156/87

400/86/AV

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NATIONAL UNION OF TEXTILE WORKERS	Appellant
and	
TEXTILE WORKERS INDUSTRIAL UNION (S.A.)	1st Respondent
TEXTILE WORKERS UNION (TRANSVAAL)	2nd Respondent
H J FABRICIUS N.O.	3rd Respondent
NATIONAL INDUSTRIAL COUNCIL FOR THE TEXTILE MANUFACTURING INDUSTRY (RSA)	4th Respondent

CORAM: JOUBERT, BOTHA, HEFER, JJA, NICHOLAS et BOSHOFF, AJJA

HEARD: 12 November 1987

DELIVERED:

J U D G M E N T

NICHOLAS, AJA

The .....

The National Industrial Council for the Textile Manufacturing Industry (RSA) ("the Industrial Council") was registered on 19 March 1948 as an industrial council in terms of the Industrial Conciliation Act, 1937, and it is deemed to have been so registered under the Labour Relations Act, 1956 ("the Act"). In Article 3 of its constitution, the parties to the Industrial Council are defined as meaning "any Employer's organisation or Trade Union registered in terms of the Act, which is a party to the Council in terms of Article 5". Article 5 provides:

"5. MEMBERSHIP

(i) The parties to the Council shall be registered employers' organisations and registered trade unions whose members are engaged or employed in the industry.

(ii) The parties who have agreed to the establishment of the Council are:
The National Textile Manufacturer's As-

sociation (herinafter referred to as the 'employers' or the 'Employers' Organisation' on the one part) and
The Textile Workers' Industrial Union of S.A. (hereinafter referred to as the 'employees' or 'trade union')on the other part.

(iii) A party to the Council may withdraw from it by giving three months' notice in writing to the Secretary.

(iv) Additional employers' organisations or trade unions registered in terms of the Act in respect of persons engaged or employed in the industry, may be admitted to membership of the Council on such conditions as may be determined by the Council, and the terms 'the employers', 'the employers' organisation', the 'employees' and the 'trade union' as the case may be shall thereupon be deemed to include any party thus admitted."

Article 6(i) provides:

"6(i) The Council shall consist of fourteen representatives each of the employers and em-

ployees .....

ployees, provided that if and when the Council is registered for the manufacture of worsted fabrics or fine cotton piece goods, then in respect of each such section two of the representatives of the employers and an equal number of representatives of the employees shall be appointed from amongst the employers and employees who are engaged or employed in the section concerned.

The number of representatives of Employers and Employees may be increased from time to time by resolution of the Council, provided there shall at all times be an equal number of representatives on the two sides and provided further that no alteration to the basis of representation shall be made unless carried by a two-third majority at a general meeting."

Textile Workers Industrial Union of S.A., which is mentioned in Article 5(ii), will be referred to as "TWIU". Textile Workers Union (Transvaal)("TWU(Tvl)"), which was admitted as a party in 1981, is the only other trade union member of the

Industrial .....

Industrial Council.

S. 21A of the Act was inserted by s. 10 of Act 94 of 1979 and amended by s. 20 of Act 57 of 1981. In its present form it provides:

> "21A. After the commencement of this section no additional employers (if the registrar approves) or registered employers' organizations or registered trade unions shall be admitted as parties to an industrial council unless all the parties to the council have agreed thereto in writing, and the industrial council shall within seven days of the date on which it arrived at a decision on an application for admission advise the employer or registered employers' organization or registered trade union of its decision in writing: Provided that an employer or registered employers' organization or registered trade union who or which feels aggrieved by the refusal of his or its application for admission as a party to the industrial council, may within 30 days of the date on which the industrial council decided

the application, appeal to the industrial court: Provided further that if the industrial council has not within a period of 70 days of the date on which it received any such application for admission, advised the applicant concerned of its decision thereanent, the industrial council shall, in the application of the preceding proviso, be deemed to have refused the application concerned on the last day of the said period."

(The words underlined were inserted by the 1981 Act.)

On 27 July 1984, the National Union of Textile Workers ("NUTW"), which is a trade union registered under the Act, applied for admission as a party to the Industrial Council. The application was refused. NUTW again applied for admission by letter dated 3 September 1985. In a letter dated 3 October 1985, the Industrial Council called for additional .....

ditional information and verification of statements made in the application. Further correspondence followed until 2 December 1985, when the Industrial Council advised NUTW that the parties to the Council had not reached consensus and that "accordingly the matter of your membership will have to be discussed and a final decision taken at a meeting of the Council to be held in the New Year". In consequence, the Industrial Council did not within a period of 70 days of the date of the application advise NUTW of its decision, and the Industrial Council was deemed, in accordance with the second proviso to s. 21A, to have refused the application. NUTW did not wait for the meeting to be held in 1986. Feeling aggrieved by the "refusal" of its application, it appealed on

9 December 1985 in terms of the first proviso to s. 21A to the industrial court, one of the functions of which is "to decide any appeal lodged with it in terms of section 21A" (s. 17(11)(b) of the Act).

In its notice of appeal NUTW claimed an order inter alia

"1. Directing that the appellant be admitted as a party to the respondent.

2. Directing that the representation of the appellant and the other trade union parties to the respondent be based in proportion to each trade union's respective membership in good standing within the interests and areas of the respondent."

In compliance with Rule 24C (5) of the "Rules for the Conduct of the Proceedings of the Industrial Court"

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the Industrial Council furnished to the industrial court "all documents relating to the above-mentioned matter". In a statement it set out the history of the matter, and concluded:

> "Apart from what is stated above, the Respondent is unable to furnish reasons for its decision, as no decision has, in fact, been reached."

The Industrial Council did not oppose the appeal but abided the decision of the industrial court.

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The appeal was however opposed by TWIU and TWU(Tvl), who as interested persons submitted representations regarding the appeal in terms of Rule 24C(6)..

Mr. H J Fabricius, an additional member of the industrial court, presided at the hearing of the appeal, which took place on 10 and 11 February 1986.

The court was asked in limine to give a ruling on the nature of the appeal referred to in s. 21A. TWIU and TWU(Tvl) argued that the industrial court's powers were limited to those of review, while NUTW argued that the industrial court was empowered to hear the matter and determine the merits afresh.

The industrial court found in favour of NUTW,

holding .....

holding that the word "appeal" as used in the section "was an appeal in the wide sense of the word".

TWIU and TWU(Tvl) then applied for a post-ponement of the hearing of the appeal to enable them to to take the ruling on review. This application was refused and TWIU and TWU(Tvl) then withdrew from the proceedings and took no further part in them.

After considering the papers and affidavits filed and hearing NUTW's attorney, Mr. Fabricius made the following order:

> "The Appellant is admitted as a party to the Respondent Council. It is ordered that the representation of the Appellant and the other trade union parties to the Respondent be based in proportion to each trade union's respective

membership .....

> membership in good standing within the interests and areas of the Respondent, and accordingly that the Appellant be admitted to the Respondent Council with three representatives and three alternates. The order is to take effect from today."

TWIU and TWU(Tvl) then made application to the Transvaal Provincial Division for an order "reviewing and setting aside the order of Mr. Fabricius given on the 11th day of February 1986 in the Industrial Court of South Africa under Case No 12/2/4, alternatively the second sentence thereof", and for an order as to costs.

The application was heard by McCREATH J, who came to the conclusion

> "that on a proper construction of Section 21A of the Act the Industrial Court's powers

> on appeal are limited to those of review and that the Industrial Court's decision in the present matter to the contrary, as well as the entire order subsequently made by it, should accordingly be set aside by this Court."

An order to that effect was made and NUTW was ordered to pay the costs of the application. (The decision has been reported as Textile Workers Industrial Union (SA) v Fabricius N.O. 1986(4) SA 998 (T)).

The Court a quo granted leave to appeal to this Court, and directed that the costs of the application for leave be costs in the appeal.

The primary question for decision is the meaning of the word "appeal" as used in s. 21A of the Act.

In Tikly and Others v Johannes N.O.and Others 1963(2) SA 588 (T), (in which the Court considered the nature of an appeal

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to the revision court in terms of s. 19(5) of the Group Areas Development Act, 61 of 1955), TROLLIP J pointed out at 590 that the word "appeal" can have different connotations. He said:

> "In so far as is relevant to these proceedings it may mean:
>
> (i) an appeal in the wide sense, that is, a complete re-hearing of, and fresh determination on the merits of the matter with or without additional evidence or information (Golden Arrow Bus Services v. Central Road Transportation Board, 1948 (3) SA 918 (A.D.) at p. 924; S.A. Broadcasting Corporation v. Transvaal Townships Board and Others, 1953(4) SA 169 (T) at pp. 175-6; Goldfields Investment Ltd. v. Johannesburg City Council, 1938 TPD 551 at p. 554);
>
> (ii) an appeal in the ordinary strict sense, that is, a re-hearing on the merits but limited to the evidence or information on

which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong (e.g. Commercial Staffs (Cape) v. Minister of Labour and Another, 1946 CPD 632 at pp. 638-641);

(iii) a review, that is, a limited re-hearing with or without additional evidence or information to determine, not whether the decision under appeal was correct or not, but whether the arbiters had exercised their powers and discretion honestly and properly (e.g. R. v. Keeves, 1926 AD 410 at pp. 416-7; Shenker v. The Master, 1936 AD 136 at pp. 146-7)."

TROLLIP J's classification was adopted by this Court in S. v. Mohamed, 1977(2) SA 531 (A) at 538 D-G.

The general rule for the interpretation of statutes has been frequently stated. In Rex v Keeves, 1926 AD 410, it was put in this way by KOTZE JA at 416:

"The .....

> "The general rule in interpreting statutory provisions is that the words used are to be construed in their ordinary sense, that is, in the sense generally understood by the people, unless there exist good reason to the contrary in the particular case."

The learned judge of appeal continued:

> "In its ordinary sense the word 'appeal' denotes an application to a higher authority for relief from a decision of a lower one. This is the general meaning of the term, as we may gather from our best dictionaries."

(Thus the Shorter Oxford English Dictionary gives as the relevant meaning of "appeal": "The transference of a case from an inferior to a higher court". Webster's Third International Dictionary defines it as "a legal proceeding by which a case is brought from a lower to a higher court for re-hearing ...")

To interpret "appeal" in s. 21A as restrict[ing] [the] "review" .....

"review", to the exclusion of other meanings, is to give the word a narrow technical meaning which, although well-understood by lawyers, is not its ordinary meaning.

The word was given that narrow meaning in Shenker v The Master and Another, 1936 AD 136, where the court rejected a contention that a right of appeal or review against an appointment by the Master of the Supreme Court entitled the court of appeal to inquire into, and retry the merits of such an appointment, and to vary it, DE VILLIERS JA saying (at 146),

> "Now if that were the position, it would form a striking exception to the general rule as to the exercise of discretion by public administrative officials to whose determination

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> a matter is committed by a statute. That rule is that the courts cannot and will not inquire into the merits of, or interfere with, the officer's decision, if his discretion has in fact been exercised, save on certain special grounds (such as mala fides, improper motive, exceeding of the discretionary power, non-compliance with statutory procedure, etc.) which do not exist in the present case. To put it shortly, in all such cases, apart from such special grounds, the only question for the courts of law to determine is whether the official has in fact exercised his discretion, not whether he has correctly exercised it."

It was submitted on behalf of TWIU and TWU(Tvl) that the power of the industrial court under s. 21A of the Act was only a power of review, alternatively the industrial court had no power under the section to consider the merits of the matter and to substitute its own opinion for that of

the parties to the Industrial Council. The right of appeal in s. 21A "is no more than a right to insist that the application be considered and that it be considered in good faith", and "as no irregularity, illegality or anything of that sort has been alleged against the Industrial Council, the industrial court had no power to make the order which it did".

Considerations such as those in Shenker have no application in the present case. Nor is there anything in the context of s. 21A which requires that "appeal" be given the limited meaning contended for. On the contrary, it is clear that the legislature could not have intended the word to bear that meaning.

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In category (iii), TROLLIP J was referring to review of the kind described in the second paragraph of the headnote to the case of Johannesburg Consolidated Investment Co v Johannesburg Town Council, 1903 TS 111. The relevant part of the headnote reads:

> "Review is capable of three distinct and separate meanings:-
>
> (a) Review by summons. The process by which, apart from appeal, the proceedings of inferior Courts of Justice both civil and criminal, are brought before the Supreme Court in respect of grave irregularities or illegalities occurring during the course of such proceedings.
>
> (b) Review by motion. The process by which where a public body has a duty imposed on it by statute, or is guilty of gross irregularity or clear illegality in the performance of that duty, its proceedings may be set aside or corrected.
>
> (c) A wider power specially given under parti-

> cular statutes (e.g., Insolvency Law, No. 13 of 1985, secs. 98, 105; Administration of Justice Proclamation, No. 14 of 1902; Transfer Duty Proclamation, No. 8 of 1902, sec. 4 par. 8) to the Court or a Judge, and enabling such Court or Judge, in respect of the matter referred to them, to exercise the powers of the Court of Appeal or Review, or even of a Court of first instance."

Such review (often called "review under the common law") is a function exercised by the Supreme Court under its inherent jurisdiction. It has been observed that the description in the judgment which is summarised in para (b) of the headnote was not intended as a precise and exhaustive definition of the procedure (see Harnaker v Minister of the Interior, 1965 (1) SA 372 (C)). Nevertheless it has been recognized by this Court as being authoritative in its essentials.

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It is manifest that the J.C.I. case was concerned with review by the Supreme Court, and ordinarily such powers are exercisable only by the Supreme Court.

While the legislature may enact that a tribunal other than the Supreme Court shall have powers of review of this kind, its intention to do so will not be inferred in the absence of a specific provision or clear indications to that effect. (Cf. Rose Innes, Judicial Review of Administrative Tribunals in South Africa, p. 8).

I do not think that such an intention is to be imputed to the legislature in the case of an appeal to the industrial court. In S A Technical Officials' Association v. President of Industrial Court, 1985(1) SA 597 (A), the con-

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tention was rejected that the industrial court is a court enjoying the status of and therefore to be equated with the Supreme Court. The functions of the industrial court are set out in s. 17(11) of the Act. They constitute a mixed bag: judicial ("to perform all the functions excluding the adjudication of alleged offenders which a court of law may perform in regard to a dispute or matter arising out of any law administered by the Department of Manpower" - para (a)); quasi-judicial (arbitration - para (c)); and a variety of administrative investigatory and advisory functions. In regard to qualifications for appointment, s. 17(1)(b) provides only that the president, deputy president or other members of the industrial court shall be appointed by the Minister by

reason of their knowledge of the law.

Nor do I think that a so-called "refusal" by an industrial council to admit a trade union as a party would be a reviewable decision.

An industrial council, although a creature of statute, is not a public body.

Although the Act provides in s. 21(1) that the constitution of an industrial council shall provide for -

> "(g) the admission of additional ... registered trade unions as parties to the council",

it does not impose on the council any duty in this regard. It is not a requirement of s. 21A that the industrial council as such should consider and reach a decision on an application for admission. Nor is there any duty imposed on a party

to the council to consider an application - a party is entitled, if it so chooses, to defeat an application merely by remaining passive.

Before the amendment of s. 21A, the appeal provision was plainly unworkable. Where a party failed to agree in writing to an application for admission, the industrial council did not arive at a decision; there was no refusal by the industrial council as such; and there was no "date on which the industrial council decided the application". This was presumably the reason for the amendment: the legislature cured the defect by the device of a deemed "refusal" and a deemed date of "refusal".

Despite the amendment, and the fiction thereby created, the fact is

that .....

that there exists no decision which can be reviewed.

Moreover, the Court will not interfere on review with the decision of a purely administrative or quasi-judicial tribunal where there has been an irregularity, if satisfied that the complaining party has suffered no prejudice: Rajah and Rajah Ltd and Others v. Ventersdorp Municipality and Others, 1961(4) SA 402 (A) at 407-408. A registered trade union is not entitled as of right to admission to an industrial council which covers the interests represented by the union (South African Welders' Society v. National Industrial Council for the Iron, Steel, Engineering and Metallurgical Industry and Another, 1947(2) SA 841 (A)), and consequently a refusal of admission cannot cause the trade union any prejudice recognized by law.

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In his judgment in the Court a quo (at 1001-2) McCREATH J attached importance to an observation by GREENBERG JA in the South African Welders' Society case (supra). The learned judge of appeal said (at 850) that the essence of an industrial council was its voluntary nature, which was an element which contributed to its usefulness - a usefulness which might be destroyed or impaired if the right of choice as to additional parties were denied the Council. McCREATH J considered that, regard being had to the similarity between the provisions of the 1936 Act and the Act, those views were equally valid in regard to the objects of the Act. He said (at 1002 B-C) that the interpretation of s. 21A was not without difficulty, but in his view

"... the .....

In my opinion the learned judge's reasoning is not valid.

S. 21A did not simply reaffirm the voluntary nature of an industrial council. It did so subject to a qualification, namely, a right of appeal to the industrial court. While granting to an existing party the power in effect to veto an application for admission, it recognized that the unfettered exercise of such power could lead to friction and frustration in the industry concerned and could be detrimental to peace and order in labour relations. Accordingly it created machinery for resolving an impasse by an appeal to an independent third party with knowledge and

"...the first portion of the said section reaffirms the voluntary nature of an industrial council. The fact that no additional parties may be admitted thereto without written approval of all the existing members of the council emphasises the fact that the choice of those who are to be represented on the council is intended by the Legislature to be that of the parties who originally elected to come together to constitute the council."

He concluded (at 1002 H) that it could not be said that

"... regard being had to the voluntary nature of an industrial council as hereinbefore set out, the Legislature intended that an appeal to the industrial court under this section involves a complete re-hearing of, and fresh determination on, the merits of the matter. ... It is apparent that a refusal of admission of an additional party to the council can only arise if one of the existing parties does not agree thereto. If an appeal is to be limited to that ground only then, provided that the party which has not agreed has acted honestly and in good faith there are no merits to be determined on appeal."

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experience of labour relations. The extent to which the legislature intended to modify the voluntary nature of an industrial council is dependent upon the meaning to be given to "appeal". To construe that word on the premise (for which there is no warrant) that the legislature intended a minimum of interference, begs the question.

The failure of a party to agree to an application for admission is not a ground of appeal but provides the occasion for an appeal. The merits to be determined on appeal are the rights and wrongs of the "decision", including the nature and strength of the case put forward by the applicant; the attitude of the existing parties to the industrial council; the nature and validity of any objection to admission; and the wider aspects

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independent enactment (at 1003 A-E).

There are two answers.

The fact is that the section gives a right of appeal to an aggrieved trade union (something that it did not have before the enactment of s. 21A) and, from the point of view of interpretation, it matters not whether that right is given in the substantive part of the section or in a proviso.

The scope of s. 21A is not enlarged by the first proviso, the effect of which is to qualify the prohibition in the substantive part of the section against the admission of an additional party to the council unless all existing parties agree.

My conclusion is

therefore .....

of labour relations referred to above.

McCREATH J considered further that to interpret "appeal" as a re-hearing on the merits,

> "would be to afford the applicant for membership greater rights on appeal than it had before the industrial council. The prohibition against admission as an additional party to the council unless all existing parties agree thereto would not apply in the proceedings before the industrial court and the scope of s 21A would thus be enlarged by the first proviso thereto."

Such an enlargement, the learned judge considered, overlooked the true function and effect of a proviso, which is to except out of the preceding portion of a statutory provision something which but for the proviso would be within it, or to qualify something enacted therein: it is not an

therefore that the decision of the Court a quo was wrong, and that "appeal" as used in s. 21A does not bear the restricted meaning of "review".

Next to be considered is whether "appeal" is used in s. 21A in "the wide sense" of category (i) in Tikly, or in "the ordinary strict sense" of category (ii). The distinction between them is not a difference in kind - each is a re-hearing on the merits; the distinction lies in the ambit of the materials which the appellate body is entitled to consider in reaching its decision.

I think that, for the reasons which follow, "appeal" is used in the wide sense of category (i), that is, "a complete re-hearing of, and fresh determination on the

merits .....

merits of the matter with or without additional evidence or information".

Category (ii) in Tikly is an appeal such as that from a court of law which keeps a record of evidence and gives reasons for judgment. In such an appeal, the question for decision is whether the order of the Court a quo was right on the material which it had before it. But that cannot apply in an appeal under s. 21A. An industrial council is not a tribunal: it exercises purely administrative functions. It does not itself necessarily take a decision. There is no record of proceedings. In a case such as the present, there was no evidence or information before the industrial council apart from the application and any correspondence which fol-

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lowed it. Where a refusal is a deemed "refusal" resulting merely from a failure of any party to agree, there can be no reasons.

In the present case there was before the industrial court no decision a quo. The industrial court was called upon to give the only decision. (CF. Garment Workers' Union v. Minister of Labour and Others, 1947(2) SA 361 (W) at 366); S.A.Broadcasting Corporation v. Transvaal Townships Board and Others, 1953(4) SA 169 (T) at 176).

Furthermore, as indicated above, the matters to be considered by the industrial court may well differ in nature and extent from what was before the industrial council.

The final question is whether the industrial

court .....

court was competent to make any order other than one admitting the appellant as a party to the Industrial Council. It was argued on behalf of TWIU and TWU (Tvl) that there is to be found in the Act no basis for the second sentence in the order of the industrial court: there is nothing in the Act which would entitle the industrial court to do anything other than rectify the "grievance", that is, to reverse the "decision" to refuse admission.

While s. 21A provides merely that an aggrieved trade union "may appeal to the industrial court", it is implicit that the decision on appeal should be a meaningful decision. An order simply that the appellant be admitted as a party would be a brutum fulmen. It is only through

representation .....

representation on the council that a party can participate in it. The industrial council's constitution does not make provision for the number of representatives of the employees inter se. In terms of Article 5(iv), where an additional trade union is admitted to membership under the constitution, the council may determine the conditions of admission, including, presumably, conditions as to representation. But where the admission is by order of the industrial court, there is no room for the imposition by the council of conditions (e.g. relating to representation). Consequently, if it is to make an effective order on appeal, the industrial court must necessarily have power to make an order in regard to representation.

During .....

During the argument, a question was raised by the Court as to the way in which that part of the industrial court's order reading

> "and accordingly that the Appellant be admitted to the Respondent Council with three representatives and three alternatives."

would work in practice - how would it affect the representation presently enjoyed by the respondent trade unions? Counsel for the appellant agreed that there were problems, but said that at this stage this part of the order was not of any importance and that it could be deleted. Counsel for TWIU and TWU(Tvl) then contended that that part of the order, at any rate, was beyond the competence of the industrial court. It is not necessary to deal with this contention. Even

if it was correct, the suggested amendment of the order would have no effect on any orders for costs which are to be made. The matter was not raised as a specific ground of review in the application to the Transvaal Provincial Division, or in argument in the Court a quo, or in the respondents' heads of argument in this Court.

The following order is made:

1. The appeal is upheld with costs, including the costs of two counsel.

2. The order of the industrial court is altered to read:

> "The Appellant is admitted as a party to the Respondent Council. It is ordered that the representation of the Appellant and the other trade union parties to the Respondent be based in proportion to each trade union's respective membership in good standing within the interests and areas of the Respondent."

3. .....

3. The order of the Court a quo is set aside and there is substituted therefor -

"The application is dismissed with costs."

H C NICHOLAS, AJA

JOUBERT, JA
BOTHA, JA
HEFER, JA
BOSHOFF, AJA
} Concur