G.P.-S.33967—1968-69—1,000.

J. 219.

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

(Provincial Division.)
(APPELLATE Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

THE SOUTH AFRICAN MASTER DENTAL TECHNISIANS ASN *Appellant,*

versus

THE DENTAL ASSOCIATION OF SOUTH AFRICA & ORS. *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Horwitz, Arvan & Lewis

Respondent's Attorney / *Prokureur vir Respondent*

Appellant's Advocate / *Advokaat vir Appellant* M. Schaefer

Respondent's Advocate / *Advokaat vir Respondent* Symington & De Kok

Set down for hearing on / *Op die rol geplaas vir verhoor op* 1-3-70

4.3.6.19

Coram: Botha, Holmes, Wessels JJ.A. et Potgieter A.J.A.

9.45 am —— 11.00 am
(T.P.D.) 11.15 am —— 12.45 pm
2.15 pm —— 3.45 pm

v.

Per Botha J.A.:—

APPEAL DISMISSED WITH COSTS.

REGISTRAR.
28.5.1970

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills Taxed.—Kosterekenings Getakseer.

Date. Datum.	Amount. Bedrag.	Initials. Paraaf.

IN THE SUPREME COURT OF SOUTH AFRICA.
(APPELLATE DIVISION)

In the matter between:

THE SOUTH AFRICAN MASTER DENTAL TECHNICIANS ASSOCIATION.....APPELLANT.

AND

THE DENTAL ASSOCIATION OF SOUTH AFRICA.....FIRST RESPONDENT.

AND

F.J. VILJOEN N.O.....SECOND RESPONDENT.

AND

G. McCORMICK N.O.....THIRD RESPONDENT.

AND

D.J. ROSSOUW N.O.....FOURTH RESPONDENT.

AND

THE SOUTH AFRICAN ASSOCIATION OF DENTAL MECHANICIAN EMPLOYEES.....FIFTH RESPONDENT.

CORAM: Botha, Holmes, Wessels, Trollip, JJ.A. et Rabie, A.J.A.

HEARD: 18th May, 1970. DELIVERED: 28 Mei 1970

J U D G M E N T.

Botha, J.A.

This is an appeal against an order granted by

the...../2.

the Transvaal Provincial Division directing -

> "(a) that the words "and dental mechanicians who are contractors to dentists and such dentists" in clause 1 of the Tribunal's award dated 17th January, 1969, be deleted from the award as made and as published as a schedule to Government Notice No. 2408 (sic) dated 23rd May, 1969;
>
> (b) that the whole of clause 4 of the award as made and published as a schedule to Government Notice No. 2408 (sic) dated 23rd May, 1969, be deleted;
>
> (c) That the fourth respondent pay the costs of this application".

The judgment of the Court a quo is reported at 1970(1) S.A. 537 where the facts are fully set out, and it is not necessary to refer to all of them again in this judgment.

The order was granted at the instance of the Dental Association of South Africa, to which I shall refer as the applicant, and to which association practising dentists may belong as members. The first, second and third respondents in the Court a quo were the chairman and members respectively of the Industrial Tribunal established under section 17 of the Industrial Conciliation Act 28 of 1956. Although they

submitted...../3.

submitted affidavits on the matters raised in the applicant's founding affidavit, they did not oppose the application but abided the judgment of the court. The fourth respondent, which alone opposed the application and which appeals against the order of the Court a quo, and to which I shall refer as the appellant, is the South African Master Dental Technicians Association to which those registered dental mechanicians may belong as members who are not employees, i.e. who work as independent contractors either on their own, or in partnership or as directors of companies, whether or not they employ other dental mechanicians. The fifth respondent, which also did not oppose the application in the Court below, was the South African Association of Dental Mechanician Employees to which registered dental mechanician employees may belong as members, i.e. those demtal mechanicians who are employed as such either by dentists or other dental mechanicians.

It was common cause that, although a small number of dentists themselves undertake the manufacture of dental appliances required in connection with the treatment of their

patients...../4.

patients, the major portion of the manufacturing work is in practice done by dental mechanicians whose occupation is regulated by the Dental Mechanicians Act 30 of 1945. Some dentists employ dental mechanicians on a full-time basis to perform the manufacturing work required by them. Between such dentists and such dental mechanicians the ordinary relationship of employer and employee exists. Some dental mechanicians operate as independent contractors. They are not employed by dentists but perform their manufacturing work for dentists on a contract basis. As between dentists and dental mechanicians who operate as independent contractors, the ordinary relationship of employer and employee does not exist. Some of the dental mechanicians who operate as independent contractors employ other registered dental mechanicians to work for them. As between such dental mechanicians the ordinary relationship of employer and employee exists.

The work of a dental mechanician entails not only the rendering of specialised services, but also the use of various materials in the process of manufacturing the product

required...../5.

required by the dentist. Where a dentist gives out work on a contract basis to a dental mechanician contractor, the practice is for the dentist to supply or cause to be supplied, at his own expense, all false teeth and gold necessary for the manufacture of the required product, while all other materials required are in practice invariably supplied by the dental mechanician at his own expense.

Under section 22 of the Dental Mechanicians Act, 30 of 1945, a Dental Mechanicians Labour Committee (hereinafter referred to as the Labour Committee) was established consisting of nine members of whom -

> "(a) one (who shall be chairman of the committee) shall be the chairman of the board (the Dental Mechanicians Board established under section 2 of the Act);
>
> (b) four shall be appointed to represent the interests of registered dental mechanicians who are employees ;
>
> (c) two shall be appointed to represent the interests of registered dental mechanicians who are employers of dental mechanicians; and
>
> (d) two shall be appointed to represent the interests of dentists who are employers of dental mechanicians."

It...../6.

It will be observed that there is no provision for the representation on the Labour Committee of dentists who are not employers of dental mechanicians, but who give out work on a contract basis to dental mechanicians operating as independent contractors, nor of dental mechanicians operating as independent contractors and who do not employ other dental mechanicians, but work on their own. Approximately 75% of all registered dental mechanicians fall within this latter category.

For the purposes of the Industrial Conciliation Act 28 of 1956, the Labour Committee is, in terms of section 25 of Act 30 of 1945, deemed to be an industrial council in respect of the occupation of dental mechanician, and certain provisions of the former Act, in respect of industrial councils, are, in so far as they are applicable, declared to apply mutatis mutandis in respect of the Labour Committee, which is thereby authorised to deal with disputes between employers and employees in the occupation of dental mechanicians relating to conditions of employment.

At...../7.

At a meeting of the Labour Committee held on 1st August 1968, the representatives of the dental mechanician employees demanded certain improvements in the wages and other conditions of employment of such employees. In the course of the ensuing discussion the representatives of the dental mechanician employers demanded an increase in the contract prices payable by dentists to dental mechanicians operating as independent contractors, and took up the attitude that an increase in the wages of dental mechanician employees could only be approved of if an increase in the contract rates as between dentists and dental mechanicians operating as independent contractors were also approved of. The representatives of the dentist employers refused to discuss the latter proposal on the ground that the Labour Committee had, in their opinion, no authority in regard to the determination of such contract rates.

At the meeting an agreement in regard to improved wages and other conditions of employment for dental mechanician employees was arrived at between the representatives of such employees and the representatives of the dentist employers, but the representatives of the dental mechanician employers

voted...../8.

voted against a proposed resolution that the said improvements be incorporated in an industrial agreement, but they did not join issue with the employees on the merits of their demands, or of the agreement reached between the employees and the dentist employers in regard thereto. The representatives of the dental mechanician employers thereupon moved a resolution that the Minister of Labour be informed -

> "(1) That a deadlock was reached by the meeting on the fixation of a consolidated wage and improvement of conditions of leave for employees in the dental mechanician occupation;
>
> (2) That further deliberations will not result in a settlement of the dispute;
>
> (3) That the dispute be referred to arbitration and further that an adjustment of contract rates be considered by the arbitrator to be necessary to any award made in adjustment of the wages to safeguard the employees".

The motion was carried by a majority. One representative of the dentist employers voted against it while the other one abstained from voting. One of the representatives of the mechanician employees also abstained. It was agreed that the Minister of Labour and the arbitrator be informed

that...../9.

that those members of the Labour Committee who voted against the resolution or abstained from voting, did so because they believed that the determination of the contract rates did not come within the jurisdiction of the Labour Committee or the arbitrator, and that paragraph 3 of the resolution was ultra vires.

Thereafter the dispute was referred to the Industrial Tribunal established under section 17 of the Industrial Conciliation Act 28 of 1956, hereinafter referred to as the Tribunal, for arbitration under section 46 of that Act. (See Sec. 26 of Act 30 of 1945). The terms of reference were -

> "(1) The fixation of a consolidated wage payable by all employers in the occupation of dental mechanician to dental mechanician employees;
>
> (2) The improvement and fixation of leave conditions in the occupation of dental mechanician; and
>
> (3) The adjustment of contract rates be considered by the arbitrator to be necessary to any award made in the adjustment of wages to safeguard the employees".

At the commencement of the proceedings before the Tribunal, its chairman, the first respondent, referred to the memoranda which

had...../10.

had been submitted to the Tribunal by the three parties concerned, and stated that there appeared to be agreement between the parties as to the first and second terms of reference. In regard to the third term of reference, he mentioned the fact that three members of the Labour Committee were of the opinion that the determination of contract rates fell outside the jurisdiction of the Labour Committee, and could not therefore, in their view, be a matter for arbitration under section 46 of Act 28 of 1956. He stated, however, that the Tribunal was satisfied that, as long as the materials used by dental mechanician contractors were excluded from consideration, and the matter confined to the actual work done, the Tribunal was competent to arbitrate on the third term of reference.

Despite objections on behalf of the applicant to the Tribunal's competence in regard thereto, the latter proceeded to deal with the merits of the third term of reference. It was apparent throughout the proceedings that there was no real dispute between the parties in regard to the first

and...../11.

and second terms of reference. The only genuine dispute was that between dentists, who do not employ dental mechanicians, and dental mechanicians, who operate as independent contractors to such dentists, in regard to the contract rates applicable between them. In his replying affidavit the first respondent claimed, however, that as the arbitrators saw it, and as is clearly implied in the first term of reference, the main dispute was what adjustment of contract rates had to be made so ~~far~~ as to safeguard the employees who were concerned that the minimum wages might be undermined by the contract rates.

The award finally made by the Tribunal was published under Government Notice R827 in Government Gazette 2408 of 23 May 1969, and is declared to be binding, not only upon dentists who employ dental mechanicians, dental mechanicians who employ other dental mechanicians, and dental mechaniciams who are employed by dentists or other dental mechanicians, ~~but also upon "dental mechanicians who are contractors to dentists and such dentists"~~ (clause 1). In clause 4 of the award the Tribunal purports to lay down a tariff of contract

rates...../12.

rates applicable between dentists and dental mechanicians who operate as independent contractors. It is the validity of this part of the award which was successfully attacked by the applicant in the Court a quo.

In his replying affidavit the first respondent alleged that the ~~contractors~~ arbitrators had no alternative but to include the said part of the award in order, firstly, to settle the dispute properly in accordance with the terms of reference as they were obliged to do, and, secondly, to ensure the safeguard referred to above. The arbitrators were of the opinion that had they not done so, a position would have been created which would have allowed certain contractors to undertake work for dentists at prices which would encourage dentists not to employ dental mechanicians or give work to contractors who employed dental mechanicians. The first respondent claimed that what the arbitrators did, was what they in their opinion considered reasonably incidental to the proper settlement of the dispute in terms of section 45(12) and (13) of the Industrial Conciliation Act 28 of 1956.

The...../13.

The question for determination in this appeal is whether the Tribunal is empowered by the provisions of the Dental Mechanicians Act 30 of 1945, or the Industrial Conciliation Act 28 of 1956, to arbitrate upon and to determine the contract rates applicable between dentists and dental mechanicians who operate as independent contractors.

I have already observed that the Labour Committee is, in terms of section 25(1) of the Dental Mechanicians Act 30 of 1945, deemed to be an industrial council which has been registered under section 19 of the Industrial Conciliation Act 28 of 1956 in respect of the occupation of dental mechanician. Certain provisions of the latter Act in respect of industrial councils, including section 23, are, in so far as they are applicable, declared to apply mutatis mutandis in respect of the Labour Committee. It follows that the same powers conferred and the same duties imposed upon an industrial council by those provisions are also confered and imposed upon the Labour Committee, and that the latter is therefore authorized by section 23 of Act 28 of 1956, within the

occupation...../14.

occupation of dental mechanician, to -

> "endeavour by the negotiation of agreements or otherwise to prevent disputes from arising, and to settle disputes that have arisen or may arise between employers or employers' organizations and employees or trade unions and take such steps as it may think expedient to bring about the regulation or settlement of matters of mutual interest to employers or employers' organizations and employees or trade unions".

An industrial council, and ergo the Labour Committee, is nowhere, except in section 24(1)(p) of Act 28 of 1956, which will be dealt with later, authorized to deal with any disputes or matters of mutual interest between other persons than employers and employees or their respective organizations.

An "employee" is by section 1 of Act 28 of 1956 defined as -

> "any person.....employed by, or working for an employer and receiving, or being entitled to receive any remuneration, and any other person whatsoever .....who in any manner assists in the carrying on or conducting of the business of an employer".

From what has gone before it is, I think, clear that dental mechanicians operating as independent contractors and performing manufacturing work for dentists on a contract

basis, are not bound to render personal services to such dentists. They are bound merely to produce a certain result by their own labour or the labour of others and with materials supplied by themselves. Nor do they in any manner assist in the carrying on or conducting of the business of such dentists. They are therefore not employees as defined in the Act. (Cf. S. vs. A.M.C.A.Services Pty., Ltd., 1962(4) S.A. 537(A) at p.542-3).

It follows therefore, in my view, that the Labour Committee, when functioning as an industrial council in respect of the occupation of dental mechanician, is not empowered to deal with any dispute that has arisen between dentists and dental mechanicians operating as independent contractors and performing work for such dentists on a contract basis.

This view is confirmed by the constitution of the Labour Committee which in terms of section 2 of Act 30 of 1945 consists of representatives of employers and employees only in the occupation of dental mechanician. There is no representation on the Labour Committee of dentists who are not employ-

ers of...../16.

employers of dental mechanicians, but give out work on a contract basis to dental mechanicians operating as independent contractors. Nor is there any representation of dental mechanicians operating as independent contractors and who do not employ other dental mechanicians, but work on their own. The absence of such representation is the more significant in view of the fact that the Legislature could not have been unmindful of the fact that dental mechanicians operating as independent contractors to dentists may elect not to employ other dental mechanicians. (See e.g. Sections 15, 16(3)(c), 17 and 22(1)(c) of Act 30 of 1945).

Further confirmation of the view expressed is to be found in section 33(g) of the Act which authorizes the Labour Committee to make rules as to -

> "the procedure for dealing with disputes between employers and employees on any matter falling within the committee's functions".

The word "employee" is not defined in Act 30 of 1945, and is here, as in sections 3(1)(b) and 22(1)(b),(c) and (d), used in its ordinary signification. In that signification it cannot include a dental mechanician operating as an inde-

pendent...../17.

independent contractor. (Colonial Mutual Life Assurance Society Ltd. vs. MacDonald, 1931 A.D. 412, and cf. R. vs. Feun, 1954(1) S.A. 58(T)).

The Tribunal's powers of compulsory arbitration under section 46 of Act 28 of 1956 in relation to the occupation of dental mechanician, is derived from section 26(1) of Act 30 of 1945. That section (as read with section 12(1) of the Interpretation Act 36 of 1937) provides that -

> "(1) Whenever a dispute relating to conditions of employment has been referred to the committee, the provisions of section 46 of the Industrial Conciliation Act, 1956....shall, mutatis mutandis, apply in respect of that dispute".

Section 46 of Act 28 of 1956, as applied in respect of the Labour Committee in terms of sections 25(1) and 26(1) of Act 30 of 1945, provides for the compulsory arbitration of a dispute which the Labour Committee has failed to settle.

On the view expressed above that the Labour Committee is not empowered by the provisions of either Act 30 of 1945 or Act 28 of 1956 to deal with a dispute that has arisen between dentists and dental mechanicians

operating...../18.

operating as independent contractors, ~~then~~ it must follow that section 26(1) of Act 30 of 1945 does not authorize the reference of such a dispute to the Tribunal for compulsory arbitration under section 46 of Act 28 of 1956.

The provisions of section 26(1) of Act 30 of 1945, properly construed, leads to the same conclusion. The provisions of section 46 of Act 28 of 1956 apply, in terms of section 26(1) of Act 30 of 1945, only in respect of a "dispute relating to conditions of employment" ("n geskil betreffende diensvoorwaardes" in the signed Afrikaans text) which has been referred to the Labour Committee. In that context, and having regard to the provisions referred to above in connection with the jurisdiction of the Labour Committee, the word "employment" ("diens") refers, in my opinion, to the ordinary relationship of employer and employee (the locatio conductio operarum) or to a relationship analogous thereto, but not to the relationship of principal and independent contractor (the locatio conductio operis). (Cf. Secretary for Inland Revenue vs. Somers Vine, 1968(2) S.A. 138(A) at pp. 155,156,

157...../19.

157, 158 and 159; and Goodwin vs. Minister of Labour and Others, 1951(2) S.A. 605(N) at p.611).Much less can it in my view apply to the relationship between a principal and an independent contractor who is under his contract required, as is a dental mechanician contractor, to supply not only labour or services but both labour or services and the necessary materials, which is not a true locatio conductio operis, but some other kind of contract, perhaps of purchase and sale.

In any event, the Industrial Conciliation Act 28 of 1956, is, according to its Long Title, generally designed, inter alia, for the "prevention and settlement of disputes between employers and employees, the regulation of terms and conditions of employment by agreement and arbitration....". The settlement of disputes between principals and independent contractors, who may themselves be employers of others, and the regulation by agreement or arbitration of the contractual relationship between such persons, is, subject to the provisions of section 24(1)(p) with which I proceed to deal forthwith, completely foreign to the purposes of the Act.

It...../20.

It was, however, contended on behalf of the appellant that the determination of the contract rates applicable between dentists and dental mechanician contractors is a matter which falls within section 24(1)(p) of Act 28 of 1956, and is therefore a matter in regard to which such a dispute may arise as falls within the competence of the Labour Committee and the Tribunal. Section 24(1) enumerates the matters that may be dealt with by an industrial council agreement. That section is by section 25(1) of Act 30 of 1945 applied in respect of the Labour Committee, and by virtue of sections 45(13) and 46(5) of Act 28 of 1956 applies also in respect of an award by the Tribunal under section 46 of the latter Act. While it is true that any matter mentioned in section 24(1) may by itself properly form the subject of a dispute between employers and employees cognizable by an industrial council or the Labour Committee under Act 28 of 1956, I cannot agree that a dispute in regard to a matter mentioned in section 24(1)(p) between persons therein contemplated can form the subject of such a dispute. The matter therein mentioned affects persons who may be neither employers nor employees in

any undertaking, industry, trade or occupation, or who may be persons engaged in different undertakings, industries, trades or occupations. They may therefore not be represented at all on any industrial council, or they may be represented on different industrial councils. Even if a dispute in regard to a matter mentioned in section 24(1)(p) between persons therein contemplated could therefore be a dispute cognizable by an industrial council under Act 28 of 1956, it would be difficult to know by which industrial council. However, the relationship between the persons contemplated in section 24 (1)(p) is not that of employer and employee, but that of principal and independent contractor, and a dispute between such persons is, as I have already pointed out, not cognizable by an industrial council or the Labour Committee.

In so far as the occupation of dental mechanician is concerned, the persons who can be affected by a matter mentioned in section 24(1)(p) are, in view of the provisions of section 16 of Act 30 of 1945 which, inter alia, prohibits other persons than registered dental mechanicians from doing work pertaining to that of a dental mechanician, and otherwise

than...../22.

than at the instance of a dentist, limited to dental mechanicians who are contractors to dentists and such dentists. The relationship between such dentists and such dental mechanician contractors is not that of employer and employee. Such dentists and such dental mechanician contractors, who are not employers of other dental mechanicians, are not represented on the Labour Committee. A dispute between such dentists and such dental mechanician contractors in regard to a matter referred to in section 24(1)(p) is not a dispute between employers and employees relating to "conditions of employment" as contemplated by section 26(1) of Act 30 of 1945, and cannot therefore, in my view, from the subject of a substantive dispute cognizable by the Labour Committee or by the Tribunal under section 46 of Act 28 of 1956.

It is clear, however, that the Labour Committee or the Tribunal may in relation to any dispute properly before it, include in any agreement negotiated by the former and in any award made by the latter, provisions in regard to the matter referred to in section 24(1)(p). I will assume that the dispute between the dental mechanician employees, on the one

hand...../23.

hand, and the dentist employers and the dental mechanician employers, on the other hand, in regard to the employees' demand for higher wages and improved conditions of employment, was properly before the Tribunal. The question for consideration then is whether the determination of the contract rates applicable between dentists and dental mechanician contractors fall within the competence of the Tribunal in terms of section 24(1)(p).

Section 24(1)(p) authorizes the Tribunal to include in an award made by it -

> "(p) when any work is given out on contract to any person by a principal or contractor, whether or not that principal or contractor is himself an employer in or is engaged in the undertaking, industry, trade or occupation concerned, the rates at which or the basis or principles upon which, payment shall be made to that person for the work".

In S. vs. Progress Dental Laboratory (Pty)Ltd., 1965(3) S.A. 192(T) it was held at p.196 that -

> "Sec. 24(1)(p) only authorizes the inclusion in an industrial agreement of provisions for the rates, basis or principles of payment in contracts for the performance of a particular task or the execution of a specific piece of work by the supply of labour

or...../24.

or services only, and not by the supply of labour or services and materials".

I respectfully agree with this construction of the provisions of section 24(1)(p) and with the reasons advanced in the judgement in support thereof.

It was common cause that contracts between dentists and dental mechanician contractors provide not only for the supply of labour or services, but for both labour or services and the materials required for the manufacture of the dental appliances contracted for by the dentists, except only teeth and gold. It must follow, therefore, that in regard to such contracts the Tribunal has no authority under section 24(1)(p) to determine the rates at which payment shall be made thereunder.

In an attempt to avoid the consequences of the judgement in the Progress Dental Laboratory case (supra), the Tribunal, in determining in the present case the contract rates applicable between dentists and dental mechanician contractors, purported to exclude therefrom "the cost of all materials used including teeth and gold". (See Note (a) to

clause...../25.

clause 4 of the award set out in the Schedule to Government Notice R827 of 23 May 1969). It is, I think, clear that clause 4 relates to the ordinary contracts between dentists and dental mechanician contractors which provide for the supply of both labour and materials, and not to contracts which provide for the supply of labour only. If it were intended to be confined to contracts between dentists and dental mechanician contractors for the supply of labour only, note (a) thereto would have been unnecessary, and clause 4 would have been largely ineffective, for according to the evidence, such contracts are for all practical purposes unknown.

Because of the exclusion from the rates determined by the Tribunal of the cost of all materials used, clause 4 of the award does not purport to lay down the rates at which payment shall be made for the materials supplied by dental mechanician contractors, and it was contended on behalf of the appellant that the facts in the present case are therefore distinguishable from those in the Progress Dental Laboratory

case...../26.

case (supra), and that paragraph 4 of the award falls within the powers confered by section 24(1)(p). I cannot agree. It is clear from the judgment in that case that the question considered by the Court was, at page 195,-

> "whether on a proper construction of para.(p), it can also refer to a contract in which materials as well as labour or services have to be supplied by the person entrusted with the due performance of the task or execution of the specific piece of work".

It is that question which the Court answered in the negative. In other words, the Court held, and I agree with it, that a contract, such as a contract between a dentist and a dental mechanician contractor, which provides for the supply, not only of labour or services, but also of the necessary materials, is not such a contract as is envisaged by section 24(1)(p), and that an industrial council or the Tribunal accordingly has no competence under that section in regard to the rates of payment to be made under such a contract. It's competence under that section is confined to contracts for the supply of labour or services only. The Tribunal's competence cannot be brought within the section by merely excluding...../27.

excluding from the rates determined the cost of the materials to be supplied under the contract, for the contract still remains a contract other than a contract envisaged in section 24(1)(p). It is clear from what has been said above that a contract between a dentist and a dental mechanician contractor is a contract for the supply of a particular dental appliance required by the dentist, for the manufacture of which the contractor is required to supply both his labour, or the labour of dental mechanicians employed by him, and his own materials. Such a contract is not such a contract as is envisaged by section 24(1)(p), and the Tribunal is accordingly not in terms of that section authorized to determine any rates at which payment shall be made thereunder whether for the labour only or for the labour and materials.

It was contended on behalf of the appellant, however, that the word "work" in section 24(1)(p) should - despite what was said in the judgment in the Progress Dental Laboratory case (supra) at p.195 - be construed, in relation to the occupation of dental mechanician, as including the

materials...../28.

materials used by a dental mechanician contractor in the execution of his contract with a dentist. The ~~agreement~~ argument was that, as section 25(1) of Act 30 of 1945 applies in respect of the Labour Committee the provisions, inter alia, of section 24(1)(p) of Act 28 of 1956, "mutatis mutandis", the word "work" in section 24(1)(p) should, having regard to the invariable practice in the occupation of dental mechanician, for dental mechanician contractors to enter into contracts with dentists for the supply both of labour and materials, be altered by construction to include both labour and materials in order to give effect to the expression "mutatis mutandis" in section 25(1) of Act 30 of 1945. In Touriel vs. Minister of Internal Affairs, Southern Rhodesia, 1946 A.D. 535, this Court held, at pp.544,545 and 547, that necessity and not fitness or desirability was the test to be applied for the purposes of ascertaining what changes the expression mutatis mutandis requires to be made in applied legislation. No consideration of necessity requires that, as applied in respect of the Labour Committee in relation to the occupation

of...../29.

of dental mechanician, the meaning and scope of section 24(1)(p) requires to be changed in the manner suggested. The provisions of the section can be applied to contracts in the occupation of dental mechanician for the supply of labour only, and there is no necessity, in order to apply it in relation to that occupation, to alter its provisions to bring within its ambit contracts which do not fall within it.

There remains for consideration only the argument on behalf of the appellant that the Tribunal is in any event under section 45(12) of Act 28 of 1956 authorized to determine the contract rates applicable between dentists and dental

mechanician...../30.

mechanician contractors. That section is by section 46(5) applied in respect of a compulsory arbitration under section 46.

Section 45(12) provides that, subject to certain provisions not here relevant, "an award shall deal only with the subject matter of the dispute, and with matters reasonably incidental to the settlement of the dispute". The contention was that the determination of the contract rates applicable between dentists and dental mechanician contractors was reasonably incidental to the settlement of the dispute between the dental mechanician employees on the one hand, and the dentist employers and dental mechanician employers on the other hand. It is true that the dental mechanician contractors refused to agree to an increase in the wages of the dental mechanician employees unless an increase in the contract rates were also approved of, and that the determination of such contract rates would have promoted a settlement of the dispute between the dental mechanician employees and their employers. I am satisfied, however, that the Tribunal

is...../31.

is not by virtue of the provisions of section 45(12) empowered to include in an award provisions affecting persons not parties to the dispute, although such provisions may relate to matters which may be reasonably incidental to the settlement of the dispute before it.

The matters in relation to which provisions may in terms of section 24(1) of Act 28 of 1956 be included in an agreement negotiated by an industrial council or the Labour Committee, or an award made by the Tribunal, are set out in paragraphs (a) to (z) of that sub-section and is followed by a general provision in wide terms. Except for paragraph (p), all the provisions mentioned relate to matters affecting employers and employees who, in the case of an agreement, must of necessity be parties to the agreement, and in the case of an award, parties to the dispute, for section 49(1) provides, inter alia, that an award under section 45 or 46 shall be final and binding -

> "upon the employees and employers who, and the trade unions and employers' organizations which, are parties to the dispute and upon the employees and employers who are members of those unions or organizations".

Paragraph...../32.

Paragraph (p) of section 24(1), with the provisions of which I have already dealt, provides, it is true, for the inclusion in an agreement or an award of provisions which may affect persons not parties to the agreement or to the dispute, but such provisions are not by reason of the provisions of sections 48(1)(a) and 49(1) binding upon such persons unless they are declared by the Minister to be so binding upon them under section 48(7) of Act 28 of 1956, which section is by section 49(12) of the Act applied in respect of an award made under section 46. If the Legislature had by any other provisions of section 24 or by the provisions of section 45(12) intended the Tribunal to include in an award provisions, other than such provisions as are contemplated in section 24(1)(p), which affect or may affect persons not parties to the dispute, and upon whom such provisions would not by reason of the provisions of section 49(1) be binding, one would have expected a provision similar to that of section 48(7) to enable such provisions to be declared binding upon such persons, or one would not have expected section 48(7)

to...../33.

to have been limited to provisions in relation to matters referred to in section 24(1)(p). The provisions of section 48(1)(b) and (c), which in terms of section 49(12) apply in respect of an award under section 46, and in terms of which the Minister may extend the operation of the provisions or certain of the provisions of an award binding upon certain employees and employers, to certain other employers and employees who were not parties to the dispute, is clearly not relevant in this connection.

For these reasons I agree with the Court a quo that the determination in clause 4 of the award of the contract rates applicable between dentists and dental mechanician contractors was not competent.

The appeal is dismissed with costs.

D.H. Botha

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BOTHA, J.A.

Holmes, J.A.)
Wessels, J.A.) Concurred.
Trollip, J.A.)
Rabie, A.J.A.)

For the Appellant: M. Schaeffer.

For the First Respondent: A.S. Botha. S.C.

Attorneys for Appellant.

H. Miller, Ackerman & Bronstein, Century Insurance Building, Market & Kruis Streets, JOHANNESBURG.

Daniel Jacobson, 508 J.B.S. Building, Church Square, PRETORIA.

Horwitz, Arcan & Lewis, Christo Building, 39 Maitland Street, BLOEMFONTEIN.

Attorneys for Respondents.

Adams & Adams, Masada Building, C/r Paul Kruger & Proes Streets, PRETORIA.

Symington & De Kok, C/r West Burger & Elizabeth Streets, BLOEMFONTEIN.

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