THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No 503/96

In the matter between:

THE INDUSTRIAL COUNCIL FOR THE BUIDING INDUSTRY (WESTERN PROVINCE)	First Appellant (First Applicant in Court a quo)
THE BUILDING INDUSTRY COUNCIL, TRANSVAAL	Second Appellant (Second Applicant in Court a quo)
THE INDUSTRIAL COUNCIL FOR THE BUILDING INDUSTRY, BLOEMFONTEIN	Fourth Appellant (Fourth Applicant in Court a quo)
THE INDUSTRIAL COUNCIL FOR THE BUILDING INDUSTRY, EAST CAPE	Sixth Appellant (Sixth Applicant in Court a quo)
THE INDUSTRIAL COUNCIL FOR THE BUILDING INDUSTRY, EAST LONDON	Seventh Appellant (Seventh Applicant in Court a quo)
THE INDUSTRIAL COUNCIL FOR THE BUILDING INDUSTRY, KROONSTAD	Eighth Appellant (Eighth Applicant in Court a quo)
THE BUILDING INDUSTRIAL COUNCIL NORTH AND WEST ROLAND	Nineth Appellant (Nineth Applicant in Court a quo)
THE INDUSTRIAL COUNCIL FOR THE BUILDING INDUSTRY, KIMBERLEY	Tenth Appellant (Tenth Applicant in Court a quo)

and

TRANSNET INDUSTRIAL COUNCIL	Respondent (First Respondent in Court a quo)

Coram: Vivier, Nienaber JJA et Melunsky AJA

Heard: 18 August 1998

Delivered: 7 September 1998

JUDGMENT

VIVIER JA:

The eight appellants are all industrial councils registered or deemed to have been registered as such under the Labour Relations Act 28 of 1956 ("the LRA"), each with regional jurisdiction over different geographical areas of the building industry in South Africa. Although the LRA has now been repealed by the Labour Relations Act 66 of 1995 it was common cause that this case must be decided as if the latter Act had not been passed. The respondent is an industrial council which is deemed under sec 9(9) of the Legal Succession to the South African Transport Services Act 9 of 1989 ("the Act") to have been registered as such under the LRA. According to the respondent's registration certificate issued by the industrial registrar on 2 October 1991 it was registered in respect of -

> "the undertakings, industries, trades or occupations of Transact Limited known as Spoornet, South African Airways, Autonet, Portnet, Transtel, Transwerk, Promat, Protekon or any other business, undertaking, industry, trade, occupation, unit, department or section of Transnet Limited in the Republic of South Africa".

For convenience I shall refer to "an undertaking, industry, trade or occupation" as "an undertaking" or, where the plural is used, to "undertakings".

Subsequent to the respondent's registration a dispute arose between the appellants, on the one hand, and Transnet Limited ("Transnet") on the other, concerning the appellants' jurisdiction over certain building operations conducted by Transnet and its divisions. The dispute arose in the following way. Transnet and its predecessors, to which I shall refer in greater detail later, had traditionally been involved in building operations connected with the maintenance, construction and renovation of their own

buildings and for their own operational purposes. Since its incorporation during October 1989, Transnet had, in addition, engaged in building operations on the open market for outside parties under contracts unrelated to its own operational requirements. The appellants objected to Transnet undertaking such building work on the open market without being bound by the industrial agreements negotiated by the appellants for the building industry in their respective geographical areas which had been put into force by the Minister of Manpower under sec 48 of the LRA. The dispute led to an application brought on 17 November 1994 in the Transvaal High Court by the present eight appellants, together with two other industrial councils for the building industry. The last-mentioned two applicants, which were the third and fifth applicants respectively, were subsequently dissolved and have played no further part in the proceedings. The respondents were the present respondent, as first respondent, the industrial

registrar as second respondent and Transnet as third respondent. The industrial registrar gave notice at the outset that he would abide the Court's decision and he has taken no part in the litigation. Transnet withdrew its opposition before the application was heard and has similarly taken no further part in the proceedings. The relief sought was for an order declaring that upon a proper construction of the present respondent's certificate of registration, read with its constitution, the undertakings in respect of which it was registered were limited to the activities Transnet was engaged in immediately before 1 October 1989 and did not include building operations carried on by Transnet and its subsidiaries for purposes not necessitated by their own operational requirements. In the alternative an order was sought reviewing and setting aside the industrial registrar's decision to approve the respondent's constitution and to issue the registration certificate.

The matter came before Van Dyk J and by agreement between the parties an order was granted in terms of Uniform Rule of Court 33(4) that the following question be determined first and separately from any other question: whether the definition of the constitutional scope of the respondent contained in clause 3 of its constitution complies with the requirements of sec 9 of the Act. Van Dyk J held that the definition did so comply. He accordingly answered the question posed in the affirmative and ordered the appellants to pay the respondent's costs. With the leave of the Court a quo the appellants now appeal to this Court.

Clause 3 of the respondent's constitution reads as follows :

> "The constitutional scope of the council shall include the whole of the undertakings, industries, trades and occupations of Transact in the Republic of South Africa."

The constitution was approved by the industrial registrar in terms of sec 9 (11) of the Act. This subsection requires the industrial registrar to satisfy

himself, before granting his approval of a constitution agreed upon by Transact and the trade unions in question, that it is consistent with the LRA, that it does not contain provisions which are contrary to the provisions of any law and that it is not calculated to hinder the attainment of the objects of any law. The industrial registrar having given his approval and the South African Transport Services Conditions of Service Act 1988 ("the Conditions of Service Act") having lapsed as provided for in sec 9(6) of the Act, the respondent was deemed in terms of sec 9(9) to be registered under the LRA. The registration certificate issued to the respondent in effect embodied the definition of the respondent's constitutional scope in clause 3 of its constitution.

The appellants' contention essentially was that this definition was inconsistent with the requirements of both sec 9(9) of the Act and the LRA since it failed to indicate exactly which undertakings the respondent

represented and so failed to define the occupational limitation to its jurisdiction.

It is convenient to deal first with the provisions of the LRA. Registration of an industrial council under the LRA is obtained under sec 19. After receiving the constitution and the application for registration containing the prescribed information together with such further information as he may require, the industrial registrar causes a notice to be published in the Gazette giving particulars of the application and inviting any person who objects to the application to lodge his objection in the manner specified in the notice (subsecs (1) and 2(a)). Provision is made in paragraphs (e) and (f) of subsec (2) for written representations by the parties to the council and by the person who lodged the objection. Subsec (3) provides as follows :

"(3) If after considering the application, any objections

lodged and any representations made within the periods prescribed, any further information furnished within a period fixed by him and such additional matters as he deems relevant, the registrar is satisfied that -

(a) the requirements of this section have been complied with; and

(b) the proposed constitution is consistent with this Act and does not contain provisions which are contrary to the provisions of any law or are calculated to hinder the attainment of the objects of any law; and

(c) there is not in existence an industrial council which is registered in respect of the undertaking, industry, trade or occupation and in respect of the area concerned; and

(d) the parties to the council are sufficiently representative, within any area, of the undertaking, industry, trade or occupation concerned,

he may register the council in respect of the area and undertaking, industry, trade or occupation referred to in paragraph (d)."

Sec 19(3) thus empowers the industrial registrar to register an industrial council in respect of an area and an undertaking if he is satisfied,

inter alia, that the employer and employee parties to the council are sufficiently representative, within that area, of that undertaking. The industrial registrar thereby determines the jurisdictional scope of an industrial council. In order for the industrial registrar to be satisfied that the parties to an industrial council are sufficiently representative it is obviously necessary for him to identify the undertaking concerned. The industrial registrar is also empowered to vary the area or undertaking in order to ensure that the industrial council is sufficiently representative (sec 19(8)). In terms of subsec (9) the provisions of subsecs (1), (2), (3), (4) and (5) of sec 19 apply mutatis mutandis in respect of any proposed variation under subsec (8). The approval of the industrial registrar is thus required before an industrial council may vary the undertaking in respect of which it has been registered.

Sec 23(1) of the LRA provides that an industrial council shall, within

the undertaking, and in the area in respect of which it has been registered, endeavour by the negotiation of agreements or otherwise to prevent disputes from arising, and to settle disputes which have arisen or may arise between employers or employers' organisations and employees or trade unions and to endeavour to regulate or settle matters of mutual interest to employers or employers' organizations and employees or trade unions.

In Photocircuit SA (Pty) Ltd v De Klerk NO and De Swardt NO and Others 1991(2) SA 11(A) Preiss AJA said the following about sec 23(1) at 18E-

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

See also Genrec Mei (Pty) Ltd v Industrial Council for the Iron, Steel,

Engineering, Metallurgical Industry and Others 1995(1) SA 563(A) at 569

C-E.

An industrial council fulfils its first duty by negotiating industrial agreements in respect of the matters set out in sec 24(1) of the LRA. In terms of sec 48 the Minister of Manpower is empowered to promulgate industrial agreements by notice in the Gazette and to extend their operation in whole or in part, so as to bind employers and employees falling outside of a council's jurisdiction, even for an area additional to the area for which the industrial council is registered. (Sec 48(l)(b) and (c) and see S v Prefabricated Housing Corporation(Pty)Ltd and Another 1974(1) SA 535(A) at 540A.) With regard to an industrial council's function to settle disputes between employers and employees sec 27 A(l)(a) provides that, unless an agreement entered into by the parties to an industrial council provides otherwise, a dispute existing in any undertaking in any area where

an industrial council has jurisdiction in respect of the matter in dispute may, if the parties to the dispute are, inter alia, an employer and employees, be referred by such party to that industrial council which shall then endeavour to settle the dispute.

As was pointed out by Van Heerden JA in the Genrec case at 569 C-E, one finds repeated reference in the LRA to the limitation of jurisdiction in respect of the undertaking and the area for which an industrial council is registered. In Transvaal Manufacturers' Associates and Another v Bespoke Tailoring Employers' Association and Other, 1953(1) SA 47(A) Schreiner JA said the following about the necessity for the constitution of an industrial council and its registration certificate to contain a definition of the undertaking etc which it represents (at 56G - 57A) :

> "Counsel for the appellants contended that a definition of the industry is not a necessary feature of the registration certificate of an industrial council. It is true that the Act does not

> require a definition in the registration certificate itself or in the constitution embodied by reference in the certificate. It may also be the case that the name of the industry will suffice in some sets of circumstances to circumscribe the industry sufficiently. This will especially be possible where there are no other industrial councils registered for the same area in respect of allied or similar industries, so that there could be no risk of confusion or overlapping. But in all cases where such confusion or overlapping might occur if the boundaries between the industries were left indistinct, it seems to me to be essential to the working of the Act that there should, in the registration certificates and the constitutions of the industrial councils, be clear definitions of the industries which the councils represent."

Prior to the passing of the Act the LRA did not apply to Transnet's predecessors or their employees as they formed part of "the State" as contemplated in sec 2(2) of the LEA. The South African Railways and Harbours ("SAR & H") came into existence in 1910 when in terms of sec 125 of the South Africa Act 1909 all ports, harbours and railways belonging to the several colonies at the establishment of Union were vested in the

Governor-General-in-Council as from the date of the establishment of the Union of South Africa. In 1981 the SAR & H became the South African Transport Services ("SATS") in terms of the South African Transport Services Act 65 of 1981. Both the SAR & H and SATS conducted its operations as a commercial enterprise of the state. Sec 8 of the Conditions of Service Act provided for the establishment of a labour council for SATS functioning outside the provisions of the LRA. According to its objectives, functions and powers it would seem that the labour council was for all intents and purposes the equivalent of an industrial council for SATS and its employees.

The Act, which came into operation on 6 October 1989, brought about a fundamental change in the legal framework within which SATS and its employees functioned. Sec 2 provides for the formation and incorporation of a public company (Transnet) with share capital of which the

state, at the time of incorporation, would be the only member and shareholder. Sec 3(2) provides for the whole of the commercial enterprise of the state as contemplated in sec 3(1) of the South African Transport Services Act 65 of 1981 to be transferred to Transnet as a going concern. In terms of sec 9(2) all Transnet employees are deemed to be persons in the employ of the state for the purpose of the LRA so that the provisions of the LRA would not apply to Transnet and its employees. Subsec (3) of sec 9, however, provides, that the provisions of subsec (2) would lapse two years after the operative date of the Act which means that the LRA became applicable to Transnet and its employees after 6 October 1991. In terms of sec 9(6) the Conditions of Service Act lapsed, with certain exceptions, two years after the commencement of the Act.

Sec 9(8)(b) of the Act envisages an agreement between Transnet and the trade union members of the labour council to establish an industrial

council in terms of the LRA and para (c) of subsec (8) provides for the transfer of the labour council's assets, liabilities, rights and obligations to such industrial council should it be established within a period of one year after the date on which the Conditions of Service Act lapses.

Subsecs (9) to (17) were added to sec 9 of the Act by the Transnet Limited Second Amendment Act 110 of 1991. Subsec (9) provides as follows:

> "(9) Should the Company and the trade unions recognized by the Company, prior to the lapsing of the South African Transport Services Conditions of Service Act, 1988, in terms of subsection (6) -
>
> (a) agree to form one or more industrial councils; and
> (b) agree to and sign the constitution or constitutions
>
> of such industrial council or industrial councils,
>
> the industrial council or industrial councils shall, after approval of such constitution or constitutions by the industrial registrar in terms of subsection (11), immediately after the lapsing of the South African Transport Services Conditions of Service Act,

> 1988, be deemed to be registered in terms of the Labour Relations Act, 1956, in respect of the areas and undertakings, industries, trades or occupations of the Company provided for in such constitution or constitutions."

The respondent is thus, after approval of its constitution by the industrial registrar and the lapsing of the Conditions of Service Act, deemed to be registered under the LRA in respect of the areas and undertakings of Transact provided for in such constitution. Subsec (10) provides that the undertakings referred to in subsec (9) (ie those of Transact) shall be deemed not to be undertakings for which any other industrial council has been registered in terms of the LRA. I have already referred to the requirements of subsec (11). Subsec (12) provides that with regard to the execution of his duties under subsec (11) the industrial registrar shall be deemed to have been acting in terms of sec 19(3)(b) of the LRA. In terms of para (c) of subsec 13 the industrial registrar shall on the registration of

an industrial council in terms of subsec (9), vary the area and undertaking in respect of which any other industrial council is registered accordingly. In terms of subsec (15) the LRA applies to the respondent upon its registration in terms of subsec (9) as if it had been registered in terms of the LRA.

The new subsecs (9) to (17) clearly encourage and facilitate the establishment of an industrial council by Transact and the trade unions concerned and simplify the procedure relating thereto. The formal procedures and requirements of sec 19 of the LRA are done away with and no room is left for any person to object to the proposed registration of the industrial council. Instead the deeming provision in subsec (9) applies once the industrial registrar has approved the constitution and the Conditions of Service Act has lapsed. Instead of the requirement of sec 19(3)(c) of the LRA that the industrial registrar has to satisfy himself that there is not in

existence an industrial council which is registered in respect of the area and undertaking concerned, the deeming provision in subsec (10) that Transact's undertakings shall be deemed not to be undertakings for which any other industrial council is registered, is introduced.

Counsel for the appellants submitted that, read in the context of the relevant provisions of the LRA, sec 9(9) of the Act requires the respondent's constitution to describe the nature of the undertakings in respect of which it is registered and that a reference merely to "the whole" of Transnet's undertakings gives no definition of what the nature of such undertakings is so that the constitution accordingly does not comply with the requirements of the subsection.

When interpreting sec 9 of the Act one must not lose sight of the fact that the section is designed to deal with an ad hoc situation ie the formation, prior to the lapsing of the Conditions of Service Act, of one or

more industrial councils for Transnet and its employees, and the registration thereof immediately after such lapsing. The clear intention of the Legislature seems to be the establishment of a separate labour regime for the approximately 114 000 Transnet employees who are engaged throughout the country in what the respondent's secretary has stated to be "almost every conceivable trade or occupation". The concept of a separate labour regime for Transnet employees can be gathered from a provision such as subsec (16) in terms of which no agreement, award or order which, but for that subsection, would have become binding upon Transnet and its employees under the LRA upon the lapsing of the two-year period referred to in subsec (6), shall bind Transnet and its employees in respect of which an industrial council has been registered under subsec (9).

The deeming provision in subsec (9) applies in respect of the areas and undertakings "of the company", ie Transnet, provided for in the

constitution. By stating such undertakings to be the whole of Transact's undertakings, the undertakings in respect of which the respondent are deemed to be registered are, in my view, sufficiently identified. In terms of subsec (10) Transact's undertakings are deemed not to be undertakings for which any other industrial council has been registered. There is thus no room for confusion or overlapping or demarcation disputes resulting from boundaries between different undertakings not being clearly defined. The undertakings are defined with reference to Transnet. If a particular undertaking is a Transnet undertaking the respondent and no other industrial council has jurisdiction and there is, for purposes of registration, no need for any further definition of the undertaking concerned.

In arriving at this conclusion on the interpretation of sec 9 of the Act I am not unmindful of the decisions of our courts which have interpreted the words "undertaking, industry, trade or occupation" as referring to some form

of activity or pursuit rather than to the persons who engage in them. See National Industrial Council for the Iron, Steel, Engineering and Photocircuit SA (Pty) Ltd and Others v Minister of Manpower and Another (1993) 14 IJL 878(C) at 888B-889A and the cases there referred to. In the present case, however, sec 9(9) of the Act makes specific provision for circumscribing the undertakings concerned with reference to Transnet which distinguishes the respondent's constitution from that of any other industrial council not governed by a special legislative enactment.

I am unable to find that the respondent's constitution is inconsistent with the LRA, particularly in view of the fact that sec 9 of the Act deals with a unique situation, as I have said. The requirement of sufficient representativeness under sec 19(3) of the LRA clearly does not apply to the respondent's registration, as counsel for the appellants readily conceded.

Sec 9(13)(c) of the Act, which requires the industrial registrar upon the respondent's registration to vary the area and undertakings in respect of which any other industrial council is registered accordingly, can be complied with by simply excluding Transnet's undertakings from such other undertakings.

Counsel for the appellants submitted that under the respondent's constitution its jurisdictional scope could be said to extend to any activity of any kind which Transnet may now or in the future decide to engage in, something which is not consistent with the LRA and which is calculated to hinder the attainment of the objects of the LRA. It would appear that this was the reason why the main relief sought in the Court a quo was for a declaratory order restricting the respondent's jurisdictional scope to the activities Transnet was engaged in at a certain date. It may be that on a proper interpretation of its constitution the respondent's jurisdiction should

be so restricted. That, however, is not the issue before this Court and I express no views on it. It may also be that if Transnet extends its activities in future as counsel has postulated it will act beyond the respondent's jurisdictional scope. Again I express no views on such an eventuality. The only issue which must be decided at present is whether the respondent's constitution complies with sec 9 of the Act. For the reasons which I have given I am of the opinion that it does so comply.

The appeal is dismissed with costs, including those of two counsel.

W. VIVIER JA.

NIENABER JA Concurs.

THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

Case No: 503/96

In the matter between

THE INDUSTRIAL COUNCIL FOR THE
BUILDING INDUSTRY (WESTERN PROVINCE)
and SEVEN OTHERS Appellants

and

TRANSNET INDUSTRIAL COUNCIL Respondent

CORAM: VIVIER, NIENABER JJA et MELUNSKY AJA

DATE HEARD: 18 August 1998 DATE

DELIVERED: 07 September 1998

JUDGMENT

MELUNSKY AJA

MELUNSKY AJA

While I agree with the judgment of my brother Vivier and the order which he proposes, there are a few matters which I would like to emphasise. The question posed by the parties requires this Court to decide whether it is permissible for the respondent's jurisdiction to be determined with reference to the undertakings, industries, trades or occupations of Transnet Limited ("Transact") or whether the respondent's constitution should spell out the precise undertakings in respect of which it may exercise its powers.

The litigation between the parties springs from the appellants' concern that Transnet, through its division known as Protekon has, since the registration of the respondent, expanded its building activities to outside building work, i e work that is not related to Transnet's own operational requirements. Indeed Mr Kitshoff, who deposed to the appellants' founding affidavit, says that the "fundamental dispute" between the appellants and the

before the registration of the respondent and the real issue between the parties

was what effect the extension of those activities to outside building work had

on the respondent's jurisdiction. This matter was not adequately addressed in

argument and, as I have pointed out, it is not covered by the question that the

Court a quo - and this Court - has to decide. Therefore this Court can express

no view on whether the respondent's jurisdiction includes Transnet's building

work that is unrelated to that company's own operational requirements. The

result is most unfortunate for the parties, as considerable costs, effort

and time

have been expended without the resolution of the real dispute. This,

however,

is due to the fact that the question posed by the parties and accepted

by the

Court a quo as the matter to be determined, deviated from the issues

covered by

the notice of motion and the affidavits.

LS MELUNSKY
AJA