  
Prokureur van Respondent

A. S. Suman  
Appellant's Advocate  
Advokaat van Appellant

G. H. Keale  
Respondent's Advocate  
Advokaat van Respondent

Set down for hearing on:  
Op die rol geplaas vir verhoor op:—

Thursday, 1st Nov, 1956.

(T.P.D.)  
11/3/56

9.50 - 12.50 } CAV  
2.15 - 5.00 }

Postea On 12/11/56.

Appeal allowed, Order of Transvaal Provincial Division allowing appeal set aside, conviction and sentence reinstated and matter remitted to the Provincial Division to decide issues which remain to be decided.

W. H. K. van der Merwe  
12/11/56

Record

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between :

ATTORNEY-GENERAL of the TRANSVAAL      Appellant

&

MOORE S.A. (Pty.) LIMITED      Respondent

COMMISSIONER : Centlivres C.J., Hoexter, Steyn, Reynolds et Brink JJ.A.

Heard : 1st November 1956.      Delivered : 12-11-56

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J U D G M E N T

CENTLIVRES C.J. :- The respondent company was convicted in a magistrate's court of contravening Sec. 53(1) of Act 36 of 1937 in that it failed to register itself as an employer in terms of the requirements of clause 28 of the industrial agreement relating to the Printing and Newspaper Industry published in the Government Gazette under Notice 1294 of June 19th, 1953. That agreement contains the following definition :-

" 'Printing and Newspaper Industry,' without in any way limiting the generally accepted meaning thereof, means that industry, trade or undertaking in which employers and employees are associated in the production of printed matter of any nature whatsoever, and furthermore includes, inter alia -- (a) the following trades (together with the occupations and operations incidental thereto) whether or

" not the said trades, occupations and/or operations are carried on separately or collectively or in conjunction with printing or apart from printing, viz.- " (the list which follows includes "lithography").

The magistrate found that the main business of the company was the selling of multigraph, addressograph and multilith machines ; that it also supplied its customers and users of multilith machines with prepared photo-lithographic plates ; that it employed ten employees full time on plate making ; that plate making accounted for 2.69 per cent of the company's turnover and showed a profit ; that plate making was not a casual or insignificant part of the company's business and that the company was an employer in terms of the agreement.

On appeal to the Transvaal Provincial Division the conviction of the company was set aside and de Wet J. who delivered the judgment of that Division said :-

" The main argument on behalf of the appellant is that such of its activities as can be described as lithography are merely incidental to its main business of selling duplicating machines and supplies for these machines.

It appears inter alia from the decision in Ko-operatiewe Wynbouers Vereniging v Industrial Council for the Building Industry, (1949 (2) S.A. 600 (A.D.)), that it is quite possible for an employer to conduct two or more industries or trades at the same time and to be an employer in all of these (see p. 608). It also appears that one industry may be incidental to the other so that it may be held that the employer is in

" fact conducting only one trade or industry. At page 609 CANTLIVAN'S, J., refers to the decision in Rex v Sidersky and says : 'It is clear from the examples given ~~by~~ of two bricklayers, two engineers and two printers that what SOMERSON, J. had in mind was that it was a matter of degree whether a person who admittedly carries on a particular industry is also carrying on one or more industries..... It is true that difficulties may be experienced in deciding in borderline cases whether a person is carrying on only one industry or more than one industry, but the fact that there may be such difficulties would not justify this Court in departing from a long line of decisions.....'

A decision of this question involves the assessment of the degree to which the subsidiary industry or trade is being carried on, and such assessment to some extent depends on one's impression after analysing the facts. If, in the present case, the appellant had ~~relied~~ relied merely on the fact that the subsidiary trade accounted only for a small proportion of its turnover, the case would hardly be distinguishable from the K.W.V. case (supra) where the "building" operations accounted for only a small proportion of annual expenditure but nevertheless involved a considerable amount in money. In the present case there are additional factors which, in my opinion, turn the scale in favour of the appellant. Firstly, the processed lithographic plates are sold only to purchasers of machines ; secondly, the plates are manufactured by the makers of the machines and are supplied in a size to fit the machines ; thirdly, the plates are supplied partly processed by the makers of the machines, and, finally, the completion of the processing does not require the experience or skill of a professional lithographer. These considerations lead me to the conclusion that this branch of the company's activities can fairly be said to be ancillary to its main business and that the company is not engaged in the Newspaper and Printing Industry within the meaning of the definition.

I prefer to express no opinion in regard to the

" alternative argument that the lithography done by the company is not lithography within the meaning of the definition.

The Attorney-General of the Transvaal noted an appeal against the order made by the Provincial Division on the ground that it "erred in law in making the said order, in that it erred in holding that the respondent was not an 'employer' in the Printing and Newspaper Industry within the meaning of the definition of 'that Industry' appearing in the relevant Government Notice No.1294 of 19th June, 1953. "

On appeal to this Court, Mr. Suzman on behalf of the respondent, submitted in limine that the decision of the Provincial Division in favour of the respondent was not "on a matter of law" within the meaning of Sec. 105(1) of Act 32 of 1944 but on a matter of fact and that consequently the Attorney-General had no right of appeal to this Court.

It seems to me that in order to ascertain whether the Provincial Division gave a decision in favour of the respondent on a matter of law we must examine the judgment given by that Division in order to ascertain whether the respondent succeeded on a matter of law. There is nothing in Sec. 105(1) of Act 32 of 1944 which requires the Attorney-General to specify in his notice of appeal the "matter of law" on which he is appealing, although in practice it is no doubt desirable that the crisp question of law should be stated in that notice. A cognate section

is Sec. 104(1) which empowers the Attorney-General to appeal against "a decision in favour of the accused on any matter of law" given by a magistrate's court. That sub-section empowers the Attorney-General to "require the judicial officer concerned to "state a case for the consideration of the court of appeal, setting forth the question of law and his decision thereon, and, if "evidence has been heard, his findings of fact in so far as they "are material to the question of law." Under sub-sec. (2) it is provided that when such case has been stated, the Attorney-General may appeal from that decision. When, therefore, the Attorney-General appeals under Sec. 104 the question of law is set forth in the case stated by the judicial officer and need not be set forth in the notice of appeal framed by the Attorney-General. Cf. R. v Storm (1947 (3) S.A. 518). Section 105 does not require a stated case to be framed and the reason for the absence of such a requirement is obvious. Where a Provincial or Local Division gives a decision in an appeal from a magistrate's court its reasons for judgment are always reduced to writing : this is not always the case in an inferior court. In the case of a Provincial or Local Division there is no need to state a case, as the reasons for judgment will show whether a decision was given for an accused on a matter of law. Although the Attorney-General does sometimes mention in his notice of appeal

the crisp question of law arising in the case, there is nothing in Sec. 105 which requires him to do so. All that he need do in his notice of appeal is to say that he is appealing against the order made by the Provincial or Local Division. If it appears from the judgment of the Court a quo that that court gave a decision in favour of the accused on the facts and not on a matter of law the Appellate Division will strike the appeal off the roll on the ground that it was not competent for the Attorney-General to appeal. If, however, it appears from the judgment of the Court a quo that that court gave a decision in favour of the accused on a matter of law then it is the duty of the Appellate Division to consider whether or not the Court a quo erred in law.

In the present case the Attorney-General went further in his notice of appeal than he was required to go by alleging that the Court a quo erred in holding that the respondent was not an "employer" in the Printing and Newspaper Industry within the meaning of the definition of that Industry appearing in the relevant Government notice. That was, in effect, the finding of the Court a quo and we must now examine its judgment in order to ascertain whether that finding was on the facts or on a matter of law.

Analysing the judgment of the Provincial Division it appears that it was inclined to hold the view that as the respondent's lithography activities (assuming that the respondent was employed in lithography work within the meaning of the agreement) involved a considerable amount of money, those activities were of such a degree that respondent was employed in the Newspaper and Printing Industry within the meaning of the agreement. The Court, however, went on to say that there were four additional factors which turned the scale in favour of the appellant and then concluded that the lithography branch of the respondent's activities can fairly be said to be ancillary to its main business. As I read the Provincial Division's judgment it seems to me that it reached its conclusion on the ground that the lithography branch of the respondent's activities was ancillary to <sup>its</sup> ~~its~~ main business. If this is a correct reading of the judgment then it seems to me that it is based on a matter of law and that the objection in limine should therefore be overruled.

I shall now consider whether the Provincial Division erred in law. In Ko-operatieve Wynbouers Vereniging v Industrial Building Industry (1949 (2) S.A. 600 at pp. 608 and 609) this Court said :-

" It may at once be conceded that the main activities of the appellant have no relationship to the building industry. This, however, does not conclude the matter, for as pointed out in Re v Sidersky (1923 T.L.D. 109) at p. 113 :

'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. The question is one of fact.'

Cf. Rex v Giesken and Giesken (1947 (4) S.A.L.R. 561 at p. 566).

The two or more industries may be distinct or the one may be ancillary to the other. At least in the latter class of case, of which the present is an example, the test resolves itself into a question of degree. "

I think that it is clear from the above case that the mere fact that the lithography part of the respondent's business is ancillary to its main business is not per se conclusive in favour of the respondent ; if it is ancillary, one must go a step further and decide on the proved facts whether the lithography part of the business is of such a magnitude that it can fairly be said that the respondent is carrying on more than one industry. (ibid p. 609). Such a decision must be made where one industry is ancillary to another and only then does a question of degree arise : it obviously cannot arise when a person carries on two or more distinct industries. There can, to my mind, be no doubt that in the case I have cited the industry which was held to fall under the industrial agreement concerned was ancillary to the main activities of the K.M.V. but this Court held that that industry was nevertheless subject to the industrial agreement.

Counsel for the respondent pressed on us the case of Wilmers v Stinneys (S.A.) Ltd. (1928 T.P.D. 695). That case was

cited in argument in the K.W.V. case but it is not mentioned in the judgment. In so far as there may be anything in that case which is inconsistent with the judgment of the K.S.V. case the latter case must prevail.

I should add that I do not construe the judgment under appeal as holding that as a matter of degree the respondent is carrying on only one industry. It is true that it mentions the question of degree and then says that the four factors which it mentions turn the scale in favour of the respondent. None of those factors are related to the question of degree : they are all related (with the possibly<sup>e</sup> exception of the fourth factor which may be more germane to the question whether the respondent is engaged in lithography) to the question whether the lithography part of the business is ancillary to respondent's main business - a question which seems to me to be irrelevant in considering whether the lithography part of the business of the respondent is of such a magnitude that it can be said that the respondent is engaged in the Newspaper and Printing Industry.

I arrive at the conclusion that the Provincial Division erred in law in holding that because the lithography part of the respondent's business was ancillary to its main business that part of its business did not fall under the industrial

agreement. ~~The objection in limine must therefore be overruled.~~

For the reasons which I have already given I do not think that the Provincial Division came to a firm conclusion that the magnitude of the lithography part of the business was such that it fell under the industrial agreement. Nor did the Provincial Division make any finding on the question whether the lithography done by the company is lithography within the meaning of the industrial agreement. In these circumstances we cannot, under Sec. <sup>105</sup>~~105~~(1)(a) of Act 32 of 1944 simply reinstate the conviction and sentence and leave it at that. The only course open to us is to follow the decision of this Court in Attorney-General (Transvaal) v Steenkamp (1954 (1) S.A. 351 at p. 357) and make the following order :- The appeal is allowed, the order of the Transvaal Provincial Division allowing the appeal is set aside, the conviction and sentence are reinstated and the matter is remitted to the Provincial Division to decide the issues which remain undecided i.e. whether the respondent is engaged in lithography within the meaning of the industrial agreement and if so whether such lithography is of such a magnitude that it can fairly be said that the respondent is engaged in the Newspaper and Printing Industry within the meaning of that agreement.

The answering of either question in the negative will result  
in the conviction and sentence being set aside.

*W. J. C. L. L. L.*

Hoexter J.A. }  
Steyn J.A. } con cur  
Reynolds J.A. }  
Brink J.A. }

IN THE MAGISTRATE'S COURT FOR THE DISTRICT  
OF JOHANNESBURG. HOLDEN AT JOHANNESBURG.

Case No. C. 1262/55.

R E G I N A

versus

MOORES (S.A.) (PTY.) LTD.

MAGISTRATE'S REASONS FOR JUDGMENT.

The accused company was charged with contravening Clause 28(1) read with 28(3) of the Agreement relating to the Printing and Newspaper Industry published in terms of Section 48 of Act 36 of 1937 and read with Government Notice No. 1294 dated 19.6.53 and Sections 53(1) and 82 of the said Act, in that the company, being an employer in the said Industry had failed to register.

FACTS FOUND PROVED.

1. That the accused company carrying on business at the corner of Goud and Kerk Streets, Johannesburg, had as its main business the selling of multigraph, addressograph and multilith machines.

2. That in conjunction with the sale of its multilith machines the company offered to supply its customers and users of multilith machines with prepared photo-lithographic plates.

3. That the multilith machine was a machine capable of reproducing images and other printed matter from previously prepared lithographic plates.

4. That the lithographic plates were processed

/ on .....

on plates of zinc and aluminium.

5. That the blank plates (metal used) so called originals, were ready-grained and of one uniform grain only.

6. That the lithographic plates supplied by the accused to users were processed by both the "direct" and "Photographic" methods known to the Printing Industry.

7. That the photographic process used in processing the plates was a "negative" process identical to the "Albumen" process used by lithographers in the Printing Industry.

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8. That the albumen process was one of the main processes used in lithography.

9. That lithography was one of the three main methods of printing and a "trade" defined in the Printing Industry.

10. That the accused in processing photo-lithographic plates were doing lithography.

11. That the accused company employed ten (10) employees full time on plate making in the various branches of the company's business.

12. That platemaking accounted for 2.69% of the company's turnover and showed a profit.

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13. That platemaking was not a casual or insignificant part of the company's business.

14. That platemaking was not incidental to the accused's main business - the selling of machines - but a separate business.

15. That the accused company and its employees were associated in a trade in the printing industry.

16. That the accused company was an "employer" in terms of the agreement for the Printing

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/and .....

and Newspaper Industry.

17. That as such the accused company was bound by paragraph (b) (1) of Government Notice No. 1294 dated 19.6.53 and required to register with the Industrial Council for the industry which it has failed to do.

REASONS FOR FINDINGS.

The facts found appear from both the Crown and defence evidence.

The Crown's contention that the accused company was an employer and as such required to register under the Printing and Newspaper Industry was based on the fact, that the process and operations, employed by the company and its employees in the processing of photo-lithographic plates for its customers, were identical to those used in lithography (which included photo-lithography) one of the recognised trades included in the Printing Industry.

The defence, on the other hand, while admitting that they were engaged in lithographic platemaking contended that the accused was not an employer because

- (1) it was not a party to and not bound by the agreement
- (2) its process of platemaking was not that contemplated by the agreement for the Printing and Newspaper Industry because it was different and less skilled from that envisaged as lithography and
- (3) that, even if lithography, it was incidental to the company's main business and that the company and its employees were not engaged or associated in an industry.

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In regard to the defence's first contention it was clear that the company was not a party to the agreement, but by virtue of paragraph (b) (1) of Government Notice No. 1294 dated 19.6.53 the company would be bound provided it was proved that the company and its employees were associated, engaged or employed in the Industry in the Union.

The company was incorporated in 1930 and was carrying on its type of platemaking business before the present agreement was entered into, or came into force on 1.7.53, also, from the correspondence between the company and the Joint Board for the Industry (Exhibit "2") it was clear that as far back as August 1952, the company's activities in platemaking were known to the Board who on 25.8.52 approached the accused company and requested it to register under the then existing agreement. The dispute which arose therefrom has now resulted in the present prosecution.

It was clear that at 1.7.53, when the present agreement came into force, the accused company and its employees were already engaged in the process of platemaking, and, from the evidence of Goss and others, have all along been so engaged. It seemed unlikely, therefore, that the definition of lithography in the present agreement was not also intended to envisage and include as contended by the defence, the process employed by the accused. VIDE REX vs. REICHLIN 1939 A.D. 271. This case would appear to be distinguishable from that of Rex vs. Scapszack, 1929 T.P.D. 98 and Rex vs Gearing, 1931 CP.D. 408).

The accused's main business being that of selling machines, the Crown, in order to establish that the company fell under the Industry, had to prove that the company and its employees were engaged and employed or associated in a collective enterprise in a class of productive work or manufacture as laid down in REX

/vs.....



vs. Sidersky 1928 T.P.D. 109. The company could fall within the Industry, however, even if it and its employees engaged in only a section or portion thereof by virtue of the definition of "undertaking, industry, trade or occupation" in Section 1 of Act 36 of 1937. Also, the Certificate of Registration of the Industrial Council for the Printing and Newspaper Industry and the Agreement (G.N. 1294 dated 196.53) both provide e.g. page 6 of the Agreement under the definition of "Printing and Newspaper Industry"... (a) the following trades (together with the "occupations and operations incidental thereto) whether or "not the said trades, occupations and/or operations are "carried on separately or collectively or in conjunction "with printing or apart from printing, viz ... lithography."

The fact that the company did not ~~grain~~ engraving of plates nor actual printing would seem not to exclude it in the light of the aforesaid definition, and it would appear to be in the same position as "trade or process houses" in the Industry who do no actual printing but merely process plates.

As regards the defence's second contention, the witnesses Crombie and Black, qualified lithographers, called as experts, deposed to what constituted lithography, including photo-lithography, as understood in the Printing Industry. Both described the process of photo-lithographic platemaking in detail and declared that the process of platemaking as described by Sauer, Smith and Gush, employees of the accused company called as Crown witnesses, was identical to the process used in the Industry, and described by them, except for certain trade names. The similarity of the process as deposed to by Crombie and Black with that described by Sauer, Smith and Gush was clearly apparent from a comparison of their evidence. This process also corresponds to that set out in Exhibit "N" as page 226.

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In both instances the process employed was to photograph the subject (image or "copy" so called) to be reproduced with an ordinary camera to obtain a "negative"; next a zinc plate, like Exhibit "C", was cleaned, dried in a whirler and coated with a sensitising solution to receive the image; the negative was then placed on this plate and clamped into position in a "printing down" frame and the air exhausted to bring the negative into contact with the sensitised plate, whereupon the whole was exposed to strong light, which transferred the exposed portions of the image on to the plate. The plate was then coated with a chemical and washed; the image was then developed by removing the unexposed portions leaving the exposed image which had been hardened on to the plate; this image was ink receptive. The plate was then coated with a gum ("Keepeze" in accused's case) to preserve the image, whereupon the plate was ready for use in the printing machine. This method according to both Crombie and Black constituted the use of an "albumen" process, one of the main processes used in lithography.

Sauer deposed to being a "process engraver" employed on multilith platemaking, while Smith regarded himself as a multilith platemaker, and Gush claimed to be a platemaker producing plates by both the "direct" and photographic methods. They all did the whole process involved, including retouching the "copy" and "edging" the image, They all claimed to perform their work in accordance with a set of instructions (Exhibit "U") issued by the company and none of them grained the "master" plates, nor mixed any chemicals (which they were unable to do) used in the process, as these were supplied ready-mixed with instructions for use. Furthermore, of the three, only Sauer had served an apprenticeship while Smith and Gush were taught the

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operations by Goss in a matter of months.

In the light of their evidence the defence contended that the company's process was simpler and less skilled than that known to the trade of lithography, (though Goss claimed that the principles set out in the process described by Crombie and Black did not strike him as strange, but as very involved) where the journeyman lithographer had (a) to have a certain minimum education qualification, (b) to serve a lengthy practical apprenticeship and (c) to have a knowledge of chemistry in order to mix inks. Also, that in the trade of lithography plates of various types of grain were used, whereas they use only one type of grain which excluded the choice which the lithographer in the trade would have of selecting the most suitable type of grain for a particular job. Furthermore, that according to the pamphlet (Exhibit "T") supplied by the accused "the skills of the lithographer have been bottled".

From the evidence of Black, whose firm as lithographers used the accused's multilith machines, it was clear that his firm had some of their plates prepared by "trade houses", and used the chemicals supplied by the accused company when making their own plates. Both he and Crombie stated that the use of ready-grained plates and ready-mixed chemicals and inks were a common practice in the Printing Industry, although some printing firms made their own plates and mixed their own chemicals. Black stated that his firm did not grain their own plates.

Also, the definition of lithography makes no mention of mixing chemicals, which would seem to fall under the duties of a labourer and not a journeyman in terms of the Agreement. Trade houses, who make plates, use ready-mixed chemicals according to Black and Crombie.

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It was clear, therefore, that the fact that the company used ready-grained plates and ready-mixed chemicals did not bear out the defence's contention as these were a common practice also in the Industry. Likewise the fact, that the company used only one type of grained plate for use on one type of machine only, would seem to be immaterial as long as it was produced by an identical process to and intended for the same purpose as that in the trade. It was the nature of the work and operations in which the company and its employees were associated, and engaged and employed, that must be considered. (Sidersky's case supra and REX vs SEXBY, 1943 A.D. 222).

Neither would the fact that the company's employees were unskilled seem to avail it as long as the employees were in fact doing the work of journeyman lithographers, as the accused and its employees would be engaged in lithographic platemaking and the test to be applied would appear that laid down in REX vs. SAWKINS, 1925 C.P.D. 338 i.e. "Not the man's skill but the work on which he is "employed". Thus the fact that the "skills of the "lithographer have been bottled" as stated in the pamphlet would not avail the accused. This case would appear to be distinguishable from that of REX vs. REYNOLDS AND OTHERS, 1940 C.P.D. 555.

From the evidence of Black it was clear that the processing of litho-plates in the trade was now-a-days handled by different persons at different stages, e.g. a camera operator is known as a "process man", a "retoucher", who works on the photographs, is known as a lithographer, and a platemaker is known as a lithographic platemaker. Thus from the evidence of Sauer and Smith both would

/fall .....

fall under all three categories for they operate a camera, retouch photographs (which require a certain amount of skill) and process plates.

Furthermore, according to Crombie accused company in its Durban branch, has all the essential equipment for platemaking, i.e. camera, printing down frame, whippers, edging baths, lamp and ancillary equipment, used in the trade although according to Goss most of it was home-made.

The defence claimed that the multilith machines was a duplicating, as opposed to a printing, machine, but both Black and Crombie, the experts, stated that the multilith was a small lithographic printing machine operating on the same basis as the bigger lithographic machines in the Industry, and Crombie declared that the multilith was a machine similar to the "Rotoprint" machine (See page 123 of Exhibit "D") a printing machine.

Crombie deposed to lithography being a planographic form of printing i.e. that the subject to be printed is on a plate which is perfectly flat, neither in relief nor intaglio. The image (subject or "copy") to be printed being transferred to a litho-plate by several methods including the photographic process dealt with above. This plate was then put in the machine which was to do the actual printing. He stated that the basis of lithography was the antipathy of grease to water i.e. the image (subject) being greasy, the plate when moved through the machine received a coating of dampness on those portions which were not greasy; the plate then passed through inking rollers, and as they in turn were greasy, charged only the image with a coating of ink but not the damp portions of the plate. The greasy image was then transferred (printed) to the stock which was to be printed upon, either directly or by means of the

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off-set process, which was the transference of the image to a rubber blanket, and from there on to the stock.

Comparing this portion of his evidence with that of Sauer, it was clear, that the process followed on the multilith machine was identical, and that the multilith machine seemed to be one which operated by a lithographic process printing by the off-set method. Goss, also, admitted that ordinary duplicators worked from stencils, as opposed to plates, and that Exhibit "G", specimens produced on Black's multilith machine, could not all be produced on another type of duplicator other than multilith, except on a Davidson's duplicator, which was one which operated on the same principle as the multilith. According to the definition of "Duplicating" in the agreement it includes:  
- ..... "the cutting or preparation of stencils for use on duplicating machines," not the processing of plates. The defence's contention that the multilith machine was a duplicating machine would seem, therefore, to be without substance.

Hence, it was clear that the process and operations, i.e. the nature of the work, performed and engaged in by the company in its platemaking department were those used in lithography one of the three main methods of printing.

I accepted the Crown evidence and found that the accused company and its employees were engaged in the trade of lithography as envisaged in the Agreement.

Although the company's main business was the selling of machines, it is trite law, that it was possible for an employer to be engaged in more than one occupation or enterprise (Sidersky's case supra) and following the decision in REX vs. GIESKEN, 1947(4) S.A. 561. Thus the accused company could be engaged in an enterprise, e.g. that of platemaking, a process of lithography,

/as .....

as shown by the facts, which would bring it as employer within the Printing Industry.

Nevertheless, the Crown, in order to succeed in the present case, had in addition to prove that what the accused company was doing was (a) neither casual nor insignificant or (b) merely incidental to its ordinary business.

The facts relevant to (a) above were the following: it was common cause and admitted that out of the company's total employees numbering 142, ten (10) were employed in platemaking in three of its branches, i.e. the process and operations described by Sauer, Smith and Gush, and that these operations have been performed all along. It was also clear from the evidence of Sauer and Smith that they and their assistants in Durban were employed full-time on the processing of plates. Sauer deposed to the Durban branch preparing on an average 10 plates per day, whereas Gush claimed that his three assistants in the Johannesburg branch were employed full-time on platemaking with an output of from 160 to 180 per month and up to 20 plates per day.

Goss declared that the sales, supplies and services of multilith machines represented 24% of the company's turnover and that at £2 per plate, platemaking for the period 1.1.52 - 31.12.54 accounted for £20,409 in a total turnover of £758,234 i.e. 2.69% of turnover. He also stated that of all "masters" sold in South Africa in 1954 3.4% were processed by the accused's platemaking department; that the plates were processed for sale to customers, became the customer's property, and that the company showed a profit in this department.

Comparing the magnitude of this activity of the accused company with that in the case of REX vs C.T.C. BAX LAARS, 1943, where one employee was engaged in doughnut-making for sale at a profit which over three months accounted for / £51,117.....

£117 and £86 respectively in turnover of £47,000, £57,000 and £62,000, it seemed clear that the accused company's activities were on a larger scale. Furthermore, the employee in the C.T.C. case was engaged solely in doughnut-making and had no experience in the baking and confectionery industry (the machine operated mechanically) and she merely had to look out for stoppages, sufficiency of oil and to maintain pressure, but, as the doughnuts were made for purpose of sale in the employer's business and at a profit, it was held that she was employed in the baking and confectionery trade. In this case (Moore's ) Sauer and the others were engaged only in platemaking and claimed to be unskilled in lithography yet made litho-plates for sale in the accused company's business which resulted in a profit. As the C.T.C.'s activities in the aforesaid case were held not to be merely casual or insignificant, the accused's a fortiori would appear not to be so. Furthermore, accused and its employees have been continuously associated in platemaking on a full-time basis which would seem to make the accused company an employer with its employees in the Printing Industry in the trade of lithography, although this was done in conjunction with another enterprise, that of selling machines. Vide REX vs. BEROLD, 1939 C.P.D. (April) and REX vs. C.T.C. Bazaars (supra) Also, while platemaking was a regular, though not a major part of the accused's business, as long as it and its employees were to some extent associated in the trade, which was not casual or insignificant, the accused would be an employer in terms of the decision in REX vs. SEXBY, 1943 A.D. 222.

Furthermore, it was clear that the employees of the accused company, except Gush, employed on platemaking

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took no part in the firm's ordinary business of selling machines.

In view of the number of persons employed, the magnitude of the work, the time devoted by the employees in producing the plates and the fact that the accused showed a profit on platemaking, I found that the accused's platemaking was not casual nor insignificant in the light of the decisions of REX vs. C.T.C. BAZAARS 'supra), REX vs. WEISS, 1931 (T.P.D.) 17 P.H.K. 1, REX vs. SELIGSON? 1926 T.P.D. 27 and K.W.V. vs. INDUSTRIAL COUNCIL FOR THE BUILDING INDUSTRY, 1949(2) S.A. 600.

In regard to whether the platemaking was incidental to the accused's normal business of selling machines, the evidence showed that the company in addition to the sale of the multilith machine offered buyers instruction in the use of the machine, servicing thereof and the supply of prepared plates for use in the machine. The plates were not part and parcel of the sale, but were prepared to users specifications on demand and sold to the users of the machine. The preparation of the plates was apparently not necessary for the sale of the machine because Goss stated: "The company "did not try to dictate to their users where to have the "plates made, but their platemaking service is there if they "wish to avail themselves of it" The company also taught users to process their own plates, and multilith users made their own plates. or had them made by "trade houses," and the plates sold by the company constituted only a small percentage e.g., according to Goss, of all masters sold in South Africa in 1954 only 3.4% were processed in their platemaking department, the balance being done by the customers or by trade houses Crombie and Black also deposed to its not being the usual practice of sellers

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of printing machines to process plates for sale. In this respect this case would appear to be similar to that of G.T.C. Bazaars (supra) and distinguishable from that of REX vs KIMBELL, 1934 T.P.D. 256, where the sale of eggs was held to be necessary and part of the business of a dairy.

It was clear that in processing plates for sale the company had entered the field of manufacture, as opposed to that of its normal business of mere selling, and had at its disposal all the necessary equipment, albeit home-made, for the preparation of the plates and was engaged in a different trade. The sale of the plates to users clearly could not be regarded as such an incidental part of the sale or servicing of the machine as to constitute "spare parts" or "minor repairs," for the users processed their own plates. This case was therefore distinguishable from that of WIEMERS vs. STINNES (S.A.) LTD., 1928 T.P.D. 695. and the case of REX vs. ROHOLD, 1934 T.P.D. 371 relied on by the defence, and similar to that of the K.W.V. vs. I.C. Building Industry (supra.)

In the circumstances I found that the accused company's platemaking was not incidental to its business of selling machines but constituted a different trade.

The defence, contended, further, that, if the company were to register, its business would suffer as its sales would be limited, although it sold only to users; its trained staff would not be able to do the work as they were not qualified, and it would be at a disadvantage in obtaining labour. It was clear from the evidence of Crombie, however that there was provision for accused's employees to take "trade tests" and for them to be exempted, and in the light of REX vs. DALESKI, 1933 T.P.D. 47,

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it would seem that their contention was not well-founded.

Seeing that the accused company and its employees were associated and engaged for a common purpose in the processing of lithographic plate for sale, by a process and operations identical to that in the trade of lithography in the Agreement, the magnitude and duration thereof being more than casual or insignificant and it not being incidental to the company's normal business, I found that the company was an employer in the Printing and Newspaper Industry and as such required to register.

The accused company having failed to do so, I found it guilty.

P.J. VAN HEERDEN.  
ADDITIONAL MAGISTRATE.

Johannesburg.  
25th August, 1955.