Case no 296/89
/MC

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

Between:

PHOTOCIRCUIT SA (PTY) LIMITED	Appellant
and	
P P DE KLERK NO	1st Respondent
A M DE SWARDT NO	2nd Respondent
ELECTRICAL & ALLIED WORKERS TRADE UNION OF SOUTH AFRICA	3rd Respondent
RICHARD EDWARD MORGAN	4th Respondent
ERIC BENJAMIN WILLIAMS	5th Respondent
LUCAS JOSEPH VAN DYCK	6th Respondent
DESMOND VAN WYK	7th Respondent
JEFFREY ISAACS	8th Respondent
KAREN JANICE ALCOCK	9th Respondent
FREDA SMITH	10th Respondent
PAMELA PATRICIA JULIUS	11th Respondent
MAGDALENE SONIA PETERSEN	12th Respondent
JAMES JOHANNES ORANGE	13th Respondent
RAYMOND HAROLD ABRAHAMS	14th Respondent
NATIONAL INDUSTRIAL COUNCIL FOR IRON, STEEL, ENGINEERING AND METALLURGICAL INDUSTRY	15th Respondent

CORAM: VAN HEERDEN, MILNE, EKSTEEN, NIENABER JJA et PREISS AJA.

HEARD: 8 NOVEMBER 1990

DELIVERED: 30 NOVEMBER 1990.

J U D G M E N T

PREISS AJA:

The appellant is a manufacturer of electronic printed circuit boards. It conducts business in Lansdowne within the magisterial district of Wynberg, Cape Province. In 1987 a number of its employees became members of the ELECTRICAL AND ALLIED WORKERS' TRADE UNION OF SOUTH AFRICA ("the union"), a trade union incorporated and registered in terms of the Labour Relations Act, No 28 of 1956 ("the Act"). The employees and the union requested the appellant to deduct union subscriptions from their wages and pay them directly to the union. The appellant was furnished with stop orders authorising such deductions. The appellant refused to comply with the request. By reason of the appellant's refusal the union on 14 March 1988 declared a dispute with the appellant and referred

it to the NATIONAL INDUSTRIAL COUNCIL FOR IRON, STEEL, ENGINEERING AND METALLURGICAL INDUSTRY ("the industrial council"). The industrial council called a meeting between the parties for 15 April 1988 to resolve the dispute. The appellant failed to attend the meeting. On 16 May 1988 a strike ballot was held; thirteen out of a total of fourteen members of the union were present at the ballot. They voted in favour of calling a strike. The strike commenced on the following day, 17 May 1988. On 19 May 1988 the appellant dismissed the striking employees.

On 2 June 1988 the union, together with eleven aggrieved employees referred the dispute in regard to the dismissals to the industrial council in terms of s 27 A(1)(a) of the Act and on the same day applied for a reinstatement order in terms of s 43(2), thereby susperseding the earlier dispute. The

appellant was not represented at the hearing of the application. The industrial court issued an order reinstating the eleven employees.

This dispute not having been settled by the industrial council, the next step was a further application by the eleven employees and the union to the industrial court for a final determination in terms of s 46(9)(a) of the Act. The appellant was not represented when the hearing commenced, but on the second day Mr Peschkes, its sole director, made an appearance and argued that the industrial court had no jurisdiction to make the determination. The industrial court dismissed this objection and made the following order on 14 July 1988:

"In terms of s 46(9) of the Labour Relations

Act No 28 of 1956, as amended, the following Order is made as a final determination of the dispute between the parties:

1. Respondent is ordered to pay each of the second to twelfth Applicants their weekly wages for the period 19 May 1988 to date hereof at the rates which were applicable in each case immediately prior to their dismissal on 19 May 1988, which payment shall be made to first Applicant at 18a Capuchin Street, Athlone on or before 12 noon on 15 July 1988. Any sums already paid to Applicants in lieu of notice, fall to be deducted from payments to be made in terms of this Order.

2. Respondent is ordered to reinstate such of the second to twelfth Applicants as tender their services to Respondent on or before 8h00 on Monday 18 July 1988 on terms and conditions no less favourable than those which governed their employment prior to their dismissal on 19 May 1988.

3. The reinstatement as aforesaid is to be retrospective to 19 May 1988 and any payments made in terms of clause 1 of this Order shall be deemed to have been made in compliance with this clause.

4. Should Respondent fail to reinstate any of the Applicants as contemplated in clause 2 of this Order, Respondent is ordered to pay to each such Applicant his weekly wages as aforesaid for a further period of three months as from date of this Order.

5. Leave is granted to Respondent to apply to this Court, on one week's notice to First Applicant, for a variation of clause 4 of this Order should any of the affected Applicants be reinstated by Respondent or obtain alternative employment prior to the expiry of the three month period aforementioned.

6. Should any of the second to twelfth Applicants succeed in obtaining alternative employment within three months from date hereof, such Applicant

> is to notify First Applicant who in turn, shall notify Respondent of the fact of such alternative employment having been obtained and the date at which such alternative employment commenced."

On 26 September 1988 the appellant launched review proceedings in the Cape Provincial Division for the setting aside of the reinstatement order and the determination. The member of the industrial court who had granted the reinstatement order was cited as the first respondent. The member of that court who had made the determination was cited as the second respondent. The union was the third respondent. The eleven aggrieved employees were cited as the fourth to fourteenth respondents. The industrial council was joined by the appellant as the fifteenth respondent soon after the proceedings were commenced. All the

respondents opposed the review proceedings, the fifteenth respondent confining itself solely to the question whether s 23(1) of the Act conferred jurisdiction upon it over the appellant.

In these proceedings the appellant applied for the review and setting aside of

> "(a) the order given by the first respondent in his capacity as additional member of the industrial court on 20 [June] 1988 in the application brought by third to fourteenth respondents against the applicant in terms of the provisions of section 43 of the Labour Relations Act No 28 of 1956;
>
> (b) the determination made by second respondent in her aforesaid capacity made on 14 July 1988 in the application by third to fourteenth respondents against the applicant in terms of the provisions of section 46(9)(a) of the said Act."

The review was heard by FRIEDMAN and

BERMAN JJ who, on 28 April 1989, dismissed the application. The matter has since been reported as Photocircuit SA (Pty) Ltd v De Klerk NO and De Swardt NO and Others 1989(4) SA 209(C). At the same time, and in terms of a counter-application brought by the third to fourteenth respondents (which was unopposed), paragraphs 4, 5 and 6 of the above determination were set aside on the ground that the matters dealt with in those paragraphs did not constitute a final determination and were in conflict with a reinstatement order. The counter-application and the setting aside of the above paragraphs have no part in the appeal now before us; they are mentioned merely to complete the factual background.

The appellant thereupon sought leave to appeal against the whole of the judgment and order of

the court a quo. Leave to appeal was, however, limited by the court to the following issues:

1. Whether s 23(1) of the Act confers jurisdiction on the fifteenth respondent over the appellant, a non-member;

2. Whether the strike was illegal, i.e. whether the matter which led to the strike was already dealt with in the industrial agreement which was operative on 19 May 1988; and

3. Whether a reference of the dispute to the industrial court at the instance of the aggrieved employees was a proper reference in terms of s 46(9) of the Act.

These grounds of appeal will be addressed in the same order. Before I proceed to deal with them it remains only to mention that the first and second

respondents, although they opposed the review in the court a quo, chose not to contest the appeal and filed a notice in terms of which they undertook to abide by the result. The third to fourteenth respondents opposed the appeal on each of the three grounds. The fifteenth respondent was concerned solely with the first ground and confined its argument accordingly.

The Act, as it reads now, differs in a number of respects from the Act as it was in force at the time that the dispute was dealt with by the industrial court, first in terms of s 43 for a reinstatement order and thereafter in terms of s 46 for a final determination. Any reference to the Act is accordingly confined to such provisions as were in force at that time.

1st Ground - Whether the industrial council had jurisdiction over the appellant in terms of s 23(1) of the Act.

Section 23(1) reads as follows :

> "23(1) An industrial council shall, within the undertaking, industry, trade or occupation, and in the area, in respect of which it has been registered, 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."

This ground of appeal involves the interpretation of the above sub-section. One must commence, however, with the provisions of the Act in

terms of which the industrial court was called upon to deal with the dispute between the appellant on the one hand and its employees and the trade union on the other. Section 43(2)(a) of the Act provided that any party to a dispute who refers it to an industrial council having jurisdiction in respect of the dispute may apply to the industrial court for relief under sub-section (4) which includes reinstatement. Section 46(9) similarly provided that where an industrial council having jurisdiction in respect of a dispute has failed to settle it within a prescribed period, such dispute shall be referred to the industrial court for a determination. In each case, therefore, a pre-requisite for an order of reinstatement or a determination was that the industrial council has jurisdiction in respect of the dispute.

The appellant's contention is that since it was neither a party to the industrial council nor a member of an employers' organisation which was a party to the council, it could never have been the intention of the legislature that an industrial council, essentially a voluntary organisation, would have jurisdiction to settle disputes between persons who are not represented on it.

It will be appreciated that the first part of s 23(1) provides for a limitation of jurisdiction in two respects: an industrial council can only exercise its powers in regard to the undertaking, industry, trade or occupation (hereinafter simply described by the single generic word "occupation") in respect of which it has been registered - an occupational limitation; and in the area in respect of which it has

been registered - a territorial limitation. It is common cause that in respect of both the above requirements the appellant, by reason of the nature of its occupation and the location of its operations, would fall within the council's jurisdiction.

In regard to a limitation of parties the sub-section is silent. In ordinary, grammatical parlance jurisdiction is enjoyed in respect of disputes between "employers" or "employers' organisations" and "employees" or "trade unions" without any suggestion that membership, directly or indirectly, of the industrial council is a further requirement. Each one of these parties is defined in s 1 of the Act without reference to membership of any industrial council. True, the definitions section contains the usual reservation, "unless the context otherwise indicates",

but there is nothing in the wording of s 23(1) which in my view would lead to the conclusion that membership of the council is a necessary concomitant.

Disputes between labour and management must frequently involve non-members of an industrial council. The legislature must have been aware of this. If it was intended to limit the council's jurisdiction to the settlement of disputes involving members only, one would have expected the legislature to have said so explicitly.

Where the legislature wished to draw a distinction between members of a council and non-members that distinction is drawn in clear and express language. See, for example, s 24(3); s 25(4); s 51(6) and s 65(2)(a). An industrial agreement, to which a non-member is not a party, can by notice in the

Gazette becóme binding, in whole or in part, upon him (s 48(1)(b)). All these features in the Act point to an exercise of jurisdiction by the industrial council over parties who are not necessarily members.

This approach was criticised by counsel for the appellant on the ground that it is unlikely that the legislature would enact that a non-member would be subjected to the authority of an industrial council upon which he has no direct or indirect representation. This criticism is overstated. Provision is made in the Act for safeguarding a non-member's interest. Section 19 of the Act deals with the registration of industrial councils. The registrar will only register a council in respect of a particular area and occupation if he is satisfied, inter alia, that the parties to the council are

"sufficiently representative in respect of the whole of such area" and are "sufficiently representative of the undertaking, industry, trade or occupation" (s 19(3) and s 19(4)). The registrar is given power to vary the area or the occupation in order to ensure that they are sufficiently representative (s 19(8)). These provisions serve to ensure that the council is adequately representative of all employers within the area and in regard to the same field of operation. These safeguards are in my opinion a further indication that the legislature intended to subject non-members as well as members to its jurisdiction.

There are thus numerous indications to support a literal construction of s 23(1), in terms of which all employers are bound to the jurisdiction of the industrial council irrespective of membership.

Moreover, it is significant that the powers of a council relate, inter alia, to an endeavour "to prevent disputes from arising" and "to settle disputes that have arisen". Nowhere in s 23(1) is an adjudicatory function specifically conferred upon the council. In Consolidated Textile Mills Ltd v President of the Industrial Court and Others 1987(4) SA 665(E) ZIETSMAN J (at 681 B-C) held that in respect of some disputes an industrial council would have to endeavour to settle them "by enquiring into the matter and deciding which party is right and which party is wrong". In the light of the limitation of the function of the council to an endeavour "to settle disputes", I cannot agree with the remarks of the learned judge if he intended to convey that the section conferred adjudicatory powers. The duty of the industrial council is to

attempt to avoid or to "settle" disputes "by the negotiation of agreements or otherwise". It is by no means clear what the words "or otherwise" mean in this context. Perhaps they are intended to refer to an informal agreement falling short of an agreement as defined in the Act. I do not consider that the legislature could have intended by the use of this laconic phrase to confer a jurisdiction to adjudicate. Its interpretation must be affected by what precedes it. (Director of Education Transvaal v McGagie and Others 1918 AD 616 at 623).

In other words an industrial council would seem to be limited to fulfilling a mediating role. This conclusion is fortified in my opinion by the absence of any machinery in the Act to compel or exact compliance with any decision or "settlement" should any

one of the parties to the dispute fail to honour it.

This conclusion is more than merely academic. The absence of adjudicatory powers reduces the possibility that non-members will be unfairly treated at the hands of an industrial council since it is no more than a settlement that will affect them.

In my view the same considerations apply to the other functions of a council in terms of s 23(1), namely, to "endeavour by the negotiation of agreements or otherwise to prevent disputes from arising" and to "take such steps as it may think expedient to bring about the regulation or settlement of matters of mutual interest". This terminology does not comprehend adjudication, nor is there any mechanism in the Act whereby compliance can be exacted from a defaulting party. It is in my opinion unnecessary to spell out

exactly what is included in the functions of an industrial council; it suffices for present purposes to state that an adjudicatory function does not appear to be part of its powers.

I conclude accordingly that the jurisdiction of an industrial council is extended by s 23(1) to non-members and, in this case, to the appellant. The same conclusion was reached in the Cape Provincial Division in a full bench decision of Photocircuit SA (Pty) Ltd v Roux S.C. NO and Douglass (case no 240/88 CPD 5 June 1989) - a review by the same appellant, but in other proceedings; and in the Natal Provincial Division in the case of Nasionale Suiwelkoöperasie Bpk v De Villiers NO and Another 1990(2) SA 751(N).

In the case of National Industrial Council of the Printing and Newspaper Industry v Copystat

Services (Pty) Ltd and Others 1980(3) SA 631(W) GOLDSTONE AJ held that s 21(1)(f) of the Act referred only to disputes between persons subject to the jurisdiction of an industrial council and that non-members were excluded. In my view the learned judge was considering a different provision in the Act and did not consider the ambit of s 23(1). Should the decision be regarded, however, as analogous, I prefer the reasoning in the above Cape and Natal decisions.

It follows that the court a quo correctly held that the appellant was subject to the jurisdiction of the industrial council and that the requirements of s 43(2)(a) and s 46(9) were fulfilled. The appeal on this first ground is accordingly without merit.

2nd Ground - Whether the strike was illegal.

The court a quo granted leave to appeal on

this issue but on the limited ground as to whether the legality of the strike was bound up with the appellant's contention that the matter giving occasion for the strike was already dealt with in the industrial agreement which was binding on the parties, and that the strike was accordingly forbidden under s 65(1)(a) of the Act.

The court a quo held that s 65(1)(a) had no application because "the matter giving occasion for the strike was applicant's refusal to discuss with third respondent the question of the deduction of fourth to fourteenth respondents' dues; it was not the fact that deductions were dealt with in clause 8(3) of the agreement". I cannot, with respect, agree with this reasoning. The section does not require the fact that a matter is dealt with in an agreement to be the cause

of the strike; it requires (a) that the matter should be dealt with in an agreement and (b) that the matter should be the cause or occasion for the strike. It is difficult to conceive of employees striking because a matter is dealt with in an industrial agreement. What is required is that the dispute should be about a matter that is dealt with in the agreement. The dispute here was about the demand that the appellant should deduct the employees' union dues. The deduction is dealt with in an agreement.

At the stage of argument before us counsel for the appellant sought leave to extend this ground to the issue which had been argued in the court a quo and which was duly canvassed by that court. Both counsel who appeared for the respondents had no objection. The leave sought from this Court involved no more than

a slight amplification of the ground for which leave to appeal was originally granted. This Court agreed to hear submissions on the amplified ground (cf Nggumba en 'n Ander v Staatspresident en Andere 1988(4) SA 224(A) at 246B - 247D).

An agreement, as defined in the Act during the relevant period, "means an agreement entered into or deemed to have been entered into by parties to an industrial council or conciliation board under this Act" (s 1(1)). In regard to deductions from the remuneration of employees s 24(1)(d) provides as follows:

> "24(1) An agreement, which may be declared binding under section forty-eight, may include provisions as to all or some of the following matters -
>
> .....
>
> .....

(d) the prohibition of deductions from remuneration payable to any employee or class of employees, other than deduc= tions which the employer is required or permitted to make in terms of the agreement or of any law or order of a competent court."

Agreements are put into force by the Minister of Manpower through the publication of notices in the Government Gazette. Section 48(1)(a) and (b) provide as follows :

"48(1) Whenever an industrial council trans= mits to the Minister any agreement such as is referred to in section twenty-four, entered into by some or all of the parties to the council, the Minister may, if he deems it expedient to do so, at the request of the

council made either at the time of such transmission or at any time thereafter -

(a) by notice in the Gazette declare that from a date and for a period fixed by him in that notice, all the pro= visions of the agreement, as set forth in that notice, shall be binding upon the employers who and the employers' organizations and trade unions which entered into the agreement and upon the employers and employees who are members of those organizations or unions;

(b) in a notice published under paragraph (a) or by notice in the Gazette at any time thereafter and from time to time declare that from a date and for a period fixed by him in that notice all the provisions of the agreement, or such provisions thereof as he may specify, shall be binding upon all employers and employees other than those referred to in any relevant

notice published under paragraph (a), who are engaged or employed in the undertaking, industry, trade or occupation to which the agreement relates, in the area or any specified portion of the area in respect of which the council is registered."

Clause 8(3)(e) is a provision which appeared in the main agreement relating to the Iron, Steel, Engineering and Metallurgical Industry, published in Government Notice R1329 dated 27 June 1980 (Government Gazette No 7103). It states:

"8(3) Except as otherwise provided in this Agreement, no deduction of any description, other than the following, may be made from the amount payable in terms of this Agreement to any employee:

.....

(e) with the written consent of the

employee, deductions in respect of subscriptions to a trade union which is a party to this Agreement."

It will be seen that clause 8(3) contains a general prohibition against deductions, while providing for an exclusion inter alia in sub-clause (e).

Government Notice R1744 dated 22 August 1986 (Government Gazette No 10392) consisted of two separate declarations. First, and in terms of s 48(1)(a), the Minister declared that the provisions of the agreement which appeared in the schedule to the notice would be binding "upon the employers' organisations and the trade unions which entered into the said agreement and upon the employers and employees who are members of the said organisations or unions". Secondly, and in terms

of s 48(1)(b), the Minister declared that the provisions of the agreement, "excluding those contained in clauses 1(1)(d), 2, 3 and 8 of Part 1" would be binding upon all employers and employees other than those referred to in the s 48(1)(a) notice. One of the excluded clauses, namely clause 3 of Part 1 provided, inter alia, that the provisions contained in clause 8(3)(e) above shall apply to all employers and employees.

By Government Notice R2455 dated 30 October 1987 (Government Gazette No 11014) the Minister made a similar declaration in terms of s 48(1)(a) and s 48(1)(b) in respect of the same group of parties as in the previous notice, but this time in regard to the provisions of an agreement which appeared in the schedule to the notice (and referred to as the amending

agreement). The amending agreement purported

> "to amend the Main Agreement published under Government Notice R1744 of 22 August 1986 (hereinafter referred to as the Re-enacting Agreement) as renewed and amended by Government Notices R1567 of 14 July 1987 and R1568 of 17 July 1987."

The amending agreement did not alter the exclusion of clause 8(3)(e) of the main agreement brought about by Government Notice R1744 of 22 August 1986 aforesaid in terms of s 48(1)(b).

The latter Government Notice, namely, R2455 of 30 October 1987 remained operative for the period 9 November 1987 until 30 June 1988. It was during this period that the dispute, the subject-matter of this appeal, arose and was dealt with.

The appellant was not a member of any of the organisations which entered into the agreement. It was common cause that in terms of the notices issued under s 48(1)(b), the appellant became bound by the general prohibition in clause 8(3), but that the specific exclusion provided by sub-clause (e) did not apply to it. I agree that this is the effect of the abovementioned notices.

As a result of these notices, the appellant was, save for exceptions not material to this appeal, prohibited from making a "deduction of any description ..... from the amount payable .... to any employee" in terms of clause 8(3). Had it made any such deduction, the appellant would have been guilty of an offence in terms of s 53(1) of the Act which during the relevant period read as follows:

"53(1). Any person who contravenes or fails to comply with any provision of any agreement .... binding upon him in terms of this Act ..... shall be guilty of an offence."

In respect of both hearings the industrial court did not appear to consider whether the appellant was subject to a prohibition against deductions. The first respondent furnished no reasons for the reinstatement order. The second respondent furnished reasons for the determination, but this issue was not considered. It was raised in the review proceedings for the first time, and then only in a later supplementary affidavit from Mr Peschkes.

The court a quo dealt with this issue and came to the conclusion that the prohibition in clause 8(3) was not applicable in that the Minister, by

excluding certain provisions of the main agreement (including clause 8(3)(e)) had purported to re-write the agreement and had accordingly acted ultra vires. As stated already, the decision of the court a quo is reported as Photocircuit SA (Pty) Ltd v De Klerk NO and De Swardt NO and Others 1989(4) SA 209(C). FRIEDMAN J (at 219I-220C) states:

> "The main agreement contained a prohibition against deductions 'other than deductions which the employer is required or permitted to make in terms of the agreement'. The deduction referred to in clause 8(3)(e) was a deduction which the employer was permitted to make in terms of the agreement. In terms of 48(1)(b) the Minister is entitled by notice in the Gazette to declare that all the provisions of an agreement, or such provisions as he may specify, shall be binding on all employers and employees in the

particular industry, i.e. to non-parties.

What the Minister has purported to do is to issue a notice in terms of s 48(1)(b), the effect of which is that clause 8(3)(e) of the agreement is inapplicable to non-parties like the applicant. The question is whether he is permitted to do so. The deduction in question is one which the employer is permitted to make in terms of the agreement. The Minister cannot by regulation prohibit a deduction which is permitted in terms of an agreement. Any application of the agreement to non-parties by a notice in terms of s 48(1)(b) which purported to exclude a deduction permitted in terms of the agreement would amount to a rewriting of the agreement by the Minister, which would be contrary to s 24(1)(d). To the extent therefore, that the Minister has purported by regulation to declare clause 8(3)(e) inapplicable to applicant, the regulation is ultra vires s 24(1)(d)."

It seems as though the court a quo,

presumably as a result of a concession made by counsel, did not fully consider the ambit of the Minister's powers as derived from s 48(1)(b). I am of the view that it cannot be held that the Minister was purporting to re-write the agreement under the guise of applying s 48(1)(b). In my opinion the Minister was doing precisely what s 48(1)(b), read with s 24(1)(d), empowered him to do, namely, to declare that all the provisions or "such provisions thereof as he may specify" shall be binding upon non-parties to the agreement (which, of course, included the appellant). By specifying in the Government Notices what provisions were to be excluded, the Minister was doing no more than indicating the provisions which were binding, i.e. such provisions were thus specified, albeit by an identification of the excluded provisions.

Accordingly, the Minister in my view acted within the ambit of his powers in terms of s 48(1)(b) of the Act. The contention that he acted ultra vires cannot be sustained.

This conclusion bears directly upon the legality or otherwise of the strike and the dismissals. In terms of s 53(1) of the Act it would have been unlawful for the appellant to have consented to the deductions or to have made them. It was therefore not entitled to comply with the request made by its employees and the union. Its failure to negotiate or discuss the question was justified in law. It could not be expected to negotiate about a matter which it was specifically prohibited from implementing. Its conduct could never amount to an unfair labour practice. The strike was accordingly illegal and the

subsequent dismissals justifiable.

In his heads of argument counsel for the third to fourteenth respondents relied upon the reasoning of LAW J in National Industrial Council of the Leather Industry of SA (Footwear section) v National Union of Textile Workers and Others (1987) 8 ILJ 296. The argument was not pressed before this court. In that case the learned judge commenced with s 24(1)(d) of the Act which provides that an industrial agreement may include a provision prohibiting deductions "other than deductions which an employer is required or permitted to make in terms of ... any law ...". The court was there dealing with s 78(1C)(a) of the Act which provides :

78(1C)(a) "No employer shall deduct any

> membership fees payable to a trade union which is not registered or deemed to be registered under this Act from the remuneration of any employee unless the Minister has approved of such deduction."

The learned judge concluded that the prohibition in s 78(1C)(a) against deductions in favour of unregistered unions a contrario implied the permission of such deductions in favour of registered unions. On the strength of this approach counsel for the respondents concerned argued that the third respondent was a registered union, that s 78(1C)(a) was "a law" within the meaning of s 24(1)(d), and that since that law permitted the deduction in favour of the third respondent, the prohibition of deductions in clause 8(3) of the industrial agreement applicable to the appellant offended against s 24(1)(d). The

argument was that the latter section outlaws a prohibition of such deductions in an agreement when they are permitted by another law. Consequently clause 8(3) was ultra vires.

This argument, constructed as it is on the reasoning of LAW J, cannot be supported. In relying upon a necessary implication the learned judge in my opinion erred. There is simply no room for such an implication. Section 78(1C) above is entirely silent on the question of deductions in the case of a registered trade union. The Act accordingly contains no provision, either positively or negatively couched, which permits such deductions. Section 24(1)(d) above refers to a deduction "permitted .... in terms of any law". There is no such law. It follows that the reasoning in the above case is flawed and the

decision cannot serve to assist the case of the third to fourteenth respondents on the second ground.

During the course of argument counsel for the third to fourteenth respondents raised a point which had not been argued before the court a quo. He referred to s 19(1)(e) of the Basic Conditions of Employment Act No 3 of 1983. It provides:

> "19(1) No employer shall -
>
> .....
>
> (e) deduct from an employee's remuneration an amount except-
>
> (i) in accordance with a written authority given to him by such employee;
>
> (ii) in accordance with an order of court or a provision of any law."

On the face of it this provision would appear to strike at the prohibition in clause 8(3) of the agreement. On further analysis, however, this problem resolves itself. Section 1(3) of Act 3 of 1983 aforesaid provides that a number of statutes, including the Labour Relations Act No 28 of 1956 (i.e. the Act) shall not be affected by the former Act. The section recites:

> "1(3) The Mines and Works Act, 1956 (Act No 27 of 1956), the Labour Relations Act, 1956 (Act No 28 of 1956), the Wage Act, 1957 (Act No 5 of 1957), and the Manpower Training Act, 1981 (Act No 56 of 1981), or any matter regulated thereunder in respect of an employee, shall not be affected by this Act, but this Act shall apply in respect of any such employee in so far as a provision thereof provides for any matter which is not regulated by or under any of the said Acts in

respect of such employee."

The matters regulated in clause 8(3) of the agreement are obviously matters regulated under the Labour Relations Act No 28 of 1956 in respect of employees. It follows that Act 3 of 1983 cannot be invoked to override the prohibition in clause 8(3) of the agreement.

In finding that the Minister had acted ultra vires in issuing the s 48(1)(b) notices the court a quo precluded itself from deciding that the appellant was prohibited in law from making the deductions and from negotiating in respect of them. In the light of this conclusion it would have to be held that the court a quo erred and that the appeal should succeed on this second ground.

It is necessary, however, to deal first with a final argument which was put forward by counsel for the third to fourteenth respondents. He contended that the appellant, in respect of this ground alone, was relying upon an issue which was not justiciable by way of review. Since the application before the court a quo was a review, and not an appeal, his argument was that under the guise of a review the appellant was impermissibly seeking to challenge the merits and the correctness of the decision of the industrial court.

In order to deal with this argument it is necessary to have clarity about the issue or issues before the industrial court on each of the two occasions. Initially, the third to fourteenth respondents invoked the assistance of the industrial

council because of the appellant's failure or refusal to make the deductions for union subscriptions. By the time that the industrial court was first approached in terms of s 43(4) of the Act, the third to fourteenth respondents set out an amplified series of complaints. They maintained that the appellant

> "has committed the following unfair labour practices and/or has unfairly dismissed" (the fourth to fourteenth respondents) in that:
>
> 1. it dismissed them 'without good and sufficient cause';
> 2. it dismissed them 'while they were engaged in a strike which complied with the provisions of s 65 of Act 28 of 1956';
> 3. it dismissed them 'prematurely, hastily and without having considered other alternatives';
> 4. it 'failed to negotiate in good faith'

(with the union) 'on any of the matters which were referred by the industrial council as a dispute';

5. it 'failed to attend the industrial council meeting which had been convened in an attempt to resolve the dispute';
6. it 'failed to grant to each of' (the fourth to fourteenth respondents) 'the opportunity to attend a disciplinary hearing prior to their dismissal';
7. it 'refused to negotiate with' (the union) 'subsequent to its dismissal of' (the fourth to fourteenth respondents);
8. it had 'thereafter refused to reinstate' (the fourth to fourteenth respondents) 'in its employ'."

The above complaints are listed in the union's application to the industrial court in terms of s 43(4) of the Act, and which is dated 2 June 1988.

All these complaints were directed to the

establishment of an unfair labour practice, the legality of the strike and the reinstatement of the dismissed employees. In ordering a reinstatement the industrial court based its decision upon a finding that the appellant's conduct amounted to an unfair labour practice, that the strike was a legal one and that the dismissals were consequently unfair and unreasonable. In making the determination the industrial court expressly based its decision upon the above findings.

In my view these decisions by the industrial court are justiciable by means of review. The decisions in both cases were reached by a failure to appreciate the cogency of clause 8(3), in the light of the exclusion of clause 8(3)(e). There was thus a failure to appreciate that the appellant was bound not

to make the deductions sought to the extent of committing an offence if he failed to comply with the prohibition in clause 8(3). Had the industrial court in each case given due consideration to this prohibition it would have had to come to the opposite conclusion and would have been driven to hold that there was no unfair labour practice, no legal strike and no unfair or unreasonable dismissal. To state this conclusion simply, the industrial court arrived at two grossly unreasonable decisions. (W.C. Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others 1982(4) SA 427(A) at 448H-449A).

Support for this conclusion is derived in my opinion from two further considerations. In the first place the decision as to the legality of a strike in

terms of s 65 of the Act involves an objective determination. In my view this renders the decisions of the industrial court all the more assailable as being grossly unreasonable. In the second place had the decisions been allowed to stand the appellant would have been confronted once more with an alleged duty to make the deductions sought - an untenable and unlawful situation. These features indicate with additional cogency that the decisions of the industrial court were grossly unreasonable and should be set aside.

This conclusion renders it unnecessary to deal with the third ground of appeal.

Finally, the costs of the fifteenth respondent must be dealt with on a special basis. It was joined in the review proceedings by the appellant solely because of its interest in the correct

interpretation of s 23(1). It confined its argument in this Court to that issue only and it was successful, although the fate of this appeal was decided on another ground, namely, the second one. It is accordingly proper that the fifteenth respondent should have its costs in both the court a quo and on appeal, irrespective of the result.

The appeal succeeds. The third to fourteenth respondents must pay the appellant's costs on appeal jointly and severally. The appellant must nevertheless pay the costs of the fifteenth respondent on appeal.

The order of the court a quo is set aside and replaced with the following :

1. An order is granted setting aside the

decisions of the first and second respondents in terms of prayers (a) and (b) of the notice of motion dated 26 September 1988.

2. The third to fourteenth respondents are ordered jointly and severally to pay the applicant's costs, including the costs wasted by the hearings on 6 December 1988 and 6 March 1989.

3. The applicant is ordered to pay the costs of the fifteenth respondent.

H.J. PREISS AJA.

VAN HEERDEN JA)
MILNE JA)
EKSTEEN JA)
NIENABER JA)

Concur.