Bib 86/92

Case No. 151/89

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

BTR INDUSTRIES SOUTH AFRICA (PROPRIETARY) LIMITED	1st Appellant
P E ROUX	2nd Appellant
M J OOSTHUIZEN	3rd Appellant
C C DE WITT	4th Appellant
and	
METAL AND ALLIED WORKERS' UNION	1st Respondent
PHILLIP DLADLA	2nd Respondent

CORAM: HOEXTER, MILNE, KUMLEBEN, F H GROSSKOPF et GOLDSTONE, JJA

HEARD: 9 March and 10 March 1992

DELIVERED: 25 May 1992

J U D G M E N T

HOEXTER, JA.....

HOEXTER, JA,

The first appellant ("BTR") is a private company which manufactures rubber products at its factory at Howick in Natal. The first respondent ("MAWU") is a trade union registered in terms of sec 4 of the Labour Relations Act 28 of 1956. The second respondent is Mr P Dladla to whom I shall refer as "Dladla". Dladla is a member of MAWU and a former employee of BTR.

From August 1983 until the beginning of May 1985 the majority of the workers employed by BTR at the factory were members of MAWU. Following upon protracted and acrimonious labour wrangles between BTR and MAWU a conciliation board was established on 28 January 1986. It sat in Pietermaritzburg on 26 February 1986. On 7 May 1986 the Minister of Manpower referred certain disputes between BTR and MAWU to the industrial court ("the IC") for a determination in terms of sec

46(9) of the Act. In the application before the IC MAWU contended that BTR had been guilty of unfair labour practices and that BTR was entitled to a determination granting it relief. BTR resisted the application.

The second, third and fourth appellants in this appeal were the members of the IC which heard the application. The second appellant (the late Mr P E Roux SC) presided. He was a Deputy-President of the IC. At a late stage in the proceedings before the IC counsel for MAWU made an unsuccessful application for the recusal of the second appellant. Thereafter the matter proceeded to its conclusion. On 9 September 1987 the IC dismissed MAWU's application. No order was made as to costs. The judgment of the IC has been reported: **(1987) 8 ILJ 815.**

In February 1988 MAWU and Dladla made application on notice of motion to the Natal Provincial Division ("the court a **quo**") for a review of the proceedings in the IC. They asked

that the determination should be set aside; that the application for a determination should be referred back to an industrial court otherwise constituted; and that BTR should bear the costs of the review proceedings jointly and severally with so many of the members of the IC as might elect to oppose the review. In fact all four appellants resisted the review application.

The review proceedings came before **Didcott J.** The argument addressed to the court **a quo** fell into two main compartments. They are conveniently summarised thus in the judgment of **Didcott J:-**

> "The one I shall call the recusal compartment. The other is that huge compartment that encompasses what I shall call the merits of the case.
>
> The recusal compartment is there as a result of an unsuccessful application made in the middle of the proceedings before the Industrial Court for the recusal of its deputy president .... The proceedings as a whole are said to have been vitiated by the second respondent's decision to continue sitting in the circumstances to which objection was taken when

his recusal was sought."

In regard to the review on the merits the learned judge preferred to make no definite finding. On the other hand **Didcott J** concluded that the second appellant's refusal to recuse himself constituted a fatal irregularity. Accordingly the court **a quo** set aside the IC's determination and remitted the case for a hearing **de novo** by an industrial court consisting of three new members. In regard to the costs of the application before him **Didcott J** ordered BTR and the second appellant jointly and severally to pay those costs incurred by MAWU and Dladla in regard to the recusal compartment of the review, such costs to include the costs of employing two counsel. For the rest each party was ordered to pay his or its own costs.

Thereafter, and in response to applications for leave to appeal made before him **Didcott J** -

(1) granted the four appellants leave to appeal against the whole of his judgment and order;

(2) granted MAWU and Dladla leave to cross-appeal against that part of the order awarding them limited costs instead of the costs of the whole review application;

(3) ordered that the appeal and the cross-appeal should be heard by this court.

The review touching upon the merits of the IC's determination need be considered by this Court only in the eventuality that **Didcott J** erred in ruling that the second appellant should have recused himself. A judgment by this court upholding the decision of the court a quo would entirely dispose of the appeal. In the interests of convenience, and with a view to a possible saving in time and legal costs, the **Chief Justice** invited the parties to consider the desirability or otherwise of a "divided" hearing of the two issues. By

agreement of all parties to the appeal argument was heard on 9 and 10 March 1992 in relation to the recusal issue only; and accordingly this court is now required to consider only whether **Didcott J** was right or wrong in ruling that second appellant should have recused himself.

Between the years 1983 and 1986 labour relations between BTR's management and MAWU were characterised by a prolonged and bitter struggle. Details thereof are chronicled in the reported judgment of the IC. For the limited purposes of this appeal only the leading events need be recounted.

The factory has been in operation since 1919. In 1974 no less than 2160 workers were employed. In the years thereafter, due both to a downturn in the national economy and a necessary process of rationalisation of its production plants at the factory, BTR was obliged to retrench many of its workers. In the last decade retrenchment took place as follows: 300 workers lost their jobs in 1981; 752 in 1984; and 102 in 1985.

This massive retrenchment gave rise to much dissatisfaction and uneasiness on the part of the workers.

MAWU having recruited a majority of the workers at the factory, on 11 August 1983 it submitted to BTR a draft proposal for a comprehensive and final recognition agreement. On 27 September 1983 BTR produced its first proposal in this connection. Between August 1983 and the end of April 1985 MAWU and BTR management were involved in what the IC in its reported judgment described (at 820H) as a "protracted power play" over the issue of a full recognition agreement and the rights flowing therefrom.

The period between August to December 1984 was one of sustained industrial action on the part of workers at the factory in the form of mass meetings, a ban on overtime work, go-slow techniques on night shifts, a sit-in at the canteen and a refusal to work on the part of the solid woven-belting department. A strike ballot held on 4 February 1985 was

followed by further industrial action: a go-slow strike from 7 - 12 March and a full strike from 12 - 15 March. Meanwhile during February 1985 further proposals and counter-proposals in regard to the central issue of a recognition agreement had been exchanged between BTR and MAWU. In March mediation took place, and a conciliation board meeting was held. The latter ended in deadlock between the parties on 10 April 1985. On that date BTR submitted, as a final offer, a draft recognition agreement in a form acceptable to BTR. This was rejected by MAWU which on 17 April submitted for signature its final proposed draft for a recognition agreement.

On 30 April 1985 all the weekly-paid workers at the factory downed tools. BTR promptly sent a telex to MAWU placing on record the work stoppage and stating that it regarded this as constituting both illegal industrial action and a breach of contract. MAWU responded by (1) confirming that MAWU's members were on strike; (2) denying that the strike was

illegal; (3) linking the strike to BTR's failure to conclude a recognition agreement with MAWU; and (4) stating that MAWU's members required MAWU's final draft for a recognition agreement to be signed before they would return to work.

On 2 May 1985 BTR issued an ultimatum to the striking workers to return to work or to face the possibility of the termination of their contracts of employment. The ultimatum was ignored and on 3 May the striking workers, numbering 890 in all, were dismissed. On 4 May 1985 BTR offered re-employment to all workers. This offer was rejected. Thereafter BTR maintained its offer of re-employment to all dismissed workers, but at the same time it invited applications for employment at the factory from other job-seekers. Few of the dismissed workers accepted re-employment, and the remaining vacancies were filled on a temporary basis until 2 August 1985. On 22 July MAWU informed BTR's managing director that the workers were willing to return to work unconditionally. Written

confirmation thereof was sought by BTR. This was done by way of a telex received by BTR only on 12 August 1985, by which time the temporary work-force at the factory had already (on 2 August) been engaged on a permanent basis. The remanning of the factory was only completed at the end of 1985. No more than some 66 of the dismissed workers accepted re-employment.

In August 1985 BTR broke off negotiations with MAWU and intimated to the latter that it would be prepared to consider only such specific proposals for the settlement of the dispute between the parties as MAWU might wish to make. On 24 October 1985 MAWU applied for the appointment of a conciliation board in connection with the issues of a recognition agreement between the parties and BTR's dismissal of the striking workers. Despite opposition by BTR a conciliation board was estabished and it sat on 26 February 1986. As mentioned earlier in this judgment the Minister on 7 May 1986 referred certain disputes between the parties to the IC for a determination in terms of

sec 46(9) of the Act.

I turn to the main issues raised in the application before the IC and the nature of the relief sought by MAWU against BTR. In support of its claim that BTR had been guilty of unfair labour practices MAWU pleaded, **inter alia**, (1) that BTR had refused to negotiate in good faith with MAWU towards the conclusion of a recognition agreement and towards a resolution of the strike and the ensuing dismissal of the strikers; (2) that BTR had dismissed the striking workers without good cause or in order to victimise them for their trade union activities, or in order to facilitate selective re-employment of other workers by BTR. Accordingly MAWU claimed a determination requiring BTR (a) to recognise MAWU as the collective bargaining representative of its employees at the factory; (b) to negotiate **bona fide** with MAWU over the issue of recognition of the latter; and (c) to reinstate the dismissed strikers. At the end of the proceedings, as mentioned earlier in this

judgment, the determination made by the IC was that MAWU's application be dismissed. The conclusions at which the IC arrived are summarised at 840 of the reported judgment.

The proceedings before the IC assumed the nature of a trial and in what follows I shall refer to them as "the trial". The trial began on 4 November 1986 and, with postponements from time to time, it extended over a period of nine months, concluding on 9 September 1987. It occupied 39 full court days, and its sessions were attended daily by some 1000 onlookers chiefly drawn from the dismissed workers. For their benefit, and by agreement between the parties, an interpreter translated from English into Zulu summaries conveying the gist of what each English-speaking witness had to say. At the trial both sides were legally represented. BTR's legal team consisted of an attorney and three advocates.

Five witnesses testified on behalf of MAWU and three witnesses were called by BTR. There were two key witnesses.

The main witness for MAWU was Mr W G Schreiner ("Schreiner"), while for BTR the chief witness was Mr R J Sampson ("Sampson"). At the time relevant to the issues raised at the trial Schreiner was the branch secretary of MAWU and Sampson was responsible to BTR for personnel and industrial relations at the factory. During the bargaining between the two parties Schreiner headed MAWU's negotiating team while Sampson led that of BTR. At the trial Schreiner and later Sampson spent many days in the witness-stand. Each was subjected to a long and pertinacious cross-examination.

There is one facet of the cross-examination of Sampson which requires particular mention. It relates to the role played in the negotiations by a firm called Andrew Levy and Associates ("ALA"). ALA, which is based in Johannesburg, carries on the business of consultants and advisers on industrial and labour relations. Its clients appear to be drawn predominantly from the sector of employers. In his

evidence Sampson said that he believed ALA to be the "top" industrial relations specialist in the country. Sampson had spoken to Mr Andrew Levy ("Levy") of ALA as early as 1979 at a time when BTR was girding its loins for the emergence of trade unions; and in December 1984 BTR engaged the services of ALA. Sampson testified that in its dealings with MAWU BTR sought the advice of ALA "at every juncture"; and that in the last critical stage of negotiations BTR had relied "very heavily" on ALA's advice. According to Sampson BTR in general followed ALA's advice.

Sampson was a chartered accountant by training who had long been in the employ of BTR. He carefully made and preserved notes of his dealings with others. These notes included the advice which from time to time BTR had sought and obtained from ALA. During the course of Sampson's cross-examination, and with a view to establishing that in the treatment of its workers BTR had been guilty of sundry unfair

labour practices, counsel for MAWU explored at great length with the witness the nature and propriety of the advice given by ALA to BTR.

It is clear from the evidence that in advising its client ALA espoused the cause of BTR very zealously. On the one hand ALA viewed BTR's labour problems with sympathetic understanding. Towards MAWU's trade union aspirations and the strategies employed by it, on the other hand, the attitude of ALA was one of undisguised hostility mingled, on occasion, with disgust.

The advice given by ALA to BTR was often couched in acerbic language. In making this last observation I hasten to add the following. Having regard to the limited ambit of the issues in the present appeal one is here primarily concerned neither with the intrinsic merit of ALA's advice to BTR nor with the propriety of the latter's conduct when it put that advice into practice. For reasons soon to become apparent, one

is here concerned more immediately with the nature and extent of the overt demonstrations of ALA's loyalty and allegiance to BTR as one of the two parties in the struggle. It follows, therefore, that my description of the tenor of the advice given by ALA is not intended, for purposes of the present appeal, as a criticism of ALA. It is well known that struggles between management and labour are often fiercely waged; and that they may tend to unleash intense feelings on either side. In the instant case, for example, the evidence at the trial tends to show, in my estimation, that the pugnacity which often characterised the advice given by ALA to BTR was well matched by the obduracy sometimes shown by MAWU's negotiating team at critical stages of the power struggle when, objectively viewed, agreement on a recognition agreement was well within the grasp of the warring parties.

With the above remarks in mind I turn to consider the general thrust of ALA's advice to BTR. A few excerpts from

Sampson's notes of his discussions with either Levy or Mr Gavin Brown ("Brown") of ALA will suffice.

Mention has already been made of the short-lived strike at the factory which lasted from 12 - 15 March 1985. In regard thereto ALA advised BTR (on 13 March 1985) that it would prove to be to the disadvantage of BTR if the striking workers should heed an instruction to return to work because then BTR would not be able to "belt" the errant workers (i e take punitive action against them). In connection with the same strike the advice offered by ALA on 15 March 1985 involved a plan to fire the workers who failed to return to work, and thereafter to re-hire some of the workers so dismissed together with new applicants for employment at the factory; but that if the strikers returned to work, BTR's supervisors should carefully monitor the actions of the shop stewards and where possible "bounce out" the latter.

After the striking workers had been persuaded by MAWU

to return to work Sampson and Levy had a telephone conversation on 18 May 1985 whereafter Sampson recorded the following advice:

> "Grapevine message - initial upshot they (the workers) had a lucky escape and next time they will be unemployed. Tell chaps they came close. Schreiner will shout and scream on Wednesday. We just say 'That is it, Mr Schreiner' - he has to make the moves. He is a very worried man."

A further note by Sampson reflects the following words of advice from ALA -

> "Strike two weeks. Would not fire or re-hire for two weeks. This will erode Schreiner's power base .... If not broken by two weeks we could have a trickle back and lose shop stewards by closing the gates. Then perhaps fire after due warnings, obtain a new workforce."

On 21 March 1985, and after Sampson had offered a "package deal" to Schreiner, Levy's advice to Sampson in the course of a telephone conversation began thus:-

> "Don't meet with Schreiner. Open to 12 noon on Friday then offer withdrawn ...."

I move on to the ill-fated strike on 30 April 1985 which was

fraught with the gravest consequences for the workers and the factory alike. On that date Sampson had a telephone conversation with Brown. I quote portions only of Sampson's note reflecting ALA's advice:-

> "Be careful of threats at this sensitive stage. Do this post May Day situation. Sit out today, no threats. Don't get aggressive today (very tense, staff dragged out)..... We could consider lock out, and only allow people in on basis that there will be no work stoppage on the question of recognition agreement."

On the following day (1 May 1985) Sampson recorded the following advice as emanating from ALA -

> "He [Levy] goes along with no lockout.....He agrees, dismiss - but its the worst timing for us due to international implications on BTR in UK [United Kingdom]. This is total war mode. Andrew [Levy] believes this is the route, but very bad for us. Gear up and go ahead for tomorrow ...."

According to a note made by Sampson on 14 May 1985 after advice from Brown -

> "The most important message is there is no relationship any more .... Giles [BTR's attorney] must

> get message to Brand [MAWU's attorney] and Schreiner that we are happy to listen to them, but one of the pre-conditions is no open-ended debate or discussions. .... Every day that goes by, you are remanning the factory and his position is getting weaker. He must come with surrender terms."

Following a telex from MAWU to BTR requesting the latter to agree to the dispute between the parties going direct to the industrial court under sec 49(9)(d)of the Act, there took place on 12 September 1985 a telephone conversation between Levy and Sampson. Sampson noted the following reaction by ALA to the telex in question:-

> "This is Brand's work, this telex. We don't mind fighting a lawyer but not one who also behaves like a trade unionist. Group [to which BTR belonged] should take work away from Bowman. Gilfillan, Brand is a senior partner. We have every right to expect him to act ethically. The position is intolerable. Feeding the hand that bites me."

The way has now been cleared for an exposition of the main events leading up to the application made at a late stage of the trial for the recusal of the second appellant.

On 26 May 1987 a one-day seminar was presented by ALA at the Sandton Sun Hotel in Johannesburg. Advance notice thereof was given by way of a printed brochure and programme produced by ALA. The brochure invited enquiries and early registration by intending delegates to the seminar. The theme of the seminar, the type of delegate contemplated, and the topics for study and discussion were thus announced in the brochure:-

> **"The New Labour Law - Management Perspectives**
> A one-day seminar for management and legal practitioners examining critical developments in Labour Law, and covering strikes, dismissal and the Unfair Labour Practice."

The proceedings at the seminar were to last from 08h00 to 16h30 with a lunch break and morning and afternoon tea breaks. According to the programme eight different papers were to be delivered. The first address and its author were thus described:-

"Placing the Industrial Court in Perspective Adv P E Roux SC, Deputy President, Industrial Court."

From the programme it further appeared that of the remaining seven papers four would be delivered respectively by each of the three advocates as well as by the attorney representing BTR at the trial.

The attorneys acting for MAWU at the trial were Bowman Gilfillan Hayman Godfrey Incorporated. On 19 May 1987 Mr Brand of that firm addressed to the second appellant a telex the relevant portion of which read as follows -

> "As you know we act for Metal and Allied Workers' Union in the application for an Unfair Labour Practice determination against BTR SARMCOL currently being heard by you.
>
> Our client has seen a brochure advertising a seminar 'for Management and Senior Legal Practitioners' on Labour Law. The conference is to be held on the 26th May 1987 at the Sandton Sun Hotel. It is being 'presented' by Andrew Levy and Associates. This firm, we need hardly say, was retained to give industrial relations advice on the dispute that is the subject of the litigation we have referred to, and the nature and propriety of its advice is pertinently in issue in the proceedings. Other speakers at the seminar include Messrs. McCall, Wallis, Trollip and Giles, who comprise

the complete legal team of the Company. Finally, it seems that the seminar will have a partisan quality, since only 'Management Prespectives' are being given.

Our client has instructed us to record its formal objection to your participation in this Conference. The objection extends to your acceptance of the invitation to speak.

In the normal way we would not have communicated this objection by correspondence, but merely in open Court. However, we felt that it would be wrong for our client not to let you have its objection before the Conference takes place."

On 20 May 1987 the second appellant responded by sending the following telex to Brand:-

"I entertain not the slightest doubt that the legal representatives of the Metal and Allied Workers Union would entertain any doubt that by acceptance of the invitation, nor of my addressing the Conference would or could in any way affect either my objectivity nor impartially in respect of the application for the determination to which you refer.

If, however, you find that neither yourself nor your counsel whose advice I would request you to obtain, would be able to convince your clients of this fact, then I am prepared to reconsider whether in the interest of justice being seen to be done, I should refuse to attend or address such Conference.

> Is the implication of your objection that I in future also consult you before I and other members of the court address any other conferences arranged at the instigation of management which we may from time to time be requested to address?
>
> I would also request you to reconsider your objection, as the implications thereof may not be as readily understood by the other members of the court, who unlike myself, are not members of the legal profession.
>
> I might add that neither Mr Levy nor his associates are known to me. That both the President of the court and I have been requested to attend, and wish to attend the Conference for the instructive value which we hope it may provide us in the field.
>
> Should you in the light of this telex see your way clear to withdrawing your objection, I undertake (not that I consider that it might have been necessary) that no reference will be made directly to the case in which your clients are involved."

Brand thereupon (the precise date being unknown) telexed the second appellant as follows:-

> "You will appreciate that the objection was not raised by us personally, but as the representatives of our client. We naturally were asked by our client to advise on this matter, as was counsel. We are sure you will accept that we and counsel gave the matter the most anxious consideration before coming to the

conclusion we did.

We feel it would be wrong for us to make submissions about the merits of the objection by telex. We should record, however, that the objection is confined to the participation by you, as the presiding officer in the MAWU/SARMCOL case, in this specific Conference in the particular circumstances of this case.

We regret to inform you that our client does not withdraw its objection."

To the last-mentioned communication of Brand the second appellant responded on 22 May 1987 with the following telex:-

"I have given careful thought to your client's objection.

In the rapidly evolving New Labour Dispensation, both the President and I, not only welcome every opportunity presented to us to attend conferences on labour relations in order to expose ourselves to the instruction of others in this field, but also because they present us with the opportunity of informing others of the function and role of the Industrial Court. In fact, we consider it as part of our duty to do so.

My presence in Pretoria is required during the week of 25 - 29 May 1987. I am also not being compensated for my contribution which is being made solely in the interest of the Industrial Court. I am consequently in no way beholden to the firm who arranged the

Conference, nor will I be in a position of informal association with SARMCOL's representatives either before or after such Conference.

That the present Conference happens to have been arranged by a firm of labour consultants, who at one stage were engaged by SARMCOL in respect of the present dispute, or that it eventually emerges that respondent's complete legal team are also to be speakers at such Conference, is entirely incidental and insufficient reason to justify the perception that my objectivity and impartiality may be affected thereby.

My withdrawal from participation in such conference as a result of your client's objection, may however give rise to unwarranted inferences, or undesirable assumptions which I consider should be avoided.

Should your clients, notwithstanding my assurances to the contrary, still entertain any doubts that my judgment may have been, or may still be affected by the circumstances to which you refer, I am quite prepared at a later date, should it be required of me to allay any such thoughts."

The exchange of telexes was brought to an end by the following telex transmitted on 25 May 1987 by Brand to the second appellant:-

"By raising its objection at the earliest possible stage, our client sought to do no more than to give you an opportunity to reconsider your participation in the

> Conference. We appreciate that you have now done this and affirmed your original decision.
>
> Our client notes your attitude and the reasons that underline it. Our client's objection still stands, however, and it will be placing this correspondence on record at the renewed hearing of this matter."

The cross-examination of Sampson began on 28 March 1987 and it continued on 1 April, upon which date the trial was adjourned to 29 June. It was during this adjournment that the exchange of telexes between Brand and the second appellant in regard to the forthcoming seminar took place. The seminar duly took place on 8 May 1987, and it was in fact attended and addressed by the second appellant and the three advocates and the attorney representing BTR at the trial. All eight papers delivered at the seminar formed part of the review record placed before the court a quo.

At the resumed hearing of the trial Sampson was further cross-examined on 29 - 30 June and on 1 July 1987 when his evidence was concluded. At the trial MAWU was represented by Mr Brassey, who later acted as its counsel both in the court a quo

and in the appeal before us. Before the IC adjourned on 1 July Mr Brassey addressed the court in regard to the telexes which had passed between Brand and the second appellant during May 1987 ("the telexes"). While disavowing any intention of making an application for the second appellant's recusal at that stage of the trial, Mr Brassey requested that the telexes should be "placed on record"; and he stated that he wished to note "an objection" in regard thereto. Having regard to the somewhat equivocal stance adopted by counsel for MAWU, some discussion then ensued between the second appellant and counsel on both sides as to the real purpose behind the introduction of the telexes; and whether the only proper course was not for counsel for MAWU to apply then and there for the second appellant's recusal. The same discussion was continued on 2 July when, after a little nudging, counsel for MAWU was prevailed upon to seek more explicit instructions from his clients. This counsel did during a short adjournment. When (on the same day)

the hearing was resumed Mr **Brassey** informed the court that the shop stewards had had "a general meeting with the workers present" and that counsel had been instructed to make an application for the recusal of the second appellant. In amplification thereof Mr **Brassey** said the following:-

> "The application is based on the fact that, by attending the conference in question and addressing it, you gave a reasonable apprehension of bias to a lay person. Whether, in fact, you are biased or not is, Sir, irrelevant as a foundation to this application."

In his argument in support of the application for the second appellant's recusal counsel examined the terms of the telexes and then made the following submission:-

> "....I understand the law to be that it matters not that you are, in your heart or in your mind, wholly objective and impartial; that what is significant, Sir, is the appearance that your conduct gives to the reasonable lay person. My submission in the circumstances is that by identifying yourself in this way that you have with this conference the impression conveyed, that might be reasonably be conveyed to the reasonable lay person, is one of bias."

When Mr **Brassey** had concluded his application for recusal, the

second appellant enquired of Mr **McCall**, who led the advocates appearing for BTR at the trial, whether he wished to address the second appellant in regard to the issue of recusal. Mr **McCall** replied that it would be inappropriate for him to make any submissions at all; that the decision lay with the second appellant himself; and "that we (counsel for BTR) in no way seek to influence you."

After the IC had adjourned in order to reflect upon the matter, the second appellant announced that after careful consideration he had decided to refuse the application for his recusal. He then proceeded to state his reasons for his decision as follows:-

> "The main reason for refusing is the situation that members of my Court are constantly in positions where they attend conferences; they are also in positions where they have to give decisions against certain unions and have to, on subsequent days, deal with cases involving the same union. In other words, members of the Industrial Court, unlike judges, are far more exposed to aspects concerning labour relations and that that is the perspective which the public must enjoy of persons who man the Industrial Court and that they are

> therefore also persons who are attuned to disabusing their minds from extraneous influences because they are required to do so in the normal course of their activities. A further reason which influences me is the fact that I have been in close deliberations with the two other members of this Court and it would appear to me undesirable that a perception might exist at a later stage, should a decision be given in this case by the two other members which may possibly not be favourable to the Union, that they were influenced in their deliberations by me and that the effect of having attended this conference and the extent to what attending the conference may have affected my objectivity and that I, in turn, may have affected the two other members of the Court, this seems to me would be entirely undesirable. And the last reason for refusing the application is that I am entirely convinced in my own mind that I have in no way been influenced by attending the conference or that I acted improperly in doing so and I find it unacceptable that any of the gentlemen sitting in this Court, who have been sitting here for weeks on end, could entertain any real thought in their hearts that I might be biased by having attended that conference. If they have such a perspective then I think it is an unreasonable one. Thank you, Mr **INTERPRETER**, will you interpret that."

Against the background of the facts sketched above it is convenient to deal with the merits of the appeal before us by considering (a) the precise nature of the complaint levelled by MAWU against the second appellant in support of the application

for his recusal at the trial; (b) what legal principles govern an application for recusal of such a nature; and (c) whether in the light of the relevant legal principles the court **a quo** came to the correct conclusion on the facts before it. Each inquiry will be dealt with in turn.

(a) **The nature of MAWU's complaint against the second appellant:**

In **SA Motor Acceptance Corporation (Edms) Bpk v Oberholzer 1974(4) SA 808 (T)** the judgment of the full court was delivered by **Joubert J.** The history of the **exceptio suspecti judicis** is there traced from Roman times to modern South African law. At 810H in fin-811A the learned judge observes:-

> "**Ulpianus** het reeds in **D.2.1.10** die fundamentele regsbeginsel neergelê dat 'n regterlike beampte behoort nie reg te spreek aangaande homself, sy vrou, sy kinders of diegene met wie hy hom assosieer nie (**vel ceteris quos secum habet**)...."

The judgment contains a helpful review of the Roman-Dutch writers on the subject of recusal. It cites (at 811 C-E) Kersteman, **Hollandsch Rechtsgeleerd Woordenboek, s.v. rechters,** who lists

the virtues associated with the judicial office and refers, **inter alia** to the value of **"onzydigheid"**. At 812 C-D **Joubert J** remarks:-

> "Dit is noodsaaklik dat die recusans sy **exceptio recusationis** fundeer op 'n redelike oorsaak (**justa causa recusationis**) wat deur hom bewys moet word **Voet.** 5.1.43. Volgens ons gemenereg is die toets wat aangewend moet word by die beoordeling van die vraag of 'n **exceptio recusationis** behoort te slaag of nie objektief van aard, naamlik of daar 'n redelike vrees bestaan dat die regterlike beampte weens partydigheid, vooroordeel of enige ander erkende grond dalk 'n uitspraak sal gee anders as wat hy regtens behoort te gee. Sien, bv., **Voet**, 5.1.47...."

Stressing the requirement that the impression of possible unfairness must be reasonably created in the mind of an applicant for recusal, **Joubert J** proceeds to say (at 812 **in fin**) -

> "Vandaar dan ook dat ons gemenereg nie onbenullige redes (**frivolae causae**) erken as 'n redelike grond vir die rekusasie van 'n regterlike beampte nie. **Voet**, 5.1.46. Hulle voldoen nie aan bogenoemde objektiewe toets nie."

Later in his judgment the learned judge proceeds to catalogue

some of the **justae causae recusationis** recognised by our common law. Relevant for present purposes is a reference by Gail, **Practicae Observationes, lib.** 1, obs 33, nr 1 (see 813A of the judgment) to "**puta propter .... familiaritatem**"; and an example given by Damhouder, **Practijcke in Civile Saken,** cap 125, nr 4 (at 813 A-B) -

> "Item, als ick segge dat dien rechter ofte synen adjunct mynen vyand is, of ten minsten eenen goeden familiaren vrient van mynen vyand ende party, ende den selven seer favorabel, dat hy met myn party woonende is in een huys, ofte dat 'er syn **commensaal** is ...."

In **S v Radebe** 1973(1) 796 (A) **Rumpff JA** summed up the position at common law thus (at 812 A-C):-

> "Die algemene beginsel in die Romeins-Hollandse reg is duidelik en bevat die grondreël dat niemand in sy eie saak Regter kan wees nie. Uit die geskrifte van die skrywers en sekere wetgewende bepalings blyk dit dat by die toepassing van hierdie grondreël 'n Regter by die beoordeling van 'n saak uitgesluit word wanneer nie alleen eie belang, **maar ook 'n neiging of gesindheid ten opsigte van een van die partye,** hom anders sou kon laat oordeel as wat die onpartydigheid eis, sodat daar rede bestaan, nieteenstaande die Regter se eie voorneme, om vir partydigheid aan sy kant te vrees. Merula, **Manier van Procederen,** 4.4, verwys na twee

> hoofgronde waarop 'n Regter gevra kan word om te rekuseer, nl. onbevoegdheid en omdat hy 'suspect' is, d w s dat hy onder verdenking staan van moontlike partydigheid, en hy noem sekere voorbeelde ...."
> (Emphasis supplied).

See further: **Dairy Board v Imperial Cold Storage and Supply Co Ltd** 1977 (3) SA 659 (A) at 669B-F.

Kersteman, **op cit., s v Recusatie** p 406 states that an objection will readily be entertained if it be proved that the judge concerned was suspected of enmity, corruption, relationship by consanguinity or affinity:-

> ".....of dat 'er geprobeert kon worden dat zulk een gesuspecteerde Rechter het Proces enigermate betrof, en derhalven meer of min by die triumphe van de Partye geïnteresseert waare ...."

In the light of these authorities it is clear that the complaint on which MAWU relied in seeking the recusal of the second appellant belongs to a category well recognised by our common law. The suspicion of bias assailing the minds of the members of MAWU was simply that, in all the circumstances of the

case, by attending and addressing the seminar held on 26 May 1987 the second appellant had so associated himself with one of the parties to the trial being heard by him as reasonably to create an impression of a leaning or inclination on his part towards one side in the dispute; an impression of a predisposition to favour one of two opposing viewpoints. Manifestly that was the **causa suspiciendi.** By way of practical illustration there may be used the following example cited by counsel for the respondents of a situation which might arise during the proceedings at the seminar. It was said that during a break for lunch or tea, and in the hearing of the second appellant, a delegate could make a pointed remark bearing upon the very issues in the IC proceedings over which the second appellant was then presiding; and that, albeit subconsciously, he could be influenced thereby. There is no evidence to indicate the tenor of the informal discussions at the seminar to which the second appellant might have been privy, and the example is a purely speculative one. It seems to me,

nevertheless, that an outsider with knowledge of the nature of the seminar and the second appellant's participation therein might not unreasonably harbour the suspicion of the occurrence of some such incident.

(b) <u>The relevant legal principles:</u>

Neither at the trial nor during the review proceedings in the court **a quo** was it suggested by counsel for MAWU that the second appellant had displayed actual bias in the sense that he had approached the issues before him with a mind which was in fact prejudiced or not open to conviction. Any such allegation was specifically disavowed. This case is concerned not with actual bias but with the outward appearance of bias. For present purposes there may be adopted the definition of "bias" stated in the House of Lords by **Lord Thankerton** in **Franklin v Minister of Town and Country Planning** (1948) AC (HL) 87 at 103. It was there said that the proper significance of the word -

> "....is to denote a departure from the standard of even-handed justice which the law requires from those who occupy judicial office or those who are commonly regarded as holding a quasi-judicial office...."

For many years the decisions of the courts, both in South Africa and in England, have reflected a difference of judicial opinion in regard to the proper test to be applied in recusal cases involving the **appearance** of bias. In **R v Liverpool City Justices, ex parte Topping** (1983) 1 A11 ER 490 (QBD) the problem is thus succinctly stated (at 494 E-F) by **Ackner LJ:-**

> "Must there appear to be a real likelihood of bias? Or is it enough if there appears to be a reasonable suspicion of bias?"

A moment's reflection must show, so I consider, that these two tests involve very different critieria. The essential connotation of the word "likelihood" is that of probability. In the present context the word signifies that there is a stronger than fifty per cent prospect that the contemplated state of affairs will eventuate. The phrase "**real** likelihood"

reinforces that meaning. On the other hand the criterion of a "reasonable suspicion" necessarily imports a less exacting test. In **Duncan v Minister of Law and Order** 1986(2) SA 805(A) this court (at 819 H-I) approved the following remarks by **Lord Devlin** in **Shaaban Bin Hussien and Others v Chong Fook Kam and Another** (1969) 3 A11 ER 1626 (PC) at 1630:-

> "Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking; 'I suspect, but I cannot prove'. Suspicion arises at or near the starting point of an investigation of which the obtaining of **prima facie** proof is the end."

(See further: **Francis George Hill Family Trust v South African Reserve Bank and Others** 1990(3) SA 704(T) at 711 F-G).

Notwithstanding these logical considerations the inherent difference between the two tests has not always been observed by the courts. A discussion of this problem is to be found in a recent judgment of a full court (**Friedman, Howie and Conradie JJ**) of the Cape Provincial Division in **Mönnig and Others v Council of Review and Others** 1989(4) SA 866 (C). This judgment

(to which reference will hereafter be made as "the full court judgment") was delivered by **Conradie J.** The confusion in judicial thought betrayed by a failure to distinguish between the "real likelihood of actual bias" test on the one hand and the "reasonable suspicion of bias" test on the other hand is summarised by **Conradie J** (at 877H) in the following words:-

> "Both in England and in South Africa these two tests for bias were sometimes clearly perceived by the Courts to be essentially different, sometimes dimly perceived to be different and sometimes thought to be reconcilable and thus not essentially different at all."

I am unable to improve upon the instructive review undertaken (at 876 B - 879 G) by **Conradie J** in which the South African and English decisions in point are subjected to critical analysis. Suffice it to record my general agreement with the comments of the learned judge; and, more in particular, to indicate my respectful endorsement of his view that the oft-quoted passage from the judgment of **Lord Denning** in **Metropolitan Properties Co (FGC) Ltd v Lannon and Others** (1968) 3 A11 ER 304

(CA) at 310 A - D (which passage is cited at 878 A-C of the full court judgment):-

> "....mixes up terminology appropriate to the 'real likelihood of bias in fact' test with that usually employed in expressing the 'reasonable suspicion test.'"

It is necessary, however, to set forth at some length the conclusion to which **Conradie J** was impelled by his survey of the authorities (at 878 H 879 E):-

> "Baxter **Administrative Law** at 560 suggests that the 'real likelihood' element of the test is 'a qualification designed to exclude fanciful suspicions....', and that the test for South African law could be formulated as follows:
>
> > 'Disqualifying bias will be found to exist where the reasonable lay observer would gain the impression that there is a real likelihood that the decision maker will be biased.'
>
> I do not believe that this test correctly states the present South African law. Our Courts have not, in the last 20 years or so, regarded it as necessary for disqualifying bias to exist that a reasonable observer should suspect that there was a real likelihood of bias; provided the suspicion is one which might reasonably be entertained, the possibility of bias where none is to be expected serves to disqualify the decision maker.

> RUMPFF CJ in **S v Radebe** .... at 812 A was content to adopt Lord Denning's formulation of the test for bias as correctly stating the English law. He did not, as I read the judgment, approve that formulation for South African law. The learned Chief Justice's investigation into the Roman-Dutch law of recusal shows that system to be free from the semantic difficulty created by the 'real likelihood' formulation or the 'reasonable suspicion' test: a Judge should recuse himself if there is reason to fear partiality on his part. (At 812 B-C).....
> Our Courts have not in recent times applied the 'real likelihood of bias' test. Since **Lannon's** case was decided, the passage from Lord Denning's judgment which I have cited above has been quoted in South African Courts with approval; but it is the expression of policy therein which our Courts have approved, not the formulation of test in terms of a 'real likelihood of bias'....."
>
> (The reference to MR JUSTICE RUMPFF in connection with the **Radebe**-judgment should read **"RUMPFF JA".**)

In due course the full court judgment came before this court on appeal. The judgment of this court ("the AD judgment") was delivered on 15 May 1992 by **Corbett CJ** (see: **Council of Review, South African Defence Force, A K DE Jager NO, M Dempers NO v H J Mõnnig and Two Others,** as yet unreported.) Certain

passages in the AD judgment bear directly on the issue here under discussion. In order to put them in perspective a brief summary of the essential facts in that case as well as of the ratio of the full court judgment is necessary.

The three respondents in the appeal were national servicemen in the South African Defence Force ("the SADF"). They were charged with having conspired to disclose protected information to unauthorised persons. They were tried, convicted and sentenced before an ordinary court martial presided over by a colonel (the third appellant in this court). The convictions and sentences were confirmed by the convening authority, a brigadier (the second appellant in this court). The first appellant was the council of review which confirmed the convictions but reduced the sentences. For the sake of brevity I shall refer to the serviceman who was the second respondent in this court as "the accused." In the proceedings before the court martial the accused raised the defence of justification.

He contended that the SADF had covertly waged an unlawful campaign of harassment and vilification against the End Conscription Campaign ("the ECC"); and that he had acted in defence of the rights of the ECC by using such reasonable means as were open to him to prevent harm to the ECC. At the court martial the accused had applied unsuccessfully for the recusal of the court martial on the grounds that it could not hear the case without there being a reasonable suspicion of bias on its part. The burden of the accused's argument was that since the court martial was composed of senior SADF officers it would be placed in an invidious position: In order to determine the issues raised by the defence of justification it would have to pass judgment on the legality or otherwise of the conduct and policies of the SADF.

In terms of sec 107 of the Defence Act 44 of 1957 an application for the review of the findings of the third, second and first appellants was launched on behalf of the three

convicted servicemen in the Cape of Good Hope Provincial Division. The review was heard by a bench consisting of the three judges aforementioned. Hence the full court judgment. In the review proceedings it was argued on behalf of the servicemen, **inter alia**, that the court martial should have acceded to the accused's application for recusal. That contention was upheld by the full court. It set aside the proceedings and decisions of the court martial, the convening authority and the council of review.

For present purposes the reasoning adopted by the full court appears sufficiently from the following three passages in the judgment of **Conradie J.** At 880 E-G the learned judge said:

> "Since the appearance of impartiality has to do with the public perception of the administration of justice, it is only to be expected that some tribunals will be more vulnerable to suspicion of bias than others. The most vulnerable, I venture to suggest, are tribunals - other than courts of law - which have all the attributes of a court of law and are expected by the public to behave as a court of law does. The court martial is, of course, such a tribunal. In fact it is the only tribunal I know of, apart from a court of law,

> which is competent to impose criminal sanctions. It is, to all intents and purposes, a court which may be presided over by laymen."

Having outlined the accused's defence **Conradie J** remarked (at 881 D-E):-

> What would an informed independent observer - or a litigant himself - reasonably think about the impartiality of the court martial? I consider that such an observer would think to himself that the tribunal - composed as it was of high-ranking senior SADF officers - was being placed in an intolerable situation. It was being asked to pronounce upon the propriety of a highly sensitive project, which had been initiated and was being directed by top Defence Force officers (among them the second respondent)."

And again at 881 H-I:-

> "Moreoever, bias is not only conscious but also subconscious, and in my view a reasonable person in the position of second applicant could reasonably have thought that the risk of an unfair determination on an issue such as this was unacceptably high."

The appeal against the full court judgment was dismissed with costs by this court. Of significance in the determination of the issue now under discussion are the following passages in the judgment of **Corbett CJ** at pages 14-16 of the

typewritten judgment:-

"In **S v Malindi and Others** 1990 (1) SA 962 (A), at 969 G-I, this Court summed up the rule as to recusal, as applied to a judicial officer, as follows:

> 'The common law basis of the duty of a judicial officer in certain circumstances to recuse himself was fully examined in the cases of **S v Radebe** 1973(1) SA 796 (A) and **South African Motor Acceptance Corporation (Edms) Bpk v Oberholzer** 1974(4) SA 808 (T). Broadly speaking, the duty of recusal arises where it appears that the judicial officer has an interest in the case or where there is some other reasonable ground for believing that there is a likelihood of bias on the part of the judicial officer : that is, that he will not adjudicate impartially. The matter must be regarded from the point of view of the reasonable litigant and the test is an objective one. The fact that in reality the judicial officer was impartial or is likely to be impartial is not the test. It is the reasonable perception of the parties as to his impartiality that is important.'

It may be that this formulation requires some elucidation, particularly in regard to the meaning of the word 'likelihood' : whether it postulates a probability or a mere possibility. Conceivably it is more accurate to speak of 'a reasonable suspicion of bias'. Suspicion, in this context, includes the idea of the mere possibility of the existence present or future, of some state of affairs (**Oxford English**

> **Dictionary, sv** 'suspicion' and 'suspect'); but before the suspicion can constitute a ground for recusal it must be founded on reasonable grounds.
>
> It is not necessary, however, to finally decide these matters for, whatever the correct formulation may be, I am satisfied that the court a **quo** was correct in holding that the court martial did not pose the correct test when deciding the recusal issue (see reported judgment at 875 J - 876 B); and that the circumstances were such that a reasonable person in the position of second respondent could reasonably have thought that:-
>
> '....the risk of an unfair determination on an issue such as this was unacceptably high'. (See reported judgment at 881 H-I.)"

As will appear from what is said under the last heading in this judgment, on my view of the facts it is necessary for the purposes of this appeal to decide what the proper formulation of the test is for disqualifying bias. For the reasons which follow I conclude that in our law the existence of a reasonable suspicion of bias satisfies the test; and that an apprehension of a real likelihood that the decision maker will be biased is not a prerequisite for disqualifying bias.

In my opinion the statement in the full court judgment

(at 879 A-B) that -

> "....provided the suspicion is one which might reasonably be entertained, the possibility of bias where none is to be expected serves to disqualify the decision maker...."

fairly reflects the recent trend in South African judicial thought, and I would approve it. It seems to me further that the test so enunciated is logical and fully in accord with sound legal policy. I consider that those very objects which the "reasonable suspicion test" are calculated to achieve are frustrated by grafting onto it the further requirement that the probability of impartiality must be foreseen. A cogent argument against the "nested test" propounded by Baxter, **Administrative Law** at 560, is advanced by Professor E Mureinik in a note (**Annual Survey of SA Law 1989** at 504 - 5) on the full court judgment. The learned author writes:-

> "To investigate the probability of bias, even though governed by the requirement of reasonable apprehension, would take the courts back into the kind of speculative inquiries that the focus on appearance is calculated to obviate. If the party challenging the decision-maker

> claims to have a reasonable apprehension of bias, the question arises, under the nested test, whether the bias apprehended is merely possible or really possible or really probable. To answer that question may well take the court directly into the mind of the decision-maker, and compel it to make judgments about his or her probity, and his or her willingness and ability to exclude the influence or interest or prejudice from the operative thought processes. These are precisely the kinds of judgments that an appearance-orientated approach is designed, and wisely designed, to spare the court. If the point of the nested test is to exclude trivial objections, that is achieved perfectly adequately in the reasonable apprehension test by the requirement of reasonableness."

As a matter of policy it is important that the public should have confidence in the courts. Upon this social order and security depend. In **Rex v Chondi and Another** 1933 OPD 267 **Krause JP** made the following observations (at 271) which in this country are as pertinent now as they were some sixty years ago -

> "It is a matter of the gravest public policy that the impartiality of the Courts of Justice should not be doubted, or that the fairness of a trial should not be questioned; otherwise, the only bulwark of the liberty of the subject, in these times of revolutionary tendencies, would be undermined."

It is the right of the public to have their cases decided by

persons who are free not only from fear but also from favour. In the end the only guarantee of impartiality on the part of the courts is conspicuous impartiality. To insist upon the appearance of a real likelihood of bias would, I think, cut at the very root of the principle, deeply embedded in our law, that justice must be seen to be done. It would impede rather than advance the due administration of justice. It is a hallowed maxim that if a judicial officer has any interest in the outcome of the matter before him (save an interest so clearly trivial in nature as to be disregarded under the **de minimis** principle) he is disqualified, no matter how small the interest may be. See in this regard the remarks of LUSH J in **Sergeant and Others v Dale** (1877) QBD vol 2 558 at 567. The law does not seek, in such a case, to measure the amount of his interest. I venture to suggest that the matter stands no differently with regard to the apprehension of bias by a lay litigant. Provided the suspicion of partiality is one which might reasonably be

entertained by a lay litigant a reviewing court cannot, so I consider, be called upon to measure in a nice balance the precise extent of the apparent risk. If suspicion is reasonably apprehended then that is an end to the matter. I find myself in complete agreement with what was forcibly stated by **Edmund Davies LJ** in the **Metropolitan Properties** case **(supra)** at 314 C-D:-

> "With profound respect to those who have propounded the 'real likelihood' test, I take the view that the requirement that justice must manifestly be done operates with undiminished force in cases where bias is alleged, and that any development which appears to emasculate that requirement should be strongly resisted."

(c) <u>Did the court a quo come to the correct conclusion on the facts?</u>

In seeking to apply the law to the facts there must steadily be borne in mind the cardinal precept of our common law already mentioned: The **exceptio recusationis** requires an objective scrutiny of the evidence. The test to be applied

therefore involves the legal fiction of the reasonable man - someone endowed with ordinary intelligence, knowledge and common sense. That the test prescribed is an objective one, however, does not mean that the **exceptio recusationis** is to be applied **in vacuo**, as it were. The hypothetical reasonable man is to be envisaged in the circumstances of the litigant who raises the objection to the tribunal hearing his case. It is important, nevertheless, to remember that the notion of the reasonable man cannot vary according to the individual idiosyncracies or the superstitions or the intelligence of particular litigants.

The facts have been set forth in some detail in the earlier part of this judgment. With a view to determining whether MAWU discharged the **onus** of establishing a disqualifying bias, those facts in my view represent a difficult borderline case. It is not surprising that with reference to the second appellant's attendance at the seminar the learned judge in the

court below acknowledged -

> "It was far from clear to me that even lawyers would agree about what was proper to do in a situation like this."

In this court the case for BTR was argued by Mr Wallis, while Mr Gauntlett argued the appeal on behalf of the second, third and fourth appellants. Both counsel urged upon us that in a case such as the present it should be required of an applicant seeking recusal explicitly to state his fear or suspicion of bias on the part of the judicial officer concerned; or, at any rate, that the existence of such a fear or suspicion on the part of the applicant should be manifest from the circumstances. It was said that this requirement had not been satisfied. Since the test to be applied is an objective one, this contention appears to me to be of doubtful validity. It is, however, unnecessary to say anything more on the point. In my opinion it would be difficult to imagine a case in which a suspicion of bias harboured by an applicant was ever more clearly manifested. The telexes sent

by Brand speak for themselves. Those telexes were followed up by a formal application for recusal after a meeting of the shop stewards, attended also by other members of MAWU, had specifically instructed MAWU's legal advisers to apply for such recusal.

Mr **Wallis** advanced the further submission, albeit somewhat gingerly, that the objection embodied in Brand's telexes was not genuinely entertained by MAWU; and that the telexes were simply part of a strategy whereby MAWU hoped to rid itself of a court whose composition was not to its liking. Now it may well be that MAWU would have preferred a trial before an industrial court otherwise constituted. But the submission (put forward for the very first time on appeal) that the complaint voiced in Brand's telexes was not genuine is entirely unsupported by the evidence and runs completely counter to the probabilities.

Relying upon the dictum in **S v Malindi and Others (supra)** Mr **Wallis** submitted that MAWU had not surmounted the

hurdle of establishing the **likelihood** of partiality on the part of the second appellant. I am disposed to agree with that submission. Making full allowance for all the circumstances attendant upon the trial, I am unable to conclude that a lay litigant in the position of MAWU, or any of its members, could reasonably have formed the impression on the strength of his attendance at the seminar that there existed a probability that the second appellant, whether consciously or subconsciously, would be partial to the cause of BTR.

Mention has already been made of the fact that before the court **a quo** there were all the papers delivered at the seminar. It is common cause that these were all innocuous and unexceptionable. As part of his argument **Mr Brassey** advanced, as a "tentative generalisation", that the second appellant's attendance at the seminar served to signify his approbation both for the speakers thereat and for the organisers thereof. This argument seems to me to be quite unsound. I cannot accept that

any such outward image could reasonably be projected by the second appellant's attendance and participation at the seminar.

It is not clear whether in deciding that the second appellant should have recused himself the court **a quo** applied the "real likelihood of bias" test or the "reasonable suspicion of bias" test. There are passages in the judgment which suggest that the learned judge may have invoked the former. One such passage in his judgment reads as follows:-

> "One looks at the matter from the point of view or the perspective of the ordinary lay litigant, in the position of the particular litigant with whom one is concerned. One asks whether he reasonably fears in all the circumstances the likelihood, not the mere possibility of bias."

On the other hand there are statements in the judgment which tend to indicate that in the context of the test which he was applying the learned judge employed the phrase "real likelihood" to signify no more than "reasonable apprehension." This possibility derives some support from the following remarks by **Didcott J**:-

> "If I say that I have a reasonable apprehension of my house burning down, the apprehension is surely reasonable only if what I perceive is a real prospect of its burning down, not if I perceive some remote or fanciful prospect. In short, there must surely be a real likelihood perceived before the perception of it can be regarded as reasonable."

It is unnecessary, however, to delve further into the matter of what test was actually applied by the court a quo. I have already stated my view that the facts do not satisfy the "real likelihood of bias" test. But I have also held that it is the wrong test to apply. For the reasons which follow I conclude that the facts of the matter are strong enough to meet the less exacting requirements of the "reasonable suspicion of bias" test which should in fact be applied. Whatever the precise route followed by the learned judge in the court below, I am satisfied that he reached the correct destination.

Both Mr Wallis and Mr Gauntlett called attention in the course of their arguments to what they submitted were imperfections in the reasoning of the court a quo. It was said

that the learned judge had exaggerated the duration of the seminar (wrongly described in the judgment as having taken place over a weekend); and that he used language rather too colourful ("untoward hobnobbing" by the second appellant with ALA at the seminar) in seeking to describe what impression a lay litigant would have gained from the stark fact that the second appellant attended and spoke at the seminar. There is some force in this last criticism. But I do not consider that it represents a serious blemish in the reasoning of the court below. A further (and valid) criticism is that the learned judge overstated the role of ALA in the dispute between the parties by describing ALA as somebody -

> "....involved to a very substantial degree in that litigation..."

whereas ALA had no part in the litigation at all. The fact remains that ALA had played a crucial role in the events leading up to the trial; and in shaping the disputes which ultimately occupied the attention of the industrial court. In the eyes of

MAWU's members and officials, ALA was in the camp of the enemy.

Crucial to a determination of the issue is the nature of the dispute at the trial. In the judgment of the court below this factor is aptly described by the learned judge in the following words:-

> "It seems to me that, in the first place, it is of great importance to take account of the sort of litigation that was involved here. It was not the ordinary sort. It was not a dispute over a liquor licence or a motor carrier permit or town planning permission. It was not a dispute in which the tensions and antagonisms, if any, were merely those which arise **pro tem, ad hoc**, for the time being, between people who find themselves on opposite sides of some such dispute. We are dealing with a highly sensitive field. The relationship between management and workers in this country and many others has historically been tense and strained for much of the time. It is a relationship that is characterised by a high degree of mutual suspicion, at times of acrimony and hostility, and for understandable reasons, in that there are fundamental conflicts of interest between management and workers, or at the very least what are perceived by them as being fundamental conflicts of interests. The industrial legislation recognises all this. It recognises that this is not an area in which one easily gets people to see the other side's point of view, that it is not an area in which one easily gets give and take, that it is an area in which people are highly

> partisan, in which they tend to see matters in their own interests and from their own point of view only, hardly surprisingly because the matters are matters that are basic, wages and the like on one side, profitability on the other."

Stressing that the case before him was neither easy nor clear **Didcott J** ultimately came to the conclusion that the average lay litigant in the position of MAWU and its members would have felt that by his participation in the seminar the second appellant was displaying too great an association with ALA -

> "And I believe that this would have been felt strongly enough in reasonable minds .... steeped in the situation which existed and therefore sensitive to that situation, to have amounted to an apprehension of bias."

Having given anxious consideration to all the facts of the case it seems to me that the court **a quo** correctly came to the above conclusion; and that the appeal must fail.

It will be recalled that MAWU and Dladla were granted leave by **Didcott J** to cross-appeal against that part of the order awarding them limited costs instead of the costs of the whole review application. In the event no argument was directed by Mr **Brassey** to the cross-appeal. In my view no good ground exists for disturbing the abovementioned discretionary award of costs made by the court **a quo**.

For the aforegoing reasons both the appeal and the cross-appeal are dismissed with costs, such costs in each case to include the costs consequent upon the employment of two counsel. The attention of the taxing master is directed to the fact that no argument was directed to this court in regard to the cross-appeal.

G G HOEXTER, JA

MILNE JA)
KUMLEBEN JA)
F H GROSSKOPF JA) Concur
GOLDSTONE JA)