136/56

136/56

G.P.-S.103675—1954-5—1,000. U.D.J. 219.

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

(Witwatersrand Provincial Division).
(Witwatersrand Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

AMAL. UNION of BUILDING TRADE WORKERS of S.A. Appellant,

versus

S. A. OPERATIVE MASONS' SOCIETY. Respondent.

Appellant's Attorney / Prokureur vir Appellant: Nathan & Zwa
Respondent's Attorney / Prokureur vir Respondent: Lewis R.

Appellant's Advocate / Advokaat vir Appellant: N.E. Rosenberg Q.C. + S. [illegible]
Respondent's Advocate / Advokaat vir Respondent: M. Schaeffer

Set down for hearing on / Op die rol geplaas vir verhoor op: Tuesday, 20th Nov., 1956.

(WLD)

1/2/57

9.45 – 12.50
2.15 – 3.45 } CAV

— Appeal [illegible] [illegible] judgment [illegible].

Centlivres, C.J. [illegible]
Reynolds, [illegible]

[illegible]
10/12/56

Record.

IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

AMALGAMATED UNION OF BUILDING TRADE WORKERS OF SOUTH AFRICA Appellant

and

SOUTH AFRICAN OPERATIVE MASONS' SOCIETY Respondent

Coram: Centlivres C.J., Schreiner, ~~de Beer~~ Reynolds, de Villiers et Brink, JJ.A.

Heard: 20th November, 1956. Delivered: 10 - 12 - 1956

J U D G M E N T

SCHREINER J.A. :- The appellant and the respondent are trade unions registered under the Industrial Conciliation Act (Act 36 of 1937) and in terms of section 5 each is a body corporate capable of ~~e~~su-ing and being sued and of purchasing or otherwise acquiring, holding and alienating property, movable or immovable. The respondent was formed some sixty years ago and at one time had branches, called lodges, at Pretoria, Johannesburg, Cape Town, Durban, Bloemfontein and Paarl. The Pretoria branch went out of existence in 1948, and the Johannesburg branch at the end of 1953. It was the circumstances attending the disappearance of the latter branch that gave rise to the present proceedings.

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The parties were at all material times members, with two other trade unions and with employers' organisations, of the Industrial Council for the Building Industry (Transvaal). In November 1950 the Industrial Council caused to be registered a company called Building Industry Pension Fund Limited with a capital of £50,000 in £1 shares. According to its Memorandum of Association its objects were, inter alia and principally, "To inaugurate, undertake, ad-"minister, control and in any manner to effect Benefit, Provi-"dent or Pension Schemes for employees of the Building Indus-"try and for that purpose" to carry on all classes of insurance and to grant annuities. The shares of the company were to be held as to twenty-five per cent by the trade unions and as to similar percentages by the employers' organisations and by insurance companies sponsored by the trade unions and the employers' organisations respectively. Each of the four trade unions that were parties to the Industrial Council received one fourth of the trade unions' twenty-five per cent, that is 3125 shares, and a share certificate (No. 5) for that number of shares was issued to the respondent. The question to be decided in this appeal is whether the appellant or the respondent is entitled to that certificate -

and/.....

and the rights represented by it.

In a Government Gazette No. 4975 of the 5th December 1952 there were published, under section 48 of the abovementioned Act, the terms of an industrial agreement relating to the Building Industry in certain named, industrialised parts of the Transvaal. The main object of the agreement was to establish a benefit fund and provide for its administration. The fund was to consist of the balance of a Wage Stabilisation Fund that had come into existence as a result of an Arbitration Award made in 1944, and of future contributions by employers and employees. The agreement recites the amounts contributed to the Wage Stabilisation Fund by the employers' organisations and by the four trade unions. The employers had contributed £55,541, the appellant £35,649, the two other trade unions £17,851 and £1,449, respectively, and the respondent £563. The agreement provided in clause 10 that upon liquidation of the fund, surplus moneys to its credit should be paid to the contributing bodies in proportion to their contributions, provided that if one of the contributing trade unions were absorbed or by or amalgamated with any other trade union its share should be "paid to the amalgamating or succeeding "body". It is important to note that the money in the Wage

Stabilisation/.....

Stabilisation Fund had all come from the Transvaal; that the industrial agreement had no operation outside the Transvaal and that the benefits were only payable to Transvaal employees.

The Johannesburg branch of the respondent consisted of about 100 members, which was more than one-third of the total membership of the respondent. The branch had apparently for some time thought that the respondent was too weak and that some sort of amalgamation with another union was advisable. The other branches appear to have taken a different view. After an attempt in 1952 to amalgamate the respondent with the Operative Plasterers Trade Union had fallen through, the Johannesburg branch in 1953 entered into negotiations with the appellant with a view to the members of the Johannesburg branch becoming members of the appellant. The headquarters of the ~~appellant~~ respondent were at that time in Johannesburg and the members of the executive committee of the respondent were all members of the Johannesburg branch. Although the negotiations were for the most part conducted between committees of the Johannesburg branch and the appellant, towards the end of 1953 the executive committee of the respondent took charge to the extent that it approved the agreement in terms of which the members of the Johannesburg branch all received their clearances from the respondent and

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joined the appellant on favourable terms as to admission. By the end of the year 1953 the Johannesburg branch had ceased to exist and the headquarters of the respondent were moved to Cape Town, where a new executive committee took over from the beginning of 1954.

The lastmentioned agreement is contained in a letter, dated the 5th December 1953, and addressed by the appellant to Mr. Webster, who was then the general secretary of the respondent. The letter was on the 19th December signed by four persons on behalf of the respondent and four persons on behalf of the appellant. In terms of this agreement it was provided, inter alia, that (a) the members of the Johannesburg branch would leave the respondent and join the appellant, without having to be subject to the usual probationary period in respect of benefits, (b) the appellant would provide for certain named "old age members" of the respondent, and (c) a debt of £148. 8. 11 owed by the respondent to the appellant would be cancelled. Then there is clause 3 (c), the most important for present purposes, which reads, "That matters arising from the change of repre-
"sentation on the Industrial Council (Transvaal) and other
"Bodies such as the transfer of the Mason's Society Wage

"Stabilisation/.....

"Stabilisation Fund £563. 14. 9 monies paid to the Industrial "Council in 1948 in clause 4(1)(a) and 10(1)(a)(b) and (2) "of the Benefit Fund agreement of Gazette No. 4975 dated 5th "December 1952 with the Building Industry Benefit Fund Ltd, "3125 "A" shares in Certificate No. 5 numbers 9376 øto "12500 be drawn up legally by the two Union Sub-Committees."

This clause is not very clearly worded but it indicates that the parties had in mind that the respondent would no longer be represented on the Transvaal Industrial Council and that this fact would entail the transfer to the appellant of (i) the rights arising from the contribution of £563 made by the respondent, and (ii) the share certificate. The foreshadowed legal drawing up does not seem to have taken place, but the share certificate had already been handed over to the appellant. On the 23rd. November 1953 the general secretary of the respondent had written to the general secretary of the appellant "My Executive Com- "mittee instructed me to send out share certificate of the "Building Industry Pension Fund which is attached. The money "of the shares did not come from our Society as the amount "from the stabilisation fund from our Johannesburg Branch "members was not enough to put in for our shares and the

"amount/.....

"amount was made up from your Union. My Executive Committee "decided that because our Johannesburg Branch is amalgamated "with your Union, the shares must be transferred with them to "your Union in terms of the amalgamation agreement with the "other Masons' Society stabilisation monies. This can be "done after the other matter of amalgamation is completed "with the Industrial Council of the Building Industry here "in the Transvaal." The appellant's reply dated the 27th November 1953, reads, " I have to acknowledge the re- "ceipt of your letter dated 23.11.53 with the quoted Share "Certificate No. 5, of 3,125 shares of the S.A. Operative "Masons' Society on behalf of the Johannesburg Lodge Members "for transfer to this Union in terms of the amalgamation "agreement, clause 3(c), with this Union. This matter of "the transfer of the share certificate can be done when the "other matters of amalgamation have been completed." In the first instance the share certificate had been forwarded without a completed transfer deed but this was supplied a few days later at the request of the appellant. It was not disputed before this Court that the respondent's executive committee had instructed its general secretary to take all steps necessary to transfer the shares to the appellant.

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The latter, however, did not have the shares registered in its name and they remained in the name of the respondent.

In December 1954 the respondent received from the Building Industry Pension Fund Limited a cheque for £468. 15. -., being a dividend on the 3125 shares. A claim to this dividend was made by the appellant and repudiated by the respondent, which thereafter brought action in the Witwatersrand Local Division for an order directing the appellant to deliver the share certificate to it. The pleadings put in general issue the rightfulness of the transfer of the certificate to the appellant at the end of 1953. After hearing evidence KUPER J. gave judgment for the respondent, holding that although the delivery of the certificate and transfer deed would have given the appellant the right to the shares, had the transaction been within the powers of the respondent and its executive committee, it was in fact beyond their powers, and the respondent was accordingly ontitled to the return of the certificate. From this order the appellant now appeals to this Court.

Two questions have to be decided - (a) whether the respondent itself had power to transfer the certificate to the appellant, and (b) whether, if the respondent had such power, its exercise by the executive

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committee can be challenged[1].

Under its constitution the powers of the respondent are not separated from its objects, which are briefly stated in Rule 3 to be " The promotion and general "welfare of its members, by co-operative or other acceptable "method; with the ultimate idea of obtaining administration "and control of the Building Industry in S.A.; to assist "morally and financially members in case of accident or sick-"ness, and to make provision for the burial of deceased mem-"bers; to assist other Industrial and Trade Union Associations "in the maintenance or improvement of their social and indus-"trial positions."

These objects are undoubtedly wide. Under section 5 of Act 36 of 1937, referred to above, the respondent has power to alienate any of its assets. Any such alienation must of course be aimed at promoting the general welfare of its members, but in regard to matters of policy it had the power to decide what in its view would further its objects.(cf. Tramway and Omnibus Workers Union (Cape) v. Heading, 1938 A.D. 47 at page 55). No doubt the respondent was not entitled to give its assets away except for purposes reasonably incidental to the carrying on of its

business/.....

business as a trade union; but, if it thought that its members' interests would be promoted by an agreement which involved the surrender of assets in return for apparently adequate consideration, the fact that the consideration subsequently turned out to be inadequate would not affect the validity of the transaction. Here the respondent was relieved of the debt of £148 and of the obligation to support certain aged members. What the financial burden involved in the latter obligation amounted to does not clearly appear, but there is nothing to suggest that it was insignificant in relation to the apparently modest resources of the respondent. The evidence accepted by KUPER J. shows that in 1953 the shares were not regarded as being possible producers of income. It is true that they represented money subscribed, though not subscribed to an important extent by the respondent. It is also true that the company's articles of association recognised that dividends might be declared. But KUPER J. justifiably found that the important benefit to be derived from the shares was not any dividend but the right they gave to take part in the control and management of benefits to be conferred only on Transvaal members. The objects of the company show that its activities were to be governed by the

purpose/.....

purpose of providing benefits for employees of the building industry. The payment of a dividend seems to have been quite unexpected and, whatever the prospects of further dividends in the future may be, it is not clear that, even allowing for the fact that, in addition to the share certificate, the respondent gave up a possible chance of receiving a liquidation payment if the company were wound up, the respondent was a loser by the agreement taken as a whole. But, however that may be, and assuming that the agreement was in fact unfavourable to the respondent, this does not entitle it to restitution if it lay within its powers to make and carry out the agreement.

It was argued on behalf of the respondent that the agreement amounted to one for the amalgamation of the Johannesburg branch with the appellant and as such was beyond the powers of the respondent. Reliance was placed upon a passage in Halsbury 3rd. Edition, Vol.9 paragraph 137 which reads, "A corporation cannot, unless expressly authorised to do so, enter into any arrangement with "another corporation or body which would substantially result "in amalgamation." What is generally meant by amalgamation in company law is discussed in the cases cited in Halsbury

3rd./.....

3rd Edition Vol. 6 paragraph 1547. One can readily understand that the blending of two companies by the absorption of one by the other, or of both byta third created for that purpose, needs specific or express authorisation, since otherwise members of a company might find themselves unexpectedly members of another company of which they had never intended to become members. That kind of amalgamation is what is referred to in clause 10 of the industrial agreement ~~referred~~ mentioned ~~to~~ above. But the transaction here was not of that character. The respondent was not absorbed by the appellant nor did they combine to form a new body in which they became merged. What happened was that the Johannesburg branch ceased to exist because its members left the respondent and joined the appellant. The respondent had no right or power to prevent them from doing that, and what the respondent, through the executive committee, did was to accept the fact of defection and enter into an agreement with the appellant which, while it helped the members of the Johannesburg branch to change from one trade union to the other without loss of benefits, also secured to the respondent certain advantages against certain consideration. Calling the transaction an amalgamation might be convenient, and it was so spoken of at the time, but giving it that name does not render the

above-quoted proposition applicable to it, so as to make specific or express authorisation necessary for its validity. The agreement of 1953 accorded with the wishes of the members of the Johannesburg branch and it may be assumed that in fact they benefited while the other members of the respondent's ~~disadvantaged~~ by the loss of their support. But KUPER J. was satisfied that there was no evidence of mala fides in the conclusion of the agreement. The loss of the Johannesburg members was due to their choosing to join the appellant, and there is no ground for holding that the agreement was designed to benefit them at the expense of the remaining members of the respondent. It follows, in my view, that the respondent had power to enter into the agreement, including the power to agree to transfer ~~of~~ the certificate.

So far as concerns the powers of the executive committee, these flow primarily from Rule 7 of the Constitution, which provides that, "This Society "shall be managed by an Executive Committee of seven members "and General Secretary, its objects being to form a centre "of action that we may the more readily communicate with "each other to check any illegal use being made of the funds, "and to keep every branch of the Society strictly within "the pale of these rules." The special mention of the

objects/.....

objects of communication and ensuring the observance of the rules by the branches does not, in my view, detract from the effect of the opening provision which gives the management of the respondent to the executive committee. Once it is clear, as it is, that the powers of management were intended to extend beyond the narrow objects mentioned, there seems to be no reason why ~~those~~ the powers should be given ~~any~~ a restricted operation merely because those objects were mentioned. They may have been mentioned because it was thought that the executive committee ought in the light of past experience to pay particular attention to the matters referred to.

Some of the other rules help to bring out the powers and functions of the executive committee. It must meet fortnightly (Rule 11) and at its meetings it must transact financial business first (Rule 12). The giving of orders and the buying of goods require its sanction and it is enjoined to insure the society's effects (Rule 17). Some rules provide for the taking of the votes of members. The whole union votes on the election of the executive committee (Rule 9). The furnishing of assistance to unions resisting infringements of their rights requires a

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two-thirds majority of the votes recorded (Rule 39). Affiliation with other societies requires a four-fifths majority of recorded votes (Rule 106) as does a decision to dissolve the respondent (Rule 109). An alteration or revision of the rules requires a clear majority of all members (Rule 107).

But the most important provisions for present purposes appear to be those contained in Rules 22, 23 and 24. Every fortnight the executive committee must send out to the branches "a return of business transacted by the Society, the same to include a financial account, state of trade, record of votes, a summary of Executive Committee minutes, with all division lists, international and other communications, nominations for Executive Committee, and all general appointments, Reports of Committees and Delegations" (Rule 22). The same rule provides that "Members may use the 'Returns' as a medium of communication, but no matter shall be inserted unless it has been submitted to a Lodge and approved of". Then Rule 23 provides for the insertion of "Propositions, Amendments, Applications and Appeals from any Lodge appertaining to trade and benevolent purposes in the 'Returns'", together with supporting reasons, and the rule then provides for the taking of votes of members at Lodge meetings on the issues raised. Under Rule 24 "all

"matters upon which the opinion of the Society may be necessary "shall be submitted through the medium of the 'Returns' and no "votes to be considered legal when taken upon matters submitted "through any other course." And Rule 63 prescribes the procedure for taking votes on general questions.

The effect of these rules seems to be that the general management of the affairs of the respondent was entrusted to the executive committee. In Gibson v. Barton (L.R. 10 Q.B.329 at page 336), BLACKBURN J. answers the question who is to be considered a manager. "A manager would be, in "ordinary talk, a person who has the management of the whole "affairs of the company; not an agent who is to do a particular "thing, or a servant who is to obey orders,but a person who is "intrusted with power to transact the whole of the affairs of "the company. The Act of Parliament.....table A.....does, "by paragraph 15, says that 'the business of the company shall "be managed by the directors', and taking those words by themselves, the directors are the persons who are to manage the "business of the company, and are the managers, in that sense, "of the company." So here it seems to me that the powers of management of the respondent's affairs possessed by the executive committee were limited only by those provisions in the rules which specifically required a vote of members and by

such/.....

such practical control by the members as the system of "Returns" might provide.

There was some evidence in regard to the way in which the "Returns" conveyed information to the branches in connection with the present matter. Mr. Harper, the respondent's general secretary from the 1st January 1954 onwards, gave evidence to the effect that the members in Cape Town were aware at any rate from June 1953 onwards of the plan whereby the members of the Johannesburg branch would join the appellant. This was apparently regularly mentioned in the executive committee minutes included in the "Returns" and KUPER J. found that the branches other than the Johannesburg branch were aware of the negotiations though not of the exact terms. While the legal position may not, on the issues raised in the pleadings, be affected thereby, it is interesting to note that, although the branches other than the Johannesburg branch were said to be against the scheme, no action was at any stage taken to raise an issue in regard to the agreement arrived at in December 1953 or to have a vote taken thereon. Mr. Webster said that according to his recollection copies of that agreement were sent to the various branches, and there is no doubt that after it had been concluded it

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was sent with the other records of the respondent to Cape Town when the headquarters were transferred to that city at the beginning of 1954. It is indeed not surprising that no one sought to question that part of the agreement which related to the transfer of the share certificate, since, in view of what has been said above about the original payment for the shares and the persons intended to be benefited, it was natural to take it practically for granted that the appellant would be the body to look after the provision of benefits by the company and hold the shares.

In my view it follows from the aforegoing that the agreement of December 1953 and the transfer of the share certificate in pursuance thereof fell within the powers of management of the executive committee.

The appeal must be allowed with costs and the judgment must be altered to one dismissing the claim with costs.

Centlivres, C.J.
de Villiers, J.A.
Brink, J.A.
} Concur

C.D. Schreiner
7.12.56

Record.

IN THE SUPREME COURT OF SOUTH AFRICA
(Appellate Division)

In the matter between:

AMALGAMATED UNION OF BUILDING TRADE WORKERS OF SOUTH AFRICA. APPELLANT.

and

SOUTH AFRICAN OPERATIVE MASON'S SOCIETY. RESPONDENT.

CORAM: Centlivres C.J., Schreiner , Reynolds , de Villiers et Brink JJA.

HEARD: 20th November, 1956. DELIVERED: 10/12/56.

JUDGMENT:

REYNOLDS, J.A.

The facts in this appeal have already been set out in the judgment of SCHREINER J.A., and need not be repeated. The agreement relied on by the appellant in its claim that it is entitled to the 3125 A shares will be alluded to hereafter as the December agreement.

The effect of the December agreement may be stated thus:

Before its conclusion (i) respondent was a small trade union with about 300 members , of whom 100 formed the Johannesburg lodge or branch ; (ii) it had thus 300 members paying union dues and responsible for its liabilities ; (iii) none of its members, save those belonging to the Johannesburg branch , were interested in the Fund established by the

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Government Notice , either in the Benefit or the Pension portion ; (iv) because of its having the Johannesburg members, it received 3I25 A shares in the Building Industry Benefit Fund Co. Ltd., but these shares clearly belonged not to the Johannesburg branch but to the respondent itself - as correctly admitted by Mr. Rosenberg - and any dividends belonged to respondent ; (v) the members of the Johannesburg branch say that they placed no value on these shares but the fact remains that they were paid up £I shares in a Company which afterwards paid a dividend of £468.I6.0; and no attempt was made to have a valuation of them made in December ; (vi) respondent - including its Johannesburg members - was responsible for the sum of £I48.8.II to a strike fund , and also small allowances to some of its members who could not work.

After , and by reason of the December agreement , the position of respondent was :

(i) Respondent was a still smaller trade union for by the agreement I00 of its members would resign from it and henceforth become members of appellant on the advantageous terms to them alone that they became full members ; (ii) respondent lost the union dues of these people and their responsibility for any liabilities it might have incurred and was left to carry on with no representation in the Transvaal , which had been its

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most important branch ; (iii) it ceased in any way to be interested in the fund , unless it again established a Transvaal branch ; (iv) it lost all rights in and to the 3I25 A shares and in any possible dividend thereon , or to the right given by Article 86 (a) of the Building Industry Pension Fund Co. Ltd., to vote to nominate two directors because of these shares ; (v) it got the benefit of the cancellation of the £I48.8.II, and the assumption of its obligations towards the persons named in the agreement.

It is quite obvious that it was the extinction of the Johannesburg branch that caused any diminution as regards respondent of the value of these shares , if there were a diminution , and will be the cause of the loss of the shares and the dividend since paid . It is quite clear that the various provisions of this contract cannot be separated into intra vires and ultra vires parts but the agreement stands or falls as a whole , and the more it is attempted to diminish the value of the shares , the greater becomes the importance and value of the loss to respondent , and gain to appellant , of the I00 members of the Johannesburg Lodge , and their dues. The whole matter may be summed up by saying that by this December agreement, the executive ~~council~~ committee of respondent

all.....3....(a).....

(all of whose members were members of the seceding Johannesburg branch) detached the entire 100 members from respondent and bargained for their admission to appellant , and the advantages they got for transferring the members of the Johannesburg Lodge to appellant , and also the shares , was that for this loss suffered by respondent , the consideration given to respondent was the cancellation of the debt of £148.8.11., and the assumption by appellant of the obligation of respondent to the members named in the agreement.

It is contended by appellant that this agreement was valid since (i) an agreement so to diminish its members and resources was intra vires the objects of respondent trade union according to its constitution and (ii) that , if that is so, then the executive committee had the right so to diminish the numbers and resources and shareholding of respondent for the consideration received since it was appointed to "manage " a trade union like respondent . It is essential to remember throughout that this December agreement is not one relating to the disposal of the shares alone but that disposal is merely one integral part of an indivisible contract.

It is quite clear that under certain circumstances a branch of the respondent could be closed by the branch

.....itself.....3...(b)...

itself or by the Executive Committee of the respondent .

Rule 27 reads:

> "When it is thought necessary to
> "close a Lodge or Lodges in the
> "town or district where such a
> "Lodge is situated , and a majority
> "of votes of such meeting to decide,
> "but the E.C. shall have the
> "optional power of closing any
> "Lodge where in their opinion the
> "discontinuance of the existence of
> "such Lodge is not conducive to
> "the best interest of the Society
> "as a whole ."

There was of course nothing to prevent the

members of the Johannesburg branch from resigning as individuals from the respondent and then joining the appellant. But then they could take no assets of the respondent with them, and make no bargain on behalf of the respondent, but would have to join as new members of the appellant, whereas, the December agreement entitled them to join as full members and the very agreement shows that there was an advantage in this. They could also close down the branch if that were necessary, but, even if mere expediency amounted to necessity, again they would join the appellant as new members. Also the executive committee could close down the branch "if conducive to the best interest of the society as a whole". But again this would simply mean - even if this closing be possibly granted as being in those best interests, as it was not - that the members of the branch would be simply left to join the appellant as new members and take no assets with them. But nothing of that nature happened here. By the agreement in question, there was a bargain made with the appellant that the branch be closed to enable its members, as a body, to go over to the appellant ~~in~~ on terms advantageous to themselves, and which terms benefited no other members of the respondent save in the matter of cancelling the respondent's debt of

£148/8/11 in regard to a strike, and appellant taking over the obligations as regards certain persons.

That the members of the Johannesburg branch stipulated for advantages for themselves, did so as a body, and did not cease to be members of the respondent until these terms were granted, admits of no doubt. The negotiations with the appellant and the agreement with it were with the Johannesburg branch as a branch. The letter of the 21st September, 1953, "EXHIBIT "C" is written to the appellant from the Johannesburg branch and states that at a special meeting, attended by the general secretary of the appellant, the unanimous resolution was "that the Johannesburg branch" amalgamate with the appellant and that some of its members would be appointed to discuss terms. Though legally the adoption, or transfer, did not amount to an amalgamation, it is sufficient that a term is used indicating complete absorption ~~adoption~~. The reply of the appellant "EXHIBIT "D" acknowledges the resolution of the Johannesburg branch to amalgamate, thanks the branch for its confidence, and arranges the meeting and sends a draft agreement. On the 21st November, "EXHIBIT "F" again the appellant wrote to

the Johannesburg branch, confirming everything and forwarding the draft agreement "for the final consideration of your Johannesburg branch", and asked for an early reply so as to enable the appellant to arrange for the admission of "your members" at a meeting of the appellant on the 27th January. It is only after all this that the letter of the 23rd November, is written on behalf of the executive committee enclosing the certificate for 3125 A shares as having to be transferred because of the "amalgamation". Even this is acknowledged by the appellant on the 27th November to be from the Johannesburg lodge members of the respondent. Thereafter, the agreement now in question came about with the executive committee of the respondent, and it was only after it was all completed that all the Johannesburg members of the branch of the respondent resigned, and immediately became members of the appellant in terms of the agreement.

The result of the agreement made by the Johannesburg members of the lodge of the respondent there, and indeed with their consent while they were still members of the respondent, and as agreed to by the executive committee, while the members of the executive committee

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were all Johannesburg members, is quite plain. In its terms it arranged for the transfer of all the members of the Johannesburg lodge of the respondent to the appellant on the terms that they should be full members in terms of clauses (a), (b), (c) and (d) of the agreement. The respondent's whole membership in Johannesburg, Cape Town, Bloemfontein, Paarl and Durban was about 300, of which 100 were members of the Johannesburg branch. By the bargain arranged by the Johannesburg branch, and agreed to by the executive committee, who were all members of the Johannesburg branch, the respondent was, by this agreement, deprived of one third of its total membership, and that, in an important centre. It also lost the asset of the 3125 A shares. In return for this advantage given to the Johannesburg members, and depriving the respondent of one third of its members, it received (1) cancellation of the sum of £148/8/11, for which the Johannesburg members had previously to their resignation also been responsible, and (2) the assumption of several obligations towards certain members whose ages we do not know. A great point has been made that it was only equitable that the shares should be transferred to the appellant since they would no longer be of use to the respondent when once the Johannesburg branch

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was closed. This argument conceals the vital fact that by the December agreement itself , the Johannesburg branch of the respondent came to an end and it was by the closing of this branch and the loss to respondent , and gain to appellant , of these members and their dues , plus the 3I25 A shares , that was the cause and basis of the December agreement, and the shares - if really of no value - were simply part of the consideration given by the Executive Committee of respondent for the admission of the Johannesburg members (the members of the Committee included) to appellant . The shares were henceforth without value to respondent , and lost to respondent by the December agreement itself , and any possible future value lost , and the real question is whether respondent , or the Executive Committee had the power to agree to this loss of I00 members on any terms , let alone the cancellation of the debt of £I48.8.II etc. Further, the shares were really not valueless to respondent , ~~even after~~ apart from the December bargain , for the respondent could still revive its Johannesburg branch at any time , and was entitled, itself, to use any possible future dividends from the shares if it retained them , as was rightly admitted by Mr. Rosenberg. As stated before , there is nothing preventing members of the Johannesburg lodge from resigning and joining the appellant in the ordinary way , but the questions arise (i) whether it is in the power of the respondent , under its constitution , to make an agreement in reality just

agreeing for some reward , that 100 of its members should join the appellant on terms that they would not have had if they had joined the appellant as new members , for it is clear that some advantage to them is stipulated for in the agreement in question ; and (ii) since it is clear that the members of the respondent never agreed to this agreement , had the executive committee any authority in terms of the constitution to enter into this agreement in a manner binding upon the respondent , even if the respondent itself had the power under its constitution to enter into the December agreement ?.

The question now is considered whether the respondent had the power under its constitution to alienate the 3125 A shares on the terms contained in the agreement . That the respondent can own and alienate property by reason of section 5 of Act 36 of 1937 is not to the point here , if once the alienation was , by virtue of an agreement , outside the objects of the respondent set out in its constitution . In construing the powers as to its objects given by the constitution , the whole question is , what is the fair construction of the empowering clause as a whole , HAILSHAM VOL. V. PARA. 740, and the powers given must always include powers "incidental or conducive "

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to the objects , HAILSHAM VOL. V. PARA. 743, but not those merely convenient , PARA. 744.

In deciding the question as to whether the December agreement in question is ultra vires the powers of the respondent , the question of whether the executive committee made a good or bad bargain in this case , is irrelevant. If the bargain made was within their powers , it is difficult to see how the badness of the bargain can take it outside these powers . If , on the other hand, it was outside the powers of the respondent itself , it is equally difficult to see how the excellence of the bargain could bring it within those powers. The question is , therefore, not whether the bargain was a good or bad one for the respondent , but whether the respondent had the power to enter into a contract whereby it secured advantages to its Johannesburg members , on their resigning from the respondent and joining the appellant as members . Whether it got advantages in return in the shape of the £I48.8.II debt being cancelled , and the workless members being provided for by the appellant instead of itself , does not matter. That was all part of the price that the appellant paid , as a matter of bargaining , for the loss that the respondent

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sustained in losing one third of its members, their future dues, and the fact that they had kept up the number of the members of the respondent. Again, the undertaking of the appellant to admit the Johannesburg members as full members was part of the bargain whereby the respondent was to lose these members and the appellant to gain them. There is nothing anywhere to suggest that the Johannesburg lodge ~~could~~ would have resigned en bloc if its members had not got the advantage of becoming full members of the appellant, or indeed, resigned at all, and they did not do so until the December agreement giving them advantages had been concluded.

Now under its objects, or those ancilliary to them, had the respondent the power to make the December contract, part of which related to one third of its members leaving it under the circumstances already described and being absorbed in the trade union of the appellant, respondent receiving the quid pro quo already detailed? If such a bargain came within the powers of the respondent - whether incidental or ancilliary or otherwise - then the means adopted to give effect to these powers would be in the discretion of the respondent, TRAMWAY AND OMNIBUS

WORKERS' UNION (CAPE) VS HEADING 1938 A.D. 47, but that would only apply if once the bargain was faulty without the ancillary or other powers. But it is difficult to see how such a bargain - even if advantageous - could come within the powers set out in rule 3.

One object is "the promotion and general welfare of its members by co-operative or other acceptable method". It is the welfare of its members, i.e. the members of the respondent, that is the object and not of ex-members, or of facilitating the members leaving the respondent to become members of another trade union and so cease to be members of the respondent. Nor can "other acceptable means" help at all, since again, it is always the members whose general welfare is to be promoted, and it is difficult again to see how it can be promoted by one third of the members leaving the respondent to become members of another trade union and no longer liable for any dues to the respondent or for any liabilities it has incurred, and so really weakening the respondent.

The next object "with the ultimate idea of obtaining administration and control of the Building Industry of South Africa" certainly does not help the appellant at all, but rather indicates that the bargain

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is ultra vires and really forbidden under this clause, for the reduction in the number of members by one third, and the loss of dues, is inimical to the design of getting control of the Building Industry. There is only a semi colon between these two clauses in this constitution and it may be contended that the two clauses are linked and that "co-operative and other acceptable method" refer to this design to get control, but it is safest to ignore that possibility.

The only other relevant object is "to assist other Industrial and Trade Unions in the maintenance and improvement of their social and industrial positions". It is sheer fiction in this case to say that the December agreement fell within this clause for there was not the faintest idea behind it of maintaining or improving the social and industrial position of either the appellant or the respondent. It was simply dictated by the desire of the Johannesburg members to belong to a more powerful society than their own, not to improve the social or industrial position of the appellant, and they did this without having regard to the wishes of the other members of the respondent. But even apart from this, considered

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objectively, the December agreement could not come within this object which probably refers to contributing strike pay, sympathetic strikes, etc. Social improvement is not alleged. How ~~these~~ there could be industrial improvements of the appellant by the bargain nowhere appears. The very amount standing to the credit of the appellant in the industrial agreement shows how powerful a concern it is, and how pitifully the whole concern of the respondent compares with it. No trace of any improvement in the social and industrial position of the appellant is ever shown in the evidence, or is apparent in any way. It seems to me that this clause refers to help given to other trade unions by the respondent itself as a society, and as a continuous person, and not any suggested help given to another trade union by the respondent dismembering itself, and certainly not dismembering itself by losing one third of its members and its most important lodge.

I think, therefore, that the bargain contained in the December agreement, of which the share transfer is an integral part, is ultra vires.

But even if this were not so, the question would still arise as to whether the executive committee had, in fact, the power to make the December agreement.

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It is clear that the members of the respondent did not authorise the agreement and can only be bound by it if either (1) in fact from the constitution of the respondent, the executive committee could make this December contract owing to the powers of "management" given it, or (2) if it had not that power, the respondent may be contended to be bound by its actions on the application of the legal rules set out in ROYAL BRITISH BANK VS TURQUAND as applied in MINE WORKERS' UNION VS PRINSLOO 1948 (3) S.A. 831.

Now the rule in the respondent's constitution clearly relied on by the appellant is rule 7, though it relies on other rules too. This rule is already set out in the judgment of SCHREINER J.A. and says that the society is"managed" by the executive committee with the objects therein set out. "Managed" is not a word that can be construed in "vacuo". What are the acts of management must be construed, and understood, according to the nature and operations of the company or society to be managed. In trading companies or societies carried on for purposes of profit, the powers of the managers or directors are very large and they usually exercise all the powers of the society or company and that is usually provided for

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in the articles of association. But in a small society like this one, the powers of the directors, or members of the executive committee, would not usually be so large. Chiefly this society looks after its members in the various lodges in the country, sees that dues are collected, that the various lodges carry out the rules etc. It does no trading at all, and nothing in its rules can be traced giving the executive committee any power to dismember it by making a bargain whereby one third of its members may leave it and join another trade union ~~in~~ on terms advantageous to themselves in that they are not to be treated as new members by the trade union that they then join. Rule 7 sets out what are the main objects, or duties may be, of the executive committee and shows that really it ~~is~~ has superintendance of the affairs of the society on its ~~branches~~ hands. I do not think that it sets out that the executive committee can have no further powers, but is a general survey of its powers and duties and defines generally the management entrusted to it. But the nature of its powers set out in the other rules does not lend countenance to its possessing any extensive powers in addition to those general powers outlined in rule 7, of being the body which keeps the lodges and members to their

duty. It has not the power to decide when it must meet, but that is expressly laid down by rule 11, and it cannot order its own meetings as to finance, for that must be dealt with first, rule 12. Even though it may authorise certain purchases, it can only get printing and other goods, wherever possible, from trade unions, and all purchases from £2 in value upwards must be submitted to tender, rule 17. It must insure goods, though one would think that injunction would not be necessary if it had such full management under rule 7. It could give assistance to other unions but can only submit a request to the society and give such assistance if two thirds of the voters agree, rule 39, - indeed rule 39 seems quite consistent with the idea that it can give social and industrial help to other unions of its own will. By rule 38 it is given power to use £10 from general funds, and may advance £50 to another trade union in case of necessity, and it is difficult to see why special power should be required for this if rule 7 gave wider powers. Rules 22, 23 and 24 seem a natural corollary to rule 7, making it the object of the committee to keep in touch with all lodges and members, for they compel the committee to give considerable details, such as directors with wider powers of management normally give.

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Hence, all these rules hardly bear out any idea of extensive powers being given to the committee of this small society which is merely a society to carry out the objects already dealt with in rule 3. But even if these rules be construed as restrictions on and not extensions to the powers given by rule 3, they all indicate how small is the power given to the committee, and how that power cannot extend to making a bargain whereby the society is to lose one third of its members and their dues, on monetary or other compensation, even if the compensation here was adequate when it is realised that not only members and dues are lost, but also the shares now in question. It is a remarkable kind of "management" which makes a bargain to cut down the number of members of a society by one third. It would equally be a curious kind of management which makes a bargain to close down the Johannesburg branch and so destroy the value of the shares to the respondent - so it is said - and then hand over to the appellant shares thus made valueless.

But the rule probably most against the contention of the executive committee having the power claimed, is rule 27. That deals with the closing of

lodges. The first part of the rule deals with when a lodge is closed by its members because it is thought necessary - not merely expedient - to do so. But of course, when that lodge is so closed, it closes without any bargain such as the December one. But the only authority that the executive committee has to close a lodge is when in "their opinion the continuance of the existence of the lodge is not conducive to the best interest of the society", and that limits its powers so to close. Clearly the committee could not - and did not - close the Johannesburg lodge in the interests of the society. By ratifying, in December, the bargain already made by the Johannesburg branch, it certainly never acted under rule 27. Even if it had, its only power under rule 27 was to close the lodge, not to make the bargain now in issue. It seems to me, however, that even if rule 7 could be so widely construed as to give extensive powers of management to the committee, rule 27 defines all the powers the committee has when it comes to a lodge being closed down, and these powers cannot be enlarged by the committee itself electing to act in a way other than that authorised by rule 27 and by closing the lodge and ratifying

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the action of the Johannesburg lodge and making a bargain, enable the members of the closed lodge to get advantage, by the closing of the lodge. Nor was there any ratification of the December agreement by the members of the respondent. Even if the new executive committee were aware of it by the December agreement being sent to the new general secretary - and I think it was not - that would not help the appellant, for the new executive committee too, could have no power to make or ratify such an agreement.

Under these circumstances it seems to me that neither rule 7 nor any other rule gives the committee the right to make a bargain on any terms - whether financially good or bad - or to use the shares of the respondent, or any asset of any kind of the respondent as part of an agreement, to enable the members of the Johannesburg lodge, as a ~~being~~ body, to join the appellant on the terms in the agreement.

Since the constitution of the society makes it clear that the committee of the society has no power to make this December contract or bargain, in law, the appellant must be taken to be aware of this. MINE WORKERS' UNION VS PRINSLOO 1948 (3) S.A. 831. The fact that the appellant and the Johannesburg members thought, in good faith, that

THey had the power, can make no difference. That being so, the appellant dealt in this manner with a body that had simply no power given it by the constitution to deal with this asset, certainly not on the terms of the December agreement, and cannot take advantage of the rule laid down in the PRINSLOO case just quoted. In that case, and in the TURQUAND case, it followed, that there was power in the committee in the PRINSLOO case, and the directors in the TURQUAND case, to alienate or mortgage if given permission by the society or company so to do, and that permission was a domestic matter. The Courts, consequently, held that a third party dealing with the trade union in the PRINSLOO case, and the company in the TURQUAND case, could assume that the domestic requisites for this authority had been carried out. As it was put in PALMERS COMPANY LAW 15th edition at page 40, quoted at page 845 of the PRINSLOO case:-

> "This rule is based on the principle of "convenience, for business could not be carried "on if a person dealing with the <u>apparent agents</u> "of a company was compelled to call for evidence "that all internal regulations had been duly "observed". (The italics are mine)

Here, not only did all know that the executive committee were members of the Johannesburg

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lodge, but in law, the appellant is taken to know that the executive committee was not the agent, and certainly not the apparent agent, of the respondent, to make an agreement like the December one, and so the principle of these cases cannot apply.

Hence, on both grounds, I think that the December agreement was invalid. Nor is it necessary to discuss the argument of Mr. Rosenberg that, despite this, ownership of the shares passed. I do not see how that argument ~~agreement~~ - even if correct - can apply when all the parties in law knew that the ~~agreement~~ agreement was ultra vires, and where the appellant in fact did not purport to make any contract with the society, but only one with the committee.

Hence, I think that the appeal should be dismissed.