

REPORTABLE

Case number 645/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

PHOTOCIRCUIT S.A. (PTY) LIMITED

AND TEN OTHERS

Appellants

and

NATIONAL INDUSTRIAL COUNCIL FOR THE IRON,

STEEL, ENGINEERING AND METALLURGICAL

INDUSTRY

Respondent

CORAM : E M GROSSKOPF, SMALBERGER,
HOWIE, SCHUTZ JJA et
ZULMAN AJA

DATE OF HEARING : 19 FEBRUARY 1996

DATE OF JUDGMENT : 29 MARCH 1996

J U D G M E N T

E.M. GROSSKOPF JA/.....

E.M. GROSSKOPF JA:

The respondent is the Industrial Council for the Iron, Steel, Engineering and Metallurgical Industry. For convenience I shall refer to the economic sphere in which the respondent operates as "the Industry". The respondent was registered in June 1944 in terms of the now repealed Industrial Conciliation Act, No 36 of 1937, ("the Repealed Act") for an area described as "the Union of South Africa". In terms of section 2(4) of the Labour Relations Act, No 28 of 1956 ("the Act"), the respondent is deemed to be registered under the Act. Parties to the respondent entered into a number of industrial agreements. Those agreements relevant to the present case bestowed certain functions on the respondent. The appellants are employers in the Industry but were not parties or members of parties to the respondent or parties to these agreements. However, pursuant to section 48(1)(b) of the Act the Minister of Manpower declared these

agreements binding on all employers in the Industry. The relevant agreements, and the dates on which they were respectively gazetted, are the following: The Metal Industries Group Pension Fund and Metal Industries Provident Fund Agreement (23 June 1978); The Engineering Industries Pension Fund Agreement (23 May 1980); The Main Agreement (27 June 1980); The Education and Training Fund Agreement (26 November 1982) and The Registration and Administration Expenses Fund Agreement (27 July 1984). In many cases these agreements superseded previous industrial agreements on the same topics.

The appellants have for some time contended that these agreements are not binding on them at all, and this led to a dispute between the parties. In order to resolve this dispute the respondent brought an application in the Cape Provincial Division against the appellants for an order directing them to render returns which were required by all the above mentioned agreements except the Main Agreement.

In addition the respondent sought an order interdicting the first appellant and Mr Horst Peschkes, a director of the first appellant, who was cited in his personal capacity, from inciting or encouraging any person to refuse to comply with the obligations which they have towards the respondent in terms of the Act. I shall refer to this application as the main application.

The appellants and Mr Peschkes opposed the relief sought on a number of grounds. The appellants also brought a counter-application in which they sought to review and set aside the registration of the respondent as well as the above agreements insofar as they purported to apply to non-parties to the respondent. In addition six of the appellants brought an application for review, for the same relief and on essentially the same grounds as was contained in the counter-application, against the Minister of Manpower and the Industrial Registrar. An order was granted consolidating the main application, the counter-application

and the review application.

Shortly before the scheduled hearing of the consolidated matter the respondent filed additional heads of argument in which certain points *in limine* were raised. They were, firstly, whether the appellants were precluded by certain provisions of the Repealed Act from challenging the validity of the respondent's registration as an industrial council; and, secondly, whether the appellants were in any event precluded by reason of the lapse of time from challenging the validity of the respondent's registration and the validity of the above agreements insofar as they relate to the appellants. These points *in limine* were argued separately before Scott J over three days in June 1992 and a further day in September 1992. The last hearing was occasioned by an application by Mr Peschkes to be heard in his personal capacity. Scott J decided the first point in favour of the appellants. The second point, insofar as it related to the main

application, was also decided in favour of the appellants. Insofar as it related to the counter-application and the review application, however, the second point was ordered to stand over for later determination if necessary. The question of costs was similarly ordered to stand over for later determination. This judgment has been reported as **National Industrial Council for the Iron, Steel, Engineering & Metallurgical Industry v Photocircuit SA (Pty) Ltd and Others 1993 (2) SA 245 (C)**.

The consolidated case was, in April 1993, argued over six days before Foxcroft and Scott JJ. In the result the court ordered the appellants to render the returns claimed in the main application. The counter-application and the review application were dismissed with costs. The court gave a decision on the merits, thus rendering it unnecessary to consider the point in limine which had been ordered to stand over. The costs of the main application were apportioned among the appellants. The costs of the

hearing in limine were ordered to be costs in the cause. No order was made in respect of the claim for an interdict or the costs relating to that claim.

The appellants were given leave to appeal on certain specified grounds. These may be summarised as follows (I adopt the exposition in the appellants' heads of argument):

1. Whether the respondent had acted **ultra vires** its constitution in seeking to apply the Registration and Administration Expenses Agreement, the Education and Training Fund Agreement and the various Pension and Provident Fund Agreements to the appellants, and accordingly whether such agreements were at the material time binding on the appellants.
2. Whether upon a proper interpretation of clauses 8(3)(d) and (e) of the Main Agreement the appellants at the material time were bound to furnish returns in respect of the respondent's

various pension and provident funds.

3. Whether the respondent's registration for an area defined as "the Union of South Africa" was valid, and accordingly whether it had *locus standi* to bring the application against the appellants.
4. Whether the appellants were entitled to the costs of the hearing of the respondent's points in *limine*.

The original heads of argument submitted on behalf of the appellants dealt with these four matters. However, supplementary heads of argument were submitted shortly before the hearing of the appeal. In these heads the appellants' counsel intimated that no oral argument would be volunteered in respect of the topics numbered 1 and 3 above. In argument before us the appellants' senior counsel, Mr Duminy, who had not acted in the matter prior to the preparation of the supplementary heads of argument,

explained that he had no authority to abandon any part of the case, but that his oral argument would be confined to the matters numbered 2 and 4. In my view he exercised a wise discretion. I consider that the decision of the court *a quo* in respect of the matters excluded from counsel's oral argument was clearly correct and the rest of this judgment will proceed from that premise.

This then brings me to item 2, viz, whether upon a proper interpretation of clauses 8(3)(d) and (e) of the Main Agreement the appellants at the material time were bound to furnish returns in respect of the respondent's various pension and provident funds. The respondent placed some reliance also on clause 8(3)(f) and I deal with it at the same time. It will be convenient to commence by setting the scene for this argument.

An industrial council such as the respondent is composed of employers (or their representatives) and trade unions engaged in a defined undertaking, industry, trade or

occupation in a defined area (see e.g. sections 18 and 19 of the Act). Its duties are defined as follows (sec 23(1) of the Act):

"An industrial council shall, within the undertaking, industry, trade or occupation, and in the area, in respect of which it has been registered, endeavour by the negotiation of agreements or otherwise to prevent disputes from arising, and to settle disputes that have arisen or may arise between employers or employers' organizations and employees or trade unions and take such steps as it may think expedient to bring about the regulation or settlement of matters of mutual interest to employers or employers' organizations and employees or trade unions".

The "negotiation of agreements" is thus an important part of the industrial council's functions. In terms of sec 1 of the Act "agreement" means, for present purposes, "an agreement entered into by parties to an industrial council...". And the parties to an industrial council are the employers, employers' organizations and trade unions that initiated the formation of the industrial council or that were subsequently admitted to participation, and have not withdrawn from the council (sec 18(2) of the Act). An

industrial agreement is thus in essence an agreement entered into under the aegis of an industrial council between the employers and the workers in a particular industry in a particular area. Under sec 48(1)(a) of the Act the Minister of Manpower may declare the provisions of an industrial agreement binding upon the parties to the agreement and, where they are organizations, their members. Moreover the Minister may, under circumstances which I need not detail, declare the provisions of the agreement binding upon all other employers and employees who are engaged or employed in the industry to which the agreement relates in the area or part of it in respect of which the council is registered (sec 48(1)(b)) or upon employers and employees in an additional area (sec 48(1)(c)). In **S v Prefabricated Housing Corporation (Pty) Ltd and Another** 1974 (1) SA 535 (A) it was held (at p 540B) that an industrial agreement made binding under sec 48 is a piece of subordinate domestic legislation. Despite changes in the Act this is

still correct.

Sec 24(1) of the Act lays down which matters may be dealt with in an industrial agreement. A large number of specific topics are listed. The sub-section then concludes by authorizing provisions as to

"any matter affecting or connected with the remuneration or other terms or conditions of employment of ... employees ... or as to any matter whatsoever of mutual interest to employers and employees, the scope of this provision not being limited in any way by the mention in this sub-section of particular matters."

Among the specific matters sanctioned by sec 24(1) are the prohibition of deductions from remuneration payable to employees other than "deductions which the employer is required or permitted to make in terms of the agreement or of any law or order of a competent court" (para (d)) and "the establishment of pension, sick, medical, unemployment, holiday, provident and other insurance funds, and the levying upon employers and employees of contributions towards such funds ..." (para (r)).

This brings me to the agreements which are in issue for purposes of the present argument. They are the Metal Industries Group Pension Fund and Metal Industries Provident Fund Agreement, and the Engineering Industries Pension Fund Agreement. For convenience I shall refer to them collectively as the Pension Fund Agreements. It is common cause that these agreements are of the kind sanctioned by sec 24(1)(r) of the Act and, in the light of what I have said above, we must now accept that they were properly made binding on the appellants in terms of sec 48(1)(b).

Both these agreements contain provisions for contributions to the respective funds by employers and employees, and both require employers to deduct the contributions of certain employees from their wages. In terms of the latter agreement employers are required to deduct pension contributions from the wages of so-called "scheduled employees" and thereafter to add an equal amount

to such contributions. The amounts so collected are to be forwarded to the respondent together with a statement in such form as may be prescribed by the respondent. The former agreement is to the same general effect.

It is the compulsory deduction of contributions from wages to which the appellants object. Now there is nothing in the Act which makes it impermissible for an industrial agreement to require employers to deduct from the wages of their employees the contributions which the latter are to make to funds of the kind with which we are dealing. *Prima facie* these provisions are accordingly perfectly valid.

In support of their contention the appellants rely on certain provisions of the Main Agreement. This agreement, as its name indicates, is a general agreement relating to wages, hours of work, overtime, leave, etc. The presently operative Main Agreement was gazetted on 27 June 1980. Clause 8(3) thereof provides as follows, insofar as it is relevant:

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

.....

(d) with the written consent of the employee, deductions for sick benefit, insurance, pension and provident funds or contributions to recreation funds;

(e) contributions to the funds of the Council;

(f) any amount paid by an employer, compelled by law, ordinance or legal process, to make payment on behalf of an employee;

These provisions are expressly authorised by sec 24(1)(d) of the Act, which I have quoted above. Their validity is unquestioned.

The position therefore is that, with certain exceptions, the Main Agreement prohibits deductions from employees' wages whereas the Pension Fund Agreements enjoin such deductions. If the deductions under the Pension Fund Agreements fell under the exceptions permitted by clause 8 of the Main Agreement there would of course be no problem. One would accordingly first attempt to reconcile the

various agreements. The question then is: can they be reconciled? And, if not, how is the conflict to be resolved?

The appellants approached this matter as if the Main Agreement were a rigid constitutional document which limited the powers of the parties in relation to the contents of industrial agreements. They argued that, to be enforceable, the pension deductions had to be authorized by one or other of the paragraphs of clause 8(3). It was common cause that the paragraphs quoted above were the only ones that could conceivably be relevant. On the face of it paragraph (d) was applicable, but this did not assist the respondent since, as a fact, the appellants' employees had not given written consent to the deductions. Paragraphs (e) and (f) were not applicable, it was argued, and consequently the deductions could not be brought home under any of the paragraphs of clause 8(3). Therefore, it was contended, the provisions in the Pension Fund Agreements

relating to deductions were invalid and the appellants were under no obligation to give effect to them. Since the obligation to render returns was co-extensive with the duty to make deductions, the contention proceeded, the appellants were not liable to render any returns under the Pension Fund Agreements .

In my view this argument involves a non sequitur. The Main Agreement is an industrial agreement like any other. It is not a constitutional instrument. It has no higher status than the Pension Fund Agreements. If the Pension Fund Agreements are irreconcilable with the Main Agreement, the result would not necessarily be that the Main Agreement must prevail. The court would then have to determine, applying ordinary principles of law, how the conflict is to be resolved.

As stated above, we are here dealing with a type of subordinate legislation created by the parties to an industrial council and the Minister. The body of industrial

agreements emanating from a particular council is designed to establish a coherent system of labour relations within the industry concerned. The agreements with which we are concerned have a long history. The first of the Pension Fund Agreements was the Engineering Industries Pension Fund Agreement (then known by a different name). It was first gazetted on 19 July 1957. At that stage there already existed a main agreement which provided, in a clause corresponding to clause 8(3)(d) of the present agreement, that deductions from the remuneration of an employee for pension and provident funds could only be made with the written consent of the employee. The main agreement, always containing this provision, was renewed from time to time.

The 1957 pension agreement required or permitted in the case of unscheduled employees) the employer to make contributions to the pension fund, but apparently did not contemplate contributions by employees. In 1964 two agreements were gazetted, one in relation to an A Scheme

and the other a B Scheme. In the former the employers made contributions and in the latter the employees. It is not necessary to consider in detail how these parallel schemes operated, but it does seem that the latter agreement provided for the compulsory deduction of employees' contributions from their wages. Be that as it may, in May 1975 the two schemes were replaced by a single one providing for contributions by both employees and employers. This agreement required the employer to deduct employees' contributions from their wages. This provision was retained in principle in the agreement now in issue (1980).

The Group Pension Fund Agreement (also under a different name) was first promulgated on 28 January 1966. Initially this agreement also required contributions only by employers. This remained the position until the promulgation of the present agreement in 1978.

The position therefore is that at all relevant times

there was a Main Agreement which contained a prohibition on deductions from wages. Nevertheless as from at the latest 1975 and 1978 respectively the Pension Fund Agreements required such deductions. Had the matter ended there one might have said that, if there was an irreconcilable conflict between the Main Agreement and the Pension Fund Agreements, the Pension Fund Agreements *pro tanto* amended the Main Agreement. However, a new Main Agreement, restating the prohibition on deductions from wages, was promulgated on 27 June 1980, little more than a month after the promulgation of the relevant Engineering Industries Pension Fund Agreement (23 May 1980). Is it conceivable that the authors of the new Main Agreement would have intended in turn to amend the Pension Fund Agreements, and that they would have done so without referring to the Pension Fund Agreements, and without making any alternative provision for the payment of contributions to the Funds?

The truth of the matter is that for many years there

existed side by side, on the one hand, an agreement which prohibited (subject to exceptions) deductions from wages, and, on the other hand, agreements requiring such deductions. Both these classes of agreements were renewed from time to time without removing the apparent contradictions. Quite clearly the authors of these agreements intended all of them to be valid. This may lead to the conclusion that the authors of the agreements did not consider that there were any contradictions. The apparently conflicting provisions could in theory be reconciled by interpreting the words "sick benefit, insurance, pension and provident funds" in paragraph (d) of Clause 8(3) of the current Main Agreement to exclude funds of the sort dealt with by the Pension Fund Agreements, and to bring the deductions under the latter Agreements home under paragraph (e) or (f). This was the course followed by the court a quo (it opted for paragraph (e)). In my view this places some strain on the words of the clause, and I

would prefer to avoid it. It seems to me that a more realistic approach would be simply to accept that, over the years, the parties intended the Pension Fund Agreements to be valid despite any conflict which there may be with the Main Agreement. This type of reasoning is sometimes expressed in the maxim *generalalia specialibus non derogant*. The effect of this rule is that, in the absence of an express repeal, there is a presumption that a later general enactment was not intended to effect a repeal of a conflicting earlier and special enactment. See, eg, *Khumalo v Director-General of Co-operation and Development and Others* 1991 (1) SA 158 (A) at 164B-165E and *Sappi Fine Papers (Pty) Ltd v ICI Canada Inc* 1992 (3) SA 306 (A) at 328E-F. In the present case the position seems even stronger - as stated above, both the general prohibition on deductions and the special obligation to make deductions in respect of the pension funds were repeated from time to time, thus rendering it impossible to say as a general

proposition which was the earlier and which the later provision. At one time the current Main Agreement would be later and the Pension Fund Agreements earlier, whereas at another time the positions would be reversed. In these circumstances it seems quite clear that the authors of the agreements did not intend the Main Agreement to derogate from the Pension Fund Agreements.

It follows that in my view the provisions of the Pension Fund Agreements relating to compulsory deductions, and the concomitant duty to render returns, are valid despite any conflict which they may have with the provisions of clause 8(3) of the Main Agreement.

Mr Duminy argues further that on the facts of the case the respondent did not establish that all the appellants were obliged to render returns in respect of all the relevant agreements. This applies particularly to the Engineering Industries Pension Fund Agreement and the Education and Training Fund Agreement. In regard to the

former it is contended that there is no evidence that the appellants are employing "scheduled employees" as defined. And in regard to the latter there is a direct assertion, not controverted by the respondent, that the first appellant does not have any employees falling under the agreement. In my view it is unnecessary to consider this argument in detail. The purpose of the present litigation is to determine whether or not the appellants are in principle subject to the relevant agreements. Even if it were to be established that at any particular time one or more of the appellants did not employ workers covered by any particular agreement that would not affect the decision in this case. It will therefore suffice to say that the order to be made in this appeal must not be read as suggesting that, as a fact, any appellant has or had at any time in the past employees of the kind dealt with in any of the agreements. If there is a dispute of fact on this issue the parties will have to resolve it in some other way.

Finally the appellants contend that the court *a quo* was wrong in respect of the costs of the preliminary hearing before Scott J. It will be recalled that two points in limine were argued separately and that the appellants were substantially successful. Costs were ordered to stand over for later determination. At the end of the resumed hearing the respondent was, on the whole, successful on the merits and entitled to its costs. The court *a quo* then ordered the costs of the preliminary hearing to be costs in the cause, which in effect meant that the appellants had to pay these costs. The decision on the merits meant that, as it was put during argument, the appellants had won a preliminary skirmish but lost the war. In these circumstances it might have been appropriate for the court *a quo* to make a costs order in the appellants' favour in respect of the preliminary hearing. On the other hand, I cannot really criticise it for holding that, viewing the case as a whole, the respondent was substantially

successful and accordingly entitled to all the costs. Either of these orders, it seems to me, would have represented a proper exercise of the court's discretionary power regarding costs. It follows that I can find no grounds for interfering in the costs order actually made.

In the result the appeal is dismissed with costs, including the costs of two counsel. Such costs are to be paid by the appellants jointly and severally. By agreement between the parties the following further costs order is made:

The appellants are to pay, jointly and severally, on the attorney and client scale, the wasted costs occasioned by including the following superfluous items in the record:

1. Volumes 13, 14, 15 and 16;
2. Volume 8 pages 930 to 1017;
3. Volume 9 pages 1027 to 1038;
4. Volume 10;
5. Volume 11, except for pages 1264 to 1278;

6. Volume 17, except for pages 1812 to 1878;
7. Volume 18, except for pages 1879 to 1927 and
pages 1958 to 1973;
8. Volume 19, except for pages 1983 to 2009.

E.M. GROSSKOPF

JUDGE OF APPEAL

SMALBERGER JA]

CONCUR

HOWIE JA]

SCHUTZ JA]

ZULMAN AJA]

EMG/al