IH Case No: 202/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between :

GENREC MEI (PTY) LTD

Appellant

and

INDUSTRIAL COUNCIL FOR THE IRON, STEEL, ENGINEERING, METALLURGICAL INDUSTRY and 31 OTHERS Respondents

CORAM : CORBETT CJ, VAN HEERDEN, E M GROSSKOPF,

KUMLEBEN et NIENABER JJA

HEARD : 12 SEPTEMBER 1994

DELIVERED : 30 SEPTEMBER 1994

J U D G M E N T

VAN HEERDEN JA :

At all material times the appellant was a steel manufacturer and construction specialist having its principal place of business in Durban. By reason of the nature of its business it was subject to the jurisdiction conferred by the Labour Relations Act 28 of 1956 ("the Act") upon the first respondent as a registered industrial council, and was bound by agreements transmitted by the first respondent to the Minister of Manpower and put into force by him under s 48 of the Act.

Subject to what is said below, such an agreement ("the main agreement") obliged the appellant to make contributions to the first respondent, and also to pay to it amounts to be deducted from the wages of the appellant's employees, in respect of certain levies and funds. Those amounts were payable to the first respondent by the appellant's employees in terms of the main agreement.

The appellant became a party to a partnership contract which required it to second a number of employees, mostly pipe fitters and welders, to Casing Joint Venture (Pty) Ltd ("Casing") for the construction of piping work on the Mossgas oil rig ("the platform"). To this end the appellant entered into written agreements with 219 artisans ("the workforce"), which included the second to

thirty-second respondents. (For convenience I shall refer to them as the respondents and to the first respondent as the Council.) In terms of these agreements, concluded in Durban, the workforce had to work on the platform as employees of the appellant, although seconded to Casing. The agreements were of limited duration and would terminate on the completion of the so-called Hook-up contract. This contract, to which Casing was apparently a party, was to be performed on the platform.

In terms of the partnership contract the appellant also seconded eight of its regular employees to Casing. They were to act as supervisors and managers for the duration of the project on the platform.

The workforce, as also the eight regular employees, duly began working on the platform. Later, however, labour problems arose. One of the grievances of members of the workforce, including a number of the respondents, was that the appellant had deducted from their wages levies in respect of their membership of the Council as well as medical, sick fund and provident fund levies. They contended that those amounts should not have been deducted because they had been working beyond the boundaries of the Republic, and the

main agreement therefore did not apply to their employment. Up to that stage the appellant had been under the impression that the Act and the main agreement governed its relationship with the workforce. Hence the appellant had given effect to the provisions of that agreement by not only paying over to the Council the amounts deducted from the workforce's wages, but also by making its own contributions which would have been payable to the Council had the main agreement been applicable.

Acting on advice that its perception was wrong, the appellant then ceased making further deductions from the workforce's wages or paying any contributions, whether on its own or the workforce's behalf, to the Council. The appellant also refunded to the workforce the total amount of R34 594,86 which had been deducted from their wages. Thereafter the appellant sought a refund from the Council of this amount, as well as of the amount of R38 257,86 which it had paid to the Council on its own behalf.

The platform was situated some 72 kilometres from the nearest low water mark on the South African coast. It was consequently outside our territorial waters which, in terms of s 2 of the Territorial Waters Act 87 of 1963, extend

to a distance of 12 nautical miles (some 22 kilometres) from the low water

mark. The Council insisted, however, that notwithstanding this fact the main agreement governed the contractual relationship between the appellant and its workforce. Accordingly it refused to refund the amounts of R34 594,86 and R38 257,86, and demanded payment of further contributions by the appellant on its own behalf as well as on behalf of the workforce.

During February 1991 the appellant dismissed the respondents. This was done at a time when their employment had not yet come to an end as a result of the completion of the Hook-up contract. In a volte face, as far as some of them were concerned, the respondents then sought to rely upon the Act, alleging that their dismissals constituted an unfair labour practice. This was apparently contested by the appellant. In consequence the respondents referred their dispute with the appellant to the Council under s 27 A of the Act. They contended that the unamended Act was applicable to their relationship with the appellant in February 1991, and, even if it was not, the amended Act became so appli-cable with retrospective effect by virtue of the provisions of ss 2 and 13 of the Labour Relations Amendment Act 9 of 1991 ("the 1991 Act").

The Council and the respondents having all consented to the jurisdiction of the Durban and Coast Local Division and to their joinder in one application for declaratory relief, the appellant then brought motion proceedings against them in that Division. The main relief sought was an order declaring that the Act did not, either prior or subsequent to its amendment by the 1991 Act, apply to those employed by the appellant on the platform during February 1991, and hence also did not apply to the dispute in question.

The application was opposed by the respondents (but not by the Council). They admitted the appellant's factual allegations, but crossed swords with it on its legal contentions. In the result they applied for an order declaring the converse of the relief sought by the appellant.

The matter came before Booysen J. He refused the application with costs and in effect granted the relief asked for by the respondents. Because he was of the opinion that the unamended Act applied to the employment of the respondents by the appellant, he did not deal with the question whether the 1991 amendments had retrospective effect. He reasoned that the dispute existed in the area (the whole of the Republic) in respect of which the Council was registered

because the employment agreements had been concluded in Durban, the respondents were resident in Durban, and the appellant had its principal place of business in that city.

Subject to exceptions not material to this appeal, s 2(1) of the Act, prior to its amendment by s 2(a) of the 1991 Act, read :

> "This Act shall . . . apply to every undertaking, industry, trade or occupation".

As amended s 2(1) now provides :

> "(1) This Act shall . .apply to every undertaking, industry, trade or occupation, including an undertaking, industry, trade or occupation performing work in, on or above the continental shelf referred to in section 7 of the Territorial Waters Act. . .and in so far as the continental shelf concerned is deemed to be part of the Republic."

(For convenience I shall refer to an "undertaking, industry, trade or occupation" as "an undertaking".)

S 7 of the Territorial Waters Act is in the following terms :

> "The continental shelf as defined in the Convention on the Continental Shelf signed at Geneva on the twenty-ninth day of April, 1958, or as it may from time to time be defined by international convention accepted by the Republic, shall be deemed to be part of the Republic for the purposes of the exploitation of

> natural resources as defined in such convention, and of any law relating to mining, precious stones, metals or minerals, including natural oil, which applies in that part of the Republic which adjoins such continental shelf, and for the purposes of any such law the said continental shelf shall be deemed to be unalienated State land."

At this stage I need say no more about the quoted provisions than that it was rightly common cause that because the platform was situated above the continental shelf, the amended s 2(1) of the Act applies to an undertaking carried on at the platform.

I turn to a number of other provisions of the Act. S 19(3) empowers the registrar to register an industrial council in respect of an area and an undertaking, if satisfied, inter alia, that the parties to the Council are sufficiently representative, within that area, of that undertaking. In terms of s 23(1) 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 that have arisen or may arise between employers or employers' organizations and employers or trade unions. S 24(1) goes on to provide that an agreement, which may be

declared binding under s 48, may include provisions as to all or some or any of

a number of prescribed matters. And s 48(1) empowers the Minister, provided certain requirements are met, to declare by notice in the Gazette that an agreement such as is referred to in s 24 shall be binding upon all employers and employees, not being parties to the agreement, who are engaged or employed in the undertaking to which the agreement relates, in the area or any specified portion of the area in respect of which the Council is registered.

(S 48 (l)(c), which clothes the Minister with the additional power to declare by notice in the Gazette that an agreement, or provisions thereof, shall be binding in an area additional to that in respect of which the industrial council concerned is registered, is not material to this appeal.)

Finally, reference should be made to s 27A(l)(a). This paragraph, which for present purposes was not materially amended by the 1991 Act, stipulates that, unless an agreement entered into by the parties 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.

It has rightly not been suggested that an industrial council may function in terms of s 27A(l)(a) merely if the dispute referred to it exists in the area of its jurisdiction. Apart from the fact that it may be difficult, if not impossible, to determine the locus of a dispute, s 27A(l)(a) in my view clearly provides that (i) the dispute must exist in an undertaking and (ii) the undertaking must be in the area concerned, i.e. an undertaking carried on in that area.

One notes the repeated reference in the Act to the area in respect of which an industrial council is registered or, which is generally the same thing, the area in it which it has jurisdiction. As regards s 23(1), Preiss AJA said in Photocircuit SA (Ptv) Ltd v De Klerk NO and De Swardt NO 1991(2) SA 11(A) 18 E :

> "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."

It seems clear therefore that, if one ignores the provisions of s 48(1)(c) of the Act, the jurisdiction of an industrial council is limited to matters relating to an undertaking carried on in an area in respect of which it is registered. Now, although the Council is one of the few industrial councils registered for the whole of South Africa, it was rightly common cause that prior to the 1991 amendment of s 2(1) the Act by itself did not have extra-territorial application, and that hence the council could not deal with disputes existing in an undertaking carried on outside the Republic. The main bone of contention between the parties was on the question where the appellant's undertaking in which the respondents were employed was being carried on.

The court a quo thought that if any criterion could be said to be decisive in determining the locality of an undertaking, it would be the premises at which the employer conducts its business, which would be the place of employment. A contrary conclusion was reached by Scott J in Chemical and Industrial Workers Union v Sopelog CC (1993) 14 ILJ 144 (LAC) ("Sopelog"). That case, decided in 1989, concerned a dispute between a South African employer and its employees who worked on oil-rigs outside our territorial waters pursuant

2 to employment agreements concluded in Cape Town. Scott J found that the

industrial court did not have jurisdiction to hear an application relating to that dispute which had been brought before it under s 17(ll)(a) of the Act. His main reasoning may be summarised as follows :

(1) The territorial extent of the jurisdiction of an industrial court under s 17(ll)(a), as well as under s 43(4), of the Act cannot extend to an area in respect of which neither an industrial council nor a conciliation board would have jurisdiction (at p 149 D - E).

(2) Whether an employer or employee in any particular undertaking falls within the area of jurisdiction of an industrial council (or conciliation board), depends ultimately upon the area where such employer or employee is engaged or employed; in other words, on the location of the workplace (at p 150 B - C).

Since the employees concerned worked outside the country, and thus outside the area of jurisdiction of any industrial council (or conciliation board), the ultimate conclusion of Scott J (at p 152 A) was that the provisions of the Act did not govern the application before the industrial court.

3 Counsel for the respondents submitted that the facts of this appeal differ

in important respects from those in Sopelog. It is, however, unnecessary to analyse the alleged differences. The features, in particular of the respondents' agreements, upon which counsel relied are set out immediately below.

The main argument of counsel for the respondents ran along these lines. S 1 of the Act defines the phrase "undertaking, industry, trade or occupation" as including "a section or a portion of an undertaking, industry, trade or occupation." In terms of their agreements the respondents were entitled to payment at the off-shore rate whilst travelling from the Helipad in George to the platform; were allowed a week's leave after 21 days on the platform, which leave was to be enjoyed on shore where payment therefor was to be made, and were entitled to payment for periods of stand down and standby time when they were not off-shore. Furthermore, the agreements were concluded in Durban where the respondents were resident, whilst their fates - in regard to a unilateral termination of their services - were in the hands of the appellant whose principal place of business was in that city. Hence a section, or sections, of the relationship between the appellant and the respondents existed in South Africa.

4 And it is the relationship between an employer and his employee, and not the

physical location of the workplace, which is the determinant in regard to the jurisdiction of an industrial council.

This argument is unsound in a number of respects. It simply ignores the requirement that an undertaking must be carried on in a particular area. Moreover, nowhere in the Act is the jurisdiction of an industrial council linked to the relationship, without more, between an employer and employee. A contract of employment may be concluded in Cape Town where both parties are ordinarily resident; may stipulate that payment of wages, and reimbursement of travelling expenses incurred by the employee when visiting his family monthly, are to be made there, but provide that the employee shall work in the employer's only undertaking which is the carrying on of a manufacturing concern in Johannesburg. In such a case one would have no difficulty in concluding that only an industrial council registered for an area of which Johannesburg forms part, may in respect of that undertaking exercise the jurisdiction conferred by the Act on industrial councils. (Cf R v Gravenstein 1952 (4) SA 202 (T)). In short, there is no warrant for equating "a section" of the relationship between an

employer and his employee with a section of an undertaking.

In Sopelog Scott J may have gone too far by equating the location of the workplace with that of the carrying on of an undertaking. A contractor who has his main place of business in Durban may from time to time be awarded contracts to be executed in Pietermaritzburg and may designate some of his regular employees to perform the necessary work in the latter city. Whilst so engaged the temporary workplace of the employees will be in Pietermaritzburg but, depending on all relevant considerations, one may well conclude that the work is to be performed as part and parcel of the carrying on of the Durban undertaking.

It is hardly necessary to say that an employer may conduct more than one undertaking, albeit of the same nature. And if he conducts such undertakings in the Western Cape and the Free State, each having its own separate staff, and one industrial council is registered for the Cape and another for the Free State, clearly only the former may entertain a dispute relating to the Cape undertaking.

The question where an undertaking is being carried on at any given time, is ultimately one of fact. In casu the appellant did carry on an undertaking in

Durban. It was, however, also engaged in another undertaking conducted on the platform. The vast majority of its employees working on the platform, including all the respondents, were not part of its regular workforce. Indeed, they were taken into employment for one purpose only, and that was to work on the platform. Their agreements were of limited duration and were to come to an end on the completion of the Hook-up contract. Thereafter they would no longer be employees of the appellant. In other words, at no stage would they be employed in the Durban undertaking (unless, of course, new agreements were concluded at a later stage). It therefore appears to me that the undertaking in which they were employed was completely divorced from the Durban undertaking. Having due regard to the factors relied upon by the court a quo and counsel for the respondents, I am consequently of the view that in its main characteristics the former undertaking pertained solely to work to be executed on the platform, and hence outside our territorial waters.

As regards the application of the unamended Act, counsel for the respondent had a second string to his forensic bow. He argued that by virtue of the provisions of s 7 of the Territorial Waters Act, the unamended Act

7 governed an undertaking carried on at the platform which was, as indicated,

situated above the continental shelf. The argument is without substance. Because the section provides that for the purposes of certain laws the shelf shall be deemed to be part of the Republic, they are given extra-territorial application. They do not, however, include labour legislation.

I am therefore of the view that prior to the amendment of s 2(1) in 1991 the Act did not apply to the appellant's undertaking conducted on the platform, and that consequently the respondents could not validly refer a dispute relating to that undertaking to the Council. It remains to consider the relevant provisions of the 1991 Act which came into force on 1 May 1991.

I have already quoted the amended s 2(1) of the Act. It was rightly not contended that this subsection, standing alone, had retrospective effect. Counsel for the respondents relied, however, on s 13 of the 1991 Act which reads thus:

> "Any matter already introduced in a court of law, the industrial court or an industrial council immediately prior to the commencement of this Act and not dealt with at the commencement of this Act, as well as any application for the establishment of a conciliation board already received by the inspector defined by regulation, shall be proceeded and dealt with as if this Act had not been passed."

The respondents did not refer their dispute with the appellant to the Council before 1 May 1991. Had they done so, and had the reference still been extant on that date, s 13 of the 1991 Act would have required that the matter be dealt with as if that Act had not been passed. The obvious corollary of this, submitted counsel for the respondents, is that any dispute referred to an industrial council after 1 May 1994 is to be dealt with as if the amendment of s 2(1) of the Act had come into commencement prior to that date.

It will be observed that s 13 negatively provides that a matter falling within its ambit shall be proceeded and dealt with as if the 1991 Act had not been passed. It does not in positive terms prescribe that if a matter is introduced in a court of law, the industrial court or an industrial council subsequent to the commencement of the 1991 Act, it shall be proceeded and dealt with as if that Act had been in force at an earlier date, eg when the cause of the proceedings arose. However, according to the contention of counsel for the respondents, such a positive prescription must be inferred merely because of the negative way in which s 13 has been couched - apparently no matter how long before the date of commencement of the 1991 Act the cause of the

9 proceedings arose.

It is settled law that there is a strong presumption against retrospectivity of a statute, and that hence its operation should be construed as prospective only unless the legislature clearly expressed a contrary intention : Protea International (Pty) Ltd v Peat Marwick Mitchell and Co 1990 (2) SA 566 (A) 570 B - C. There are a number of exceptions, or quasi-exceptions, to this rule, but none is apposite for present purposes.

The Act was amended in 1991 in a number of respects. Thus, the amended s 17 (ll)(aA) now empowers the industrial court to grant an interdict in the case of any action that is prohibited in terms of s 65. A new subsection 17 D(l), introduced by s 5 of the 1991 Act, prescribes that, subject to certain provisos, a court of law and also the industrial court shall not grant an interdict restraining any person from inter alia instigating a strike or lock-out unless 48 hours' notice has been given to the respondent. The amended s 27 A (l)(a)(i) of the Act now precludes an industrial council from considering a dispute if it previously endeavoured to settle the same. The unamended s 27 A (l)(d)(i) of the Act provided that no dispute could be referred to an

industrial council unless the reference was made within 21 days from a prescribed date. In terms of the amended paragraph there is no longer a limitation period unless the dispute concerns an unfair labour practice. The unamended s 46(9)(b)(i) of the Act prescribed that a dispute not resolved by an industrial council had to be referred to the industrial court by the council's secretary or by a person designated by the council. The amended s 46(9)(b)(i) now provides that the reference may be made by any party to the dispute.

As appears from the above list, which is not intended to be exhaustive, there was every reason for the legislature to make it clear that the amendments brought about by the 1991 Act would not apply to matters falling within the ambit of s 13. Non constat, however, that it was intended that those amendments would apply with retrospective effect to matters introduced in a court of law, the industrial court or an industrial council after the commencement of the 1991 Act. Whether any of them do so apply, must in my view be answered in the light of the rules governing statutory retrospectivity, and in particular the answer to the question whether retrospectivity may affect vested rights.

As far as s 2(1) of the Act is concerned, this approach is reinforced by a consideration of the effect of the implication contended for by counsel. The respondents were dismissed in February 1991. At that time, as I have held, the Act did not apply to the appellant's undertaking carried on at the platform. The appellant may therefore well have acted within its contractual or common law rights by dismissing the respondents prior to the completion of the Hook-up contract. In any event, it could not have committed an unfair labour practice for the simple reason that the Act did not govern its undertaking. Hence there could not have arisen a dispute which the respondents could have referred to the Council under s 27 A (l)(a) of the unamended Act. Furthermore, the industrial court could not under s 46(9) of the Act have determined any dispute that may have existed between the appellant and the respondents.

Now consider the position if the submission under consideration were to be upheld. The amended Act would then apply to the dismissal of the respondents. In the result the industrial court could determine that, although it lawfully dismissed the respondents, the appellant had committed an unfair labour practice - at a time when the dismissals did not constitute such a practice - and

could eg order the appellant to pay compensation to the respondents. Any claim for damages which the appellant may have had against the respondents if the dismissals were justified by breach of contract, would then go by the board.

These considerations strongly militate against the construction of s 13 of the 1991 Act advocated by counsel for the respondents. It is indeed hardly conceivable that the legislature could have intended to interfere so drastically with vested rights and obligations.

If, as I hold, the unamended Act did not apply to the appellant's undertaking carried on at the platform, and the amended s 2(1) did not have retrospective effect by virtue of s 13 of the 1991 Act, the main agreement could not have applied to the employment of the appellant's workforce engaged on the platform. The appellant did not, however, seek any specific relief in respect of the aforesaid amounts paid by it to the Council.

In conclusion I should briefly mention two features of these proceedings. The first is that at the hearing of the appeal the appellant applied for condonation of the late filing of the notice of appeal. This application, which was not opposed, was granted and the appellant was ordered to pay the wasted

costs occasioned by it. Secondly, nine of the appellants did not oppose the appeal. They did not, however, abandon the order made in favour of all the respondents by the court a quo, and consequently cannot through their inaction escape liability for the costs of the appeal.

The appeal is allowed with costs, including the costs of two counsel, and the following is substituted for the order granted by the court a quo :

"(1) It is declared that the Labour Relations Act 28 of 1956, and the main agreement for the Iron, Steel, Engineering and Metallurgical Industry as it read from time to time, did not apply to :

(a) those employees of the applicant employed on the Mossgas 2A platform in terms of limited duration contracts in the form of annexure 'B' to the founding affidavit, and

(b) the dispute between the applicant and the second to the thirty-second respondents concerning the termination of their employment during February 1991.

(2) The second to thirty-second respondents are ordered to pay the applicant's costs, including those of two counsel."

VAN HEERDEN JA

AGREED :

CORBETT CJ
EM GROSSKOPF JA
KUMLEBEN JA
NIENABER JJA