LL Case No 438/1991

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

PAPER PRINTING WOOD AND ALLIED WORKERS' UNION Appellant

and

D J PIENAAR NO First Respondent

INDUSTRIAL COUNCIL FOR THE FURNITURE MANUFACTURING INDUSTRY, TRANSVAAL Second Respondent

INDUSTRIAL COUNCIL FOR THE BEDDING MANUFACTURING INDUSTRY, TRANSVAAL Third Respondent

CORAM: BOTHA, KUMLEBEN, GOLDSTONE JJA,

NICHOLAS et HOWIE AJJA

HEARD: 18 MAY 1993

DELIVERED: 23 AUGUST 1993

JUDGMEN

T BOTHA JA:-

The appellant is a registered trade union. The second and third respondents are registered industrial councils. In August 1988 the appellant applied for admission as a party to the second and third respondents. The application did not succeed; it was deemed to have been refused in terms of the second proviso to section 21A of the Labour Relations Act 28 of 1956 ("the Act"). The appellant appealed to the industrial court. The appeal was heard by the first respondent, who is an additional member of the court. He dismissed the appeal. Thereupon the appellant brought an application for the review of the first respondent's decision in the Transvaal Provincial Division. The application came before HARMS J, who dismissed it with costs. The judgment of the learned Judge has been reported: see Paper, Printing, Wood and Allied Workers Union v Pienaar NO and Others 1991 (2) SA 46 (T). I shall refer to the

reported judgment as "the judgment a quo". The appellant appeals against it with the leave of HARMS J.

The first issue for decision is whether the power of the Supreme Court to review the proceedings of the industrial court has been ousted by the amendments to section 17 of the Act brought about by the Labour Relations Amendment Act 83 of 1988.

HARMS J answered the question affirmatively: see the judgment a quo at 49J-51C. Earlier, in the Cape Provincial Division, FRIEDMAN J (with HERMAN J concurring) had decided to the contrary: see Photocircuit SA (Pty) Ltd v De Klerk NO and De Swardt NO and Others 1989 (4) SA 209(C) at 214E-216I. Some months before the judgment in Photocircuit was delivered it had also been held in two cases in the Transvaal Provincial Division that the Supreme Court's review-jurisdiction had not been excluded by

the 1988 amendments: see Perskor v Schoeman NO and Others (1) (1989) 10 ILJ 650 (T) at 655A-E, per DANIELS J, and Foskor v Schoeman NO and Others (1989) 10 ILJ 861 (T) at 865I-866H, per VAN DER MERWE J. In a later case in the same Division VAN DER WALT J followed these two cases in preference to the view expressed in the judgment a quo: see Foskor v Van Zyl NO and Another (1992) 13 ILJ 544 (T) at 547E-J. On the other hand, in the Natal Provincial Division SHEARER J decided that the view of HARMS J in the judgment a quo and not the view of FRIEDMAN J in Photocircuit should prevail: see Black Allied Workers Union v Prestige Hotels CC t/a Blue Waters Hotel and Another (1992) 13 ILJ 540 (N) at 541E-543E.

As far as this Court is concerned the question is still open. Photocircuit came here on ..... appeal, but this question was not in issue in the

appeal and was not adverted to in the judgment of the Court: see Photocircuit SA (Pty) Ltd v De Klerk NO and De Swardt NO and Others 1991 (2) SA 11 (A). As appears from the judgment at 17D-E leave to appeal had been confined by the Provincial Division to certain stated issues which did not include the question of the review jurisdiction of the court. Accordingly there was no occasion for this Court to consider the question. In South African Allied Workers' Union (In Liquidation) and Others v De Klerk NO and Another 1992 (3) SA 1 (A) reference was made at 8B-E to the conflicting views of FRIEDMAN J in Photocircuit and HARMS J in the judgment a quo, but the Court found it unnecessary to decide the issue.

Before the 1988 amendments it had been held that the industrial court, when it made determinations under section 17(11)(f) of the Act, did not sit as a court of law, even when it discharged functions

6 of a judicial nature, and that its proceedings were subject to review by the Supreme Court: see South African Technical Officials' Association v President of the Industrial Court and Others 1985 (1) SA 597 (A) at 612I-613D. The review referred to was clearly of the kind described in the second category of the species of review discussed in Johannesburg Consolidated Investment Co v Johannesburg Town Council 1903 TS 111 (at 115), which is usually referred to as review under the common law. The statutory form of review under section 24(1) of the Supreme Court Act 59 of 1959 was not applicable, since the industrial court ex hypothesi did not qualify as an "inferior court" in terms of the definition of that expression in section 1 of that Act. (The contrary view expressed by FRIEDMAN J in Photocircuit at 214G is, with respect, incorrect.) What was laid down in the Technical Officials Association case supra._ in.

relation to the industrial court when making determinations under section 17(11)(f) must apply equally to the industrial court when dealing with appeals under section 21A (cf National Union of Textile Workers v Textile Workers Industrial Union (SA) and Others 1988 (1) SA 925 (A)). In National Union of Mineworkers v East Rand Gold and Uranium Co Ltd 1992 (1) SA 700 (A) at 733H it was said that the juridical nature of the industrial court had in no way been changed by the amendments of the Act since the decision in the Technical Officials' Association case supra. Accordingly, what falls to be considered now is whether the jurisdiction of the Supreme Court under the common law to review the proceedings of the industrial court, as previously recognized by this Court, has been ousted by the 1988 amendments.

Of prime importance in the amendments are the provisions of the new sections 17A, 17B and 17C.

Section 17A(1) establishes a labour appeal court consisting of a number of separate divisions. Sub-section (3) provides inter alia that every labour appeal court in session shall consist of a judge of the Supreme Court, who is the chairman of the court, and two assessors appointed by him; that the assessors are to be persons who, in the opinion of the chairman, have experience in the administration of justice or skill in any matter which may be considered by the court; and that the decision of the majority of the members of the court shall be the decision of the court, except in respect of a question of law, which shall be decided on by the chairman alone (paragraphs (a), (b) and (e)). Section 17B reads as follows:

> "17B. (1) A labour appeal court shall have the power -
>
> (a) to decide any question of law reserved in terms of section 17(21)(a);
>
> (b) to decide any appeal referred to in section 17(21A).

> (2) (a) The proceedings of the industrial court may be brought under review before a labour appeal court on the grounds mutatis mutandis referred to in section 24(1) of the Supreme Court Act, 1959 (Act No. 59 of 1959).
>
> (b) For the purposes of paragraph (a), rule 53 of the Rules of Court made under section 43(2) of the Supreme Court Act, 1959, in respect of the review procedure in the Supreme Court, shall mutatis mutandis apply."

Section 17C provides that any party to any proceedings before a labour appeal court may appeal to the Appellate Division against a decision or order of the labour appeal court (except a decision on a question of fact), with the leave of the labour appeal court or of the Appellate Division.

The reasoning which led FRIEDMAN J in Photo-circuit to the conclusion that section 17B(2) did not oust the Supreme Court's review jurisdiction was premised (at 214H) on the "strong presumption against legislative interference with the jurisdiction of the

Supreme Court". This well-known presumption has frequently been applied in our courts and there is a substantial body of case law illustrating its application in various contexts. It seems to me, however, that the legislative provisions under consideration in this case present a number of unusual features which set it apart somewhat from the types of cases in which the presumption has hitherto most frequently been applied. I take first the two cases cited by FRIEDMAN J (at 214I) in support of his reliance on the presumption: Lenz Township Co (Pty) Ltd v Lorentz NO en Andere 1961 (2) SA 450 (A) and Minister of Law and Order and Others v Hurley and Another 1986 (3) SA 568 (A). In the first case the Court was concerned with the alleged incorrectness of a determination made by a statutory board, and in the second with the alleged wrongfulness of an arrest executed by a police officer. In neither case was relief sought by

way of review: in both the question was whether the Court's jurisdiction to enquire into and pronounce upon the merits of the aggrieved person's complaint had been excluded by the legislative provisions under consideration. In each case the legislative provisions, if interpreted as excluding the power of the Court to grant relief to the person aggrieved, would have left him without any redress at all. That is not the situation in the present case. Here, a person aggrieved by a decision of the industrial court is, by section 17B(2) of the Act, given the remedy of taking the proceedings on review before the labour appeal court, and the sole question is whether the grant of that remedy has the consequence of excluding the jurisdiction of the Supreme Court to exercise its common law power of review. To put it differently, the question is whether the Supreme Court retains its jurisdiction concurrently with that

conferred upon the labour appeal court.

In that context FRIEDMAN J in Photocircuit at 216G invoked the "well-established principle that where the Supreme Court has not been deprived of jurisdiction but there is another court which has jurisdiction, the Supreme Court has concurrent jurisdiction", and in this connection he referred to Robinson v BRE Engineering CC 1987 (3) SA 140 (C) and the authorities cited at 144. In those cases the courts were concerned with the question of concurrent jurisdiction between the Supreme Court and the magistrate's court. The latter is, of course, plainly an inferior court in the hierarchy of our judicial system. Again, that is not the situation in the present case. Here, the question of concurrent jurisdiction arises as between the Supreme Court and the labour appeal court, which is itself a court presided over by a judge of the Supreme Court, who is

as a rule drawn from the ranks of the judges of the Provincial Division of the area in which the labour appeal court functions (see section 17A(4) and (5)).

In this respect the present case differs also from another type of case in which the presumption against legislative interference with the jurisdiction of the courts has frequently been applied, namely, where a statute provides an extra-judicial form of redress for a person aggrieved by the decision of a statutory body or functionary, for instance a right of appeal to a statutory tribunal. The manner in which the courts have dealt with that kind of situation is exemplified by cases such as Welkom Village Management Board v Leteno 1958 (1) SA 490 (A) and Local Road Transportation Board and Another v Durban City Council and Another 1965 (1) SA 586 (A).

In the present case the Legislature has created a specials judicial forum in which persons

aggrieved by decisions of the industrial court can seek redress. It cannot be doubted, in my opinion, that the labour appeal court, when exercising the power of review conferred upon it by section 17B(2), functions as a court of law. Moreover, it functions as such on the same level in the hierarchy of courts as does the Supreme Court in its provincial and local divisions. It hears appeals and reviews; it is presided over by a judge; and appeals against its decisions lie to the Appellate Division. That being so, the question of concurrent jurisdiction in the present case poses a problem of a kind which, as far as I know, has not called for consideration before.

It is true, of course, that the labour appeal court cannot in all respects be equated with a provincial or local division of the Supreme Court. In the present context, however, the differences are of no real consequence. For example, attorneys have a

right of audience in the labour appeal court (section 17A(8)), and an appeal to the Appellate Division does not lie against a decision on a question of fact (section 17C(l)(a); cf Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ("Perskor") 1992 (4) SA 791 (A)). Such details do not, I consider, detract from the substantial equivalence in rank of the labour appeal court and the ordinary provincial and local divisions of the Supreme Court in the judicial hierarchy. In regard to an appeal under section 17B(l)(b) it is provided in section 17(21A)(d) that a division of the labour appeal court shall, for certain stated purposes or "any other matter not specifically governed by or under the provisions of this Act, be deemed to be a division of the Supreme Court —.". This merely serves to underscore the equivalent positions of the labour appeal court and a provincial or local

division of the Supreme Court. There is no similar provision in regard to the labour appeal court when it exercises its powers in terms of section 17B(l)(a) or section 17B(2), i e when it decides a question of law reserved or entertains review proceedings. The reason for this is obscure. But whatever the explanation may be, it cannot mean that in respect of some of its functions the labour appeal court is endowed with a lesser status than in respect of others.

In the judgment a quo HARMS J observed (at 50I) that section 17B(2) "was introduced as part of a new administrative court structure applicable to labour relations", and that the intention of the Legislature was "to have a specialist higher court that has to deal with not only appeals but also reviews emanating from industrial courts". The concept of specialist courts dealing with specialized matters is a familiar one in our judicial system. We

know water courts, the court of the Commissioner of Patents, special income tax courts, and so forth. In those instances there is no doubt that the jurisdiction of the ordinary divisions of the Supreme Court has been ousted. I do not pause to consider the particular statutory provisions by which that result has been achieved (in most instances the jurisdiction conferred on the specialist court was expressly declared to be exclusive). The point to be made is a different one. The existence of such specialist courts points to a legislative policy which recognizes and gives effect to the desirability, in the interests of the administration of justice, of creating such structures to the exclusion of the ordinary courts (cf Mathope and Others v Soweto Council 1983 (4) SA 287 (W) at 291H-292A). In the present case it seems to me that the Legislature probably intended to establish the labour appeal

court in conformity with that policy. The structure of the court is certainly closely akin to that of the known specialist courts. Consequently there is, in my view, substantially less reason in the present case (compared with cases such as Lenz Township, Leteno and Robinson supra) for closely scrutinizing the provisions in question or for jealously guarding against interference with the jurisdiction of the ordinary courts.

Against this background it is necessary to consider next the grounds upon which the labour appeal court was empowered to review the proceedings of the industrial court, and to compare them with the grounds upon which the Supreme Court could exercise its common law power of review. In terms of section 17B(2)(a) the grounds upon which the labour appeal court can exercise its review jurisdiction are those contained in section 24(l) of the Supreme Court Act

59 of 1959. They are the following:

"(a) absence of jurisdiction on the part of the court;
(2) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
(3) gross irregularity in the proceedings;
and
(d) the admission of inadmissible or incom petent evidence or the rejection of admissible or competent evidence."

The grounds upon which the Supreme Court exercises its common law power of review were formulated in Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another 1988 (3) SA 132 (A) at 152A-E as follows (with reference to a decision of the president of the Johannesburg Stock Exchange):

> "Broadly, in order to establish review grounds it must be shown that the president failed to apply his mind to the relevant issues in accordance with the 'behests of the statute and the tenets of natural justice' (see National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd 1972 (3) SA 726 (A) at 735F-G; Johannesburg Local Road Transportation Board and Others v

> David Morton Transport (Pty) Ltd 1976 (1) SA 887 (A) at 895B-C; Theron en Andere v Ring van Wellington van die NG Sendinqkerk in Suid-Afrika en Andere 1976 (2) SA 1 (A) at 14F-G). Such failure may be shown by proof, inter alia, that the decision was arrived at arbitrarily or capriciously or mala fide or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose; or that the president misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or that the decision of the president was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter in the manner aforestated. (See cases cited above; and Northwest Townships (Pty) Ltd v The Administrator, Transvaal and Another 1975 (4) SA 1 (T) at 8D-G; Goldberg and Others v Minister of Prisons and others (supra at 48D-H); Suliman and Others v Minister of Community Development 1981 (1) SA 1108 (A) at 1123A.) Some of these grounds tend to overlap."

This formulation was recently reaffirmed in Hira and Another v Booysen and Another 1992 (4) SA 69 (A) at 84F-I.

In the Johannesburg Consolidated Investment case supra (1903 TS) at 115-6 INNES CJ stated that

the grounds upon which a review may be claimed under the common law are "somewhat wider" than those which alone would justify a review of judicial proceedings. This last was a reference to the grounds of review contained in section 19 of the Transvaal Administration of Justice Proclamation 14 of 1902 in respect of the review of the proceedings of inferior courts. These corresponded in all material respects to the grounds now appearing in section 24(1) of the Supreme Court Act. The statement of INNES CJ thus retains validity today. And it was referred to with assent by CORBETT CJ in Hira's case supra at 85J-86A.

In argument we were referred to Baxter Administrative Law at 710, where the author expresses the view, in relation to a comparison of the statutory review provided for (inter alia) in section 24(1) of the Supreme Court Act with the common law review, -that "when the express grounds of the review are

examined, it is evident that they are very similar, if not identical, to those already recognized under inherent review". By contrast, Wallis Labour and Employment Law at 5 (note 3) expresses the view that the Supreme Court's review powers are "much wider" than the "limited review jurisdiction" conferred on the labour appeal court. Baxter op cit (note 268) says further that the terms in which the grounds of review are expressed in section 24(1) are "covered" by the ordinary grounds of review under the exercise of inherent jurisdiction. This may be accepted as correct in the sense that the former do not extend beyond the latter; but for present purposes we are concerned with the converse question.

To what extent the common law grounds of review are wider than the statutory grounds of section 24(1) appears to me to be a matter of great difficulty. I do not consider it feasible in this

judgment to attempt an analysis of the various possibilities. Some general observations must suffice. Let me take as an example the last ground of review referred to in the passage quoted from the Johannesburg Stock Exchange case supra: where a decision is so grossly unreasonable as to warrant the inference that the decision-maker had failed to apply his mind to the matter in accordance with the behests of the statute and the tenets of natural justice. Can this be brought home under para (c) of section 24(1) -"gross irregularity in the proceedings"? That expression is not confined to defects in the procedure as such. It covers the case where the decision-maker through an error of law misconceives the nature of his functions and thus fails to apply his mind to the true issues in the manner required by the statute, with the result that the aggrieved party is in that respect denied a fair hearing (see e g

Goldfields Investment Ltd and Another v City Council of Johannesburg and Another 1938 TPD 551; Visser v Estate Collins 1952 (2) SA 546 (C)). That being a reviewable irregularity under section 24(1)(c), it may be argued (I put it no higher) that a failure properly to apply the mind to the issues, due to a reason other than an error of law, but found to have occurred by way of inference from the gross unreasonableness of the decision, could also be brought home under the section. Then take another example: where the decision itself cannot be categorized as grossly unreasonable, but where it appears that the decisionmaker took into account irrelevant considerations or ignored relevant ones, and it is shown that in this respect he failed properly to apply his mind to the matter. The decision can be set aside under the court's common law power of review (see e g Jacobs en 'n Ander v Waks en Andere 1992 (1) SA 521 (A) at

549H-551C). Here it would be difficult to argue (again putting it no higher) that such a situation constitutes a "gross irregularity in the proceedings" in terms of section 24(1)(c). The questions posed by the two examples I have given have not yet arisen for consideration, as far as I am aware, and it would be inappropriate to speculate in vacuo how they are likely to be answered when they do arise in a concrete case. I have mentioned the examples in an attempt to demonstrate, not only that the line of demarcation between the two categories of grounds of review is unclear, but also that it cannot be asserted with confidence that they are wholly coextensive. In general, it is also open to doubt whether the approach to errors of law in the context of common law reviews, as summarized in Hira's case supra at 93A-94A, can be accommodated under section 24(l)(c). And it must be borne in mind (as is shown

for instance by the judgment in Hira's case) that the common law grounds of review are not static, but subject to elaboration and expansion.

The conclusion to be drawn from the above discussion is that it must be accepted that the grounds of review stated in section 24(1) are narrower than those applicable in review proceedings under the common law, even though the extent of the discrepancy is not yet settled or defined. The difference in the scope of the two species of review, uncertain as its extent may be, has an important bearing on resolving the issue in the present case. It operates as a consideration countervailing against the considerations discussed earlier which point to the lesser impact, in the circumstances of this case, of the "strong presumption" relied on by FRIEDMAN J. To the extent of the difference, section 17B(2) of the Act cannot be seen as simply having transferred

the common law power of review from the ordinary divisions of the Supreme Court to the labour appeal court. If it were held that the Supreme Court no longer has the power to review the proceedings of the industrial court, the result would be that the common law grounds of review have been pro tanto abrogated, since the Legislature could not have intended that the Supreme Court would retain residual jurisdiction in respect only of those cases in which its power was wider than the power conferred upon the labour appeal court

Both in the judgment a quo and in Photo-circuit it was accepted, without more, that the grounds of review referred to in section 17B(2) were narrower than those applying in reviews under the common law, but in the two judgments directly opposite conclusions were drawn from that state of affairs. In Bhotocircuit at 216F/G FRIEDMAN J said:

> "It is inconceivable that the Legislature would have intended to oust the jurisdiction of the Supreme Court and replace it with a body with review jurisdiction more limited than that of the Supreme Court."

This statement was preceded (at 216E) by the observa tion that it was significant that the Legislature had used the word "may" in section 17B(2)(a) - "The proceedings of the industrial court may be brought under review before a labour appeal court...." With respect, I do not agree that the use of the word "may" is significant. It is the Legislature's cus tomary manner of conferring powers and I do not think that it can be inferred from such use that the Legislature contemplated a choice between the labour appeal court and the Supreme Court. Indeed, the point seems to be conclusively disposed of by the use of the same word in the next section, 17C(l)(a): "Any party to any proceedings before a labour appeal …. court may appeal to the Appellate Division.....".

Nor do I agree with the learned Judge's use of the epithet "inconceivable" in the passage I have quoted, as will appear from what follows.

In the judgment a quo HARMS J reasoned as follows (at 51A-C):

> "It would be anomalous to find that the selfsame act or decision can give rise to a review in two Courts, one consisting of a Judge, the other of a Judge and assessors, that the two Courts are both accountable to the same appeal Court but that different legal principles should apply, depending on the applicant's choice of forum. If the Legislature's intention was to retain the existing review proceedings, I fail to understand why it would have introduced a procedure containing limited grounds of review. I am conscious that the Supreme Court jealously guards against a reduction of its common law jurisdiction (Robinson v BRE Engineering CC 1987 (3) SA 140 (C)), but judicial jealousy cannot override legislative intent: cf Greaves v Opta Medical Co 1989 (1) SA 993 (W)."

There is obviously much force in this reasoning. It is indeed difficult to think of a sensible reason why the Legislature would have wished to bestow upon he

newly created court, which ranks equal in status with the Supreme Court, the power to review the proceedings of the industrial court, while at the same time retaining the parallel existing procedure in the Supreme Court (even the procedure of Rule 53 is declared to apply in the labour appeal court - section 17B(2)(b)). However, it seems to me that there are two further considerations which tend to detract from the force of the learned Judge's reasoning. The first is that the. anomalies adhering to a system of concurrent jurisdiction (to the extent in which there is an overlapping of the grounds of review) are notional in character rather than of practical effect. No reason suggests itself why it would be difficult or inconvenient in practice to cope with a dual system of review in relation to proceedings in the industrial court. In argument before this Court reference was made to the possibility of what was

called "forum-shopping", but I am satisfied that the prospect of that kind of malpractice arising is too remote to be of any real consequence.

The second consideration is of vital importance. It is this: if it is difficult to think of a reason for having a dual system of review, it is even more difficult to think of a reason why the Legislature would have wished to diminish the scope of the pre-existing grounds upon which an aggrieved party could seek to obtain a review of the proceedings of the industrial court. As I have pointed out, if it were to be held that the jurisdiction of the Supreme Court has been ousted, it would mean that the common law grounds of review have been abrogated to the extent that they are wider than the statutory grounds. Since no reason can be found for such a result, it is unlikely that the Legislature intended to bring it about.

In the final analysis, I conclude that the considerations mentioned in the preceding paragraph must, by a narrow margin, carry the day. The Legislature's true intention is left in doubt by the fact that the pointers to an intention of the Legislature to replace the review jurisdiction of the Supreme Court with that of the labour appeal court are sufficiently counterbalanced by the lack of pointers to an intention to reduce the ambit of the grounds of review. Consequently, the Legislature has not manifested a clear intention of curtailing the pre-existing rights of parties aggrieved by the decisions of the industrial court to seek redress by way of review. In the result, the review jurisdiction of the Supreme Court has not been ousted.

In my judgment, therefore, the court a quo erred in holding that it had no jurisdiction to

entertain the appellant's application for review. That was HARMS J' s main reason for dismissing the application. The learned Judge went on, however, to explain (at 51C-J) that, even if the court could still have exercised its common law power of review, he would have dismissed the application. I proceed now to deal with the merits of the application. For that purpose it is necessary to refer briefly to the facts.

The appellant is registered as a trade union in the magisterial districts of Germiston, Port Elizabeth and Springs, in respect of persons who are employed in the pulp and paper manufacturing industry. The second respondent is registered as an industrial council in the province of Transvaal and in the magisterial district of Vryburg, in respect of the furniture manufacturing industry. The third respondent is registered as an industrial council in

the province of Transvaal in respect of the bedding manufacturing industry. It will be seen that, as between the appellant on the one hand, and the second and third respondents on the other, there is a marked difference in the registrations in respect both of area and interest.

The appellant's application to be admitted as a party to the second and third respondents did not elicit a response within the period of 70 days mentioned in the second proviso to section 21A and (as was mentioned at the commencement of this judgment) the application was accordingly deemed to have been refused. After the appellant had noted an appeal to the industrial court, the second and third respondents each passed a resolution refusing the application, for two reasons: firstly, the interests for which the appellant was registered did not include the furniture manufacturing and bedding manufacturing

industries, and the area for which the appellant was registered consisted, in the Transvaal, only of the magisterial districts of Germiston and Springs; and secondly, the appellant was not considered to be sufficiently representative, within the second and third respondents' areas, of the interests for which the respondents were registered.

When the appeal came before the first respondent the second and third respondents sought at the outset to have two questions of law reserved (in terms of section 17(21) (a)) for the decision of the labour appeal court, namely, (i) whether in law a trade union whose registered interests and area differ from those of an industrial council is eligible for admission as a party to that council; and (ii) the proper meaning and effect of section 21A. The first respondent concluded a reserved judgment on the application with this observation:

> "I have paid particular attention to the questions of law in so far as they were argued and have come to the conclusion that, with the benefit of further argument, I will be able to decide them."

On that basis he dismissed the application.

At the resumed hearing the appellant led the evidence of Mr Baskin, the secretary of the appellant's Transvaal branch. His evidence was lengthy and detailed. For the purposes of this judgment the main points of it may be paraphrased as follows: the appellant is a national union which operates in all the major regions of the country, and in a number of industries, including the furniture manufacturing and bedding manufacturing industries (it may be noted in passing that the scope of the appellant's activities is authorized by its constitution); the appellant was believed to have a membership in the Transvaal of about 3 000 employees; the appellant was a rival of the National Union of Furniture and Allied Workers

("NUFAW"), which was a party to the second and third respondents; in the industries concerned there was a closed shop arrangement in force between the employers and NUFAW, which caused many difficulties and problems for the appellant in recruiting members, for instance in respect of applications for exemption, the regulating of stop order facilities, and so forth; this resulted in an unequal contest between the appellant and the closed shop union, NUFAW, the latter having an unfair organizational advantage which was not linked to its actual support from the workers; the workers' perceptions were critical of NUFAW and of the situation that obtained in the industries in general; this led to tension and was prejudicial to orderly and peaceful industrial relations; the appellant's admission to the second and third respondents would improve their functioning and industrial relations in general; and a number of

important and large-scale employers supported the appellant's admission to the second and third respondents. In cross-examination Mr Baskin was taxed about the appellant's failure to apply for an amendment of the scope of its registration in terms of section 7 before it applied for admission to the second and third respondents. He explained the appellant's reasons for not having done so: an application under section 7 was expected to be opposed by NUFAW; that would cause an inordinate delay (up to 2 years); the procedure would be too costly for the appellant; and the appellant felt that that was not the best way of resolving the problem.

The first respondent, after hearing argument, reserved judgment. Later, he made an order dis-missing the appeal, and subsequently he supplied full reasons for having done so. I shall refer. to his

reasons as "the judgment". The appellant's main ground of attack on the first respondent's decision was, and is, that he had failed to apply his mind to the issues he was called upon the decide. Accordingly it is necessary to analyse his reasoning as contained in the judgment. For the purpose of doing so, I shall quote a number of passages in the judgment, and in order to see them in their context, I list below the main features of the judgment in staccato style and, for ease of reference, in numbered paragraphs:

(1) Description of the background to the appeal, followed by a formulation of the issue for decision in the following terms:

> "The question with which the Court is confronted, is whether a registered trade union, even though its registered interest and area (also referred to as its 'scope' of registration) differ from those of the industrial council to which it wishes to be admitted, should be admitted as a party to an existing

> industrial council merely because it is registered and s 21A of the Act refers to a 'registered trade union', or whether it should first apply for a variation of its scope of registration in terms of s 7 of the Act and then, once this has been agreed to by the Registrar, apply for admission to the appropriate industrial council."

(2) Extensive quotations from sections 4 and 7 of the Act, followed by a re-formulation of the issue as follows:

> "The question is, in effect, whether s 7 of the Act can be circumvented by lodging an appeal in terms of s 21A."

(3) Statement that a number of arguments were advanced on behalf of the appellant in support of the contention

> "that s 7 of the Act does not apply in a situation such as the present one",

followed by a lengthy discussion of the arguments, including comments on a number of cases and sections of the Act relied upon.

(4) Statement that the crux of the argument on behalf of the second and third respondents was

> "that before you are entitled to join an industrial council, you must subject yourself to the requirements of the Act and obtain appropriate registration in that field, and s 7 of the Act is therefore of paramount importance",

followed by a discussion in which the argument is inter alia stated to have been

> "that when reference is made [in the Act] to a registered trade union joining a council, it means a trade union whose registration is appropriate because either it was initially appropriate and remains so, or it has been varied in terms of s 7."

(5) Reference to the judgment of the industrial court in Amalgamated Clothing and Textile Workers Union of South Africa v National Industrial Council of the Leather Industry of South Africa (1989) 10 ILJ 196 (IC), and

quotation of the passage in that judgment at 203B-D, from which it appears that the court there decided that the words "registered trade union" in section 21A were not to be interpreted as referring to the scope of the registration, and that the trade union in that case was not disqualified from being admitted as a party to the industrial council concerned by reason of the fact that it was not registered in respect of an interest and an area in respect of which the council was registered. (6) Discussion of the grounds upon which counsel for the second and third respondents "took issue" with the decision just mentioned, with reference to other cases and various provisions of the Act, and culminating with this conclusion:

> "Should a trade union therefore be admitted to an industrial council via s 21A without first having varied its registered scope to coincide with that of the particular industrial council, the trade union member(s) of that industrial council will have been deprived of the right to object to the applicant trade union's variation of scope. In view of the express provision made for the lodging of such an objection, this could not, in my opinion, have been the intention of the legislature when drafting s 21A."
>
> (Emphasis by the first respondent.)

(7) Summary of Mr Baskin's evidence of the

reasons why the appellant did not follow the

procedure of section 7, introduced by the

remark:

> "It is as well to refer at this stage to the appellant's reasons for approaching this court in terms of s 21A",

and followed by this comment:

> "It was therefore the Appellant's intention to seek the Court's assistance to circumvent these difficulties by requesting it to admit it to the

> council in terms of s 21A. I do not think that the legislature had such assistance in mind when it framed this section. To my mind this is not an appeal in the true sense of the word but merely an attempt by the Appellant to obviate the necessity of countering what may possibly be a perfectly valid objection by the trade union that is presently the sole union represented on these industrial councils, and thereby depriving it of its right in terms of s 7 to object to the Appellant's variation of its scope."

(8) Further comment, inter alia with reference

to the situation which would come about if

the appellant were admitted to the second

and third respondents via section 21A and

thereafter applied for a variation of its

scope of registration in terms of section 7,

but such application were refused by the

registrar:

> "The strange situation would then exist that the Appellant would be entitled to sit on the councils while, in the opinion of the registrar, the original union party is sufficiently representa-

tive in the whole of the area in respect of which the Appellant union seeks registration or in any part thereof and/or of the whole of the interests in respect of which it seeks registration, or of any part thereof."

(9) Quotation of the provisions of section

48(l)(c)(iii) as

"another example of the importance the legislature attached to s 7 of the Act",

and leading to this conclusion:

"Section 7 of the Act cannot, therefore, be disregarded merely because it would be to the Appellant's advantage to do so in the present instance."

(10) Penultimate paragraph of the judgment:

"In my opinion the solution to the problem is that s 7 of the Act must be seen as an integral part of the registration of a trade union or employers' organization..... It follows then that the expression 'registered trade union', as it appears in s 21A of the Act, should be read to mean a trade union which has complied with all the requirements as to registration set out in the Act, including, where necessary, a variation of its scope in terms of

> s 7. Such an interpretation would, I submit, be in consonance with the legislature's intention with regard to s 21A."

(11) Final paragraph:

> "A party should, in my view, only resort to s 21A once it has varied its scope in terms of s 7 and overcome any objections lodged against its application for such variation: if, after it has followed this procedure, the industrial council in question refuses to admit it, it should then approach this Court for relief in terms of s 21A. Accordingly, for this and the other reasons set out above, I dismissed the appeal."

The appellant's case is that the first respondent erred in law by misconstruing the Act and that he consequently failed to apply his mind to the merits of the appeal. In the judgment a quo HARMS J pointed out (at 51F) that the first respondent was called upon by the statute (sc section 21A of the Act) on appeal to consider the matter de novo, and

— that a consideration of the merits of the appeal

entailed, in the words of NICHOLAS AJA in National Union of Textile Workers v Textile Workers Industrial Union (SA) and Others 1988 (1) SA 925 (A) at 941B, a determination of

> "the rights and wrongs of the 'decision' [by the industrial council], including the nature and strength of the case put forward by the applicant; the attitude of the existing parties to the industrial council; the nature and validity of any objection to admission; and the wider aspects of labour relations referred to above."

(The last was a reference to what had been said in the passage at 940I:

> "While granting to an existing party the power in effect to veto an application for admission, it [section 21A] recognized that the unfettered exercise of such power could lead to friction and frustration in the industry concerned and could be detrimental to peace and order in labour relations. Accordingly it created machinery for resolving an impasse by an appeal to an independent third party with knowledge and experience of labour relations.")

The court a quo found (at 51F) that the

first respondent did consider the matter de novo and that a proper re-hearing had taken place. HARMS J said further (at 51H-I):

> "In the present case the first respondent did not decline jurisdiction. He heard the appeal. He considered one of the reasons put forward by the industrial councils for their decision. He considered that reason in great detail. He came to the conclusion that it was a good reason and that it disposed of the appeal. He therefore found it unnecessary to deal with the remainder of the so-called 'merits'."

With respect, I disagree. In my opinion the judgment of the first respondent is not susceptible of the interpretation placed on it by the court a quo. There is nothing in the judgment suggesting that the first respondent considered the appellant's failure first to pursue the procedure of section 7 as a good reason for the decision of the second and third respondents in the sense of rendering it unnecessary to deal with the rest of the merits of the appeal.

49 On the contrary, the whole tenor and thrust of the judgment, as summarized in paragraphs (1) to (11) above, shows that the first respondent considered himself to be precluded from dealing with the appeal on its merits, other than in respect of the noncompliance with section 7, because of the view he took of the meaning of section 21A. He did not cast his thinking in the mould of declining jurisdiction, but his reasoning was clearly tantamount to it. My reasons for saying this will be stated in a moment. It is convenient first to mention that counsel for the second and third respondents sought to support the conclusion of the court a quo, broadly on the following line of argument: after the first respondent had declined to reserve the questions of law raised at the outset of the hearing, the hearing in fact proceeded into a phase where the merits of the appeal were fully canvassed in the evidence of Mr

Baskin and in argument; the judgment shows that the first respondent took the evidence into account, particularly in relation to the strategy of the appellant as revealed in its reasons for not following the procedure of section 7; it would be wrong to surmise that the first respondent excluded from consideration any of the evidence or arguments on the merits; although the first respondent's reasons may perhaps have been stated in "unduly ambitious" terms, he did not intend to lay down an "absolute guillotine", but was confining his remarks to the particular facts of the matter before him, as is evidenced by his use of the word "should" in the passage quoted in paragraph (1) above (which connotes desirability, not a prerequisite) and by expressions such as "this is not an appeal in the true sense" and "in the present instance" in the passages quoted in paragraphs (7) and (9) above.

In my view these submissions are neither well-founded nor supportive of the court a quo's interpretation of the judgment, because of the following salient features of the judgment:

(4) The only issue which is addressed in the judgment is formulated in paragraphs (1) and (2) in abstract terms with reference to a trade union and an industrial council in general, and without reference to the particular position of the appellant and the second and third respondents.

(5) The final conclusion in paragraph (11) is stated in abstract terms as a general proposition of law and without reference to the parties to the instant dispute or the particular circumstances surrounding it.

(6) The argument on behalf of the second and third respondents is recorded in similar

terms in paragraph (4), and as contending for an absolute rule flowing from the provisions of the Act.

(7) The decision of the industrial court mentioned in paragraph (5) is dealt with in paragraph (6) in a manner which manifests disagreement with it. Having regard to what had been decided in that case, this passage in the judgment constitutes, by the clearest implication, a finding by the first respondent that the Legislature intended a trade union which has not complied with section 7 to be disqualified from admission to an industrial council.

(8) That this was the true ratio of the judgment is confirmed by paragraph (10). Here the intention of the Legislature is formulated in terms which clearly do not allow for any

exception to the rule.

(9) In the first sentence of paragraph (10) the first respondent uses the word "must", and in the second sentence the word "should" was plainly meant to convey the same sense. It follows that "should" in paragraph (11) is to be understood in a peremptory sense, and there is no warrant for reading the same word in paragraph (1) in any other way.

(10) The judgment does not mention the evidence of Mr Baskin which was directed at making out a case for the appellant's admission to the second and third respondents.

(h) The only part of Mr Baskin's evidence which is referred to, in paragraphs (7), (8) and (9), relates to the appellant's explanation for not having complied with section 7, and it is dealt with solely for the purpose of

saying that it does not allow section 7 to be disregarded. In the context, expressions such as "this appeal" and "the present instance" do not mean that the first respondent took into account the rest of Mr Baskin's evidence.

It is clear, therefore, that the first respondent's dismissal of the appeal was based exclusively on the fact that the appellant had not availed itself of the machinery of section 7 in order to procure a variation of its scope of registration, so as to cause it to coincide with the registrations of the second and third respondents. The first respondent considered that fact to be an absolute bar to the appellant's admission to the second and third respondents. He decided the questions of law raised at the outset of the hearing of the appeal, and no more. In consequence, he did not apply his mind to

the merits of the appeal as canvassed in the evidence.

In my judgment the first respondent's decision was wrong in law. It was based fundamentally on an interpretation of section 21A which, in my view, is insupportable. According to the interpretation of the first respondent the words "registered trade union" in section 21A must be read as meaning a trade union the registration of which, in respect of area and interests, coincides with the registration of the industrial council concerned, with the corollary that, if the registration does not so coincide, the union is compelled to obtain a variation of the scope of its registration under section 7 before it can make an application under section 21A. But, as a matter of interpretation of the language used by the Legislature, the words in question are incapable of being given the meaning contended for. The defini-

tion of "trade union" in section 1 does not support the suggested interpretation. The word "registered" is not defined. It plainly refers to a registration under section 4, which has the consequences set out in section 5. There is nothing in these sections to support the notion that "registered" in section 21A bears the restricted meaning ascribed to it by the first respondent. (Cf Da Gama Textile Co Ltd v Regional Director, Department of Manpower (Port Elizabeth) and Another 1991 (3) SA 530 (A) at 532A-C and E, and 533A/B.) The result arrived at by the first respondent could conceivably be justified only if it were permissible to read words into section 21A which the Legislature itself has not expressed. I can see no warrant for doing so. It was submitted on behalf of the second and third respondents that, if the first respondent's interpretation of section 21A were rejected,- section 7 would be rendered futile or

meaningless. The simple answer to this contention is that section 7 is couched in terms which are purely permissive; its provisions can be visualized as redundant only if it is first postulated that they were intended to be peremptory in relation to section 21A. But that begs the very question that is being considered. The first respondent's interpretation of section 21A can accordingly not be bolstered with reference to the provisions of section 7.

The final question is whether the first respondent's error constituted a reviewable irregularity. In the judgment a quo (at 51D) HARMS J held that it did not, on the basis that the industrial court "has the 'right' to be wrong in law". With respect, I disagree. The learned Judge's aphorism might conceivably have been appropriate if the first respondent had considered the appellant's failure to follow the route of section 7 in

conjunction with all the merits of the appeal as put forward in the evidence, and if he had found that the former outweighed the latter in importance (I express no opinion on the point) . But that is not what the first respondent did. He elevated prior compliance with section 7 to a rigid prerequisite, as a rule of law, for an application under section 21A, and thus failed to consider the appeal on its merits. In my opinion this is a classic instance of a case in which an error of law has resulted in a failure to apply the mind to the true issues which called for consideration (cf Hira's case supra at 93G-I). Consequently the first respondent's decision must be set aside and the matter remitted to him for reconsideration.

The order of the Court is as follows:

(11) The appeal is allowed with costs.

(12) The order of the court a quo is set

aside and there is substituted for it an order in the following terms: "(a) The order of the first respondent dismissing the applicant's appeal is set aside.

(13) The matter is referred back to the first respondent to enable him to consider the applicant's appeal afresh.

(14) The second and third respondents are ordered to pay the applicant's costs."

A S BOTHA JA

KUMLEBEN JA

GOLDSTONE JA

CONCUR NICHOLAS AJA

HOWIE AJA