CASE L.C. 6/94

WILLEM HERMANUS SMIT -vs- STANDARD BANK NAMIBIA 1994/12

Strydom, J.P.

LABOUR COURT.

Interdict to stop Respondent from putting into motion lock-out proceedings - distinction to rights and dispute relating to interests discussed - Lock-out or strike only lawful if the dispute relates to an interest.

CASE NO. L C 6/94

IN THE LABOUR COURT OF NAMIBIA

In the matter between

WILLEM HERMANUS SMIT **APPLICANT**

versus

STANDARD BANK NAMIBIA **RESPONDENT**

CORAM: STRYDOM, J.P.

Heard on: 1994/12/16

Delivered on: 1994/12/19

JUDGMENT

STRYDOM, J.P.: This is an urgent application for a declarator and an interdict, namely:

(1) to declare the Respondent's action taken in terms of Section 81(1) of the Labour Act, Act 6 of 1992 to be unlawful and in contravention of Section 79 (2) (a) (i) (aa) and in contravention of Section 81(1) of the Act; and

(2) interdicting and prohibiting the Respondent from soliciting, promoting or continuing with the purported lock-out of Applicant and all other acts taken in terms of Section 81(1) by virtue of Annexure "I" attached to the Applicant's affidavit.

shall operate as an interim interdict pending the final decision of the application.

The Applicant is employed by the Respondent as Relief Manager. The Applicant, who is from South Africa, took up employment with the Respondent during 1989 . One of the conditions of his employment was a housing subsidy amounting to roughly N$5 000 per month. In order to comply with this condition the Applicant was permitted to live in a house belonging to the Respondent and it was common cause between the parties that the monetary value of this accommodation was N$5 000 per month.

However, during July, 1993 the Applicant was informed by the Respondent that they would endeavour to alter the conditions of Applicant's employment. This concerned the condition in regard to the subsidized housing. Alternative proposals were made by Respondent which did not meet with the Applicant's approval. Further alternative proposals were submitted to the Applicant but were likewise not regarded by him as fair consequently he did not accept any of these proposals.

Thereafter and in June 1994 Applicant received notice from the Respondent that Application was made for the appointment of a Conciliation Board in terms of Section 75 of the Act. Two meetings were held but the Board was unable to resolve the dispute. Applicant says that he then expected that Respondent would refer the matter to the Labour Court. However by letter dated 9 December 1994 Applicant was given

notice that Respondent was going to take action against him by way of a lock-out, commencing at 8:00 on Monday, 12 December 1994. The letter, ANNEXURE "H", made it clear that the purpose of the lock-out was to try and persuade the Applicant to accept one of the three proposals contained in Respondent's offer before the Conciliation Board. Applicant however reiterated that he was not prepared to accept any of the proposals.

There is no real factual dispute between the parties. It is common cause that the housing subsidy forms part of the conditions of Applicant's employment with the Respondent. It was further common cause between the parties that it was the intention of the Respondent to persuade the Applicant to accept a change of this condition in the form of one of the three proposals put before the Conciliation Board.

The issue between the parties is confined to whether the dispute between the parties relates to a right or an interest. Applicant's stance was that such dispute relates to a right and that the lock-out imposed by Respondent was therefore invalid as it was specifically prohibited by Section 79(2)(a)(i)(aa) of the Act. Mr Heathcote appeared for the Applicant. Mr Smuts, on behalf of the Respondent, submitted that the dispute relates to an interest and that Respondent acted within its rights by imposing the lock-out.

From authorities cited by Counsel it is clear that the distinction between what is a dispute relating to right and what is a dispute relating to an interest is not always easy

to determine. In order to determine this issue it is in my opinion necessary and permissible to look at the provisions of the Act and the general accepted meaning of the words used by the Legislator. (See De Beer v Walker N.O. 1948 SA 340 (T.P.D.).

By definition a lock-out is the converse of a strike. Lockout in terms of section 1 of the Act means, and I only quote those provisions which are relevant to the present issue,:

> "(a) the exclusion of any number or all of his or her employees from any premises on or in which work provided by him or her is or has been performed; or
>
> (b) with a view to inducing his or her employees to agree to, or to comply with, any demands or proposals which relate to any dispute or to abandon any demand or modification of any such demand;"

A "strike" on the other hand is defined as a

> "refusal or failure in concert by two or more employees of an employer to continue, whether completely or partially, to work or resume their work or to comply with the terms of conditions of employment applicable to them with a view to inducing such employer to agree to or to comply with any demands or proposals which relate to any dispute or to abandon any demand or modification of any such demand."

Although in both these definitions reference is made to "any

dispute" Counsel were agreed, and correctly so in my opinion, that the wide wordings of the definitions are limited and are subject to the provisions of Section 79(2)(a)(ii)(aa) which lay down that parties may not resort to a strike or a lock-out if the dispute between them relates to a dispute of rights. It follows therefrom that only if the dispute between the parties relates to an interest would a lock-out and a strike as part of the negotiating process be permissible.

Where the dispute relates to a right which remained unresolved after Conciliation Board proceedings, the parties are permitted by the Act to go to the Labour Court which can then adjudicate upon the right (Section 79(1) (a)) or they may agree to refer the dispute to arbitration (Section 79(1)(b)).

At this stage it is necessary to look at the definition of "dispute" in Section 1. This reads as follows:

> "dispute" for purposes of Part IX means any dispute in any industry in relation to any labour matter between -
>
> (a) on the one hand -
>
> (i) one or more registered trade unions;
>
> (ii) one or more employees;
>
> (iii) one or more registered trade unions and one or more employees; and

(b) on the other hand -

(i) one or more registered employers' organizations;

(ii) one or more employers;

(iii) one or more registered employers' organizations and one or more employers,

and includes any dispute relating to -

(aa) the application, or the interpretation of this Act or of any term and condition of a contract of employment or a collective agreement, including the denial or infringement of any right conferred by or under any provision by this Act or any right conferred by any term and condition of a contract of employment or a collective agreement, or the recognition of a registered trade union as an exclusive bargaining agent or the refusal to so recognize any such trade union.

(bb) the existence or non-existence of a contract of employment or a collective agreement."

This definition is then followed by the following two important definitions for this case namely the "dispute of interests" which means

"any dispute in relation to any labour matter other than a matter referred to in paragraph (aa) or (bb) of the definition of "dispute"

> "any dispute in relation to a matter referred to in paragraph (aa) or (bb) of the definition of "dispute", excluding any such dispute in respect of which a complaint, has been lodged in accordance with the provisions of part IV."

It is first necessary to determine what the dispute between the parties is.

The dispute in existence between the parties is in my opinion that the Respondent wants the Applicant to agree to a change or alteration of his conditions of employment, more particularly to agree to accept one of the three proposals to replace the subsidized housing he is entitled to in terms of his conditions of employment, and which the Applicant refuses to accept. May I say immediately, and Counsel also seems to have been ad idem on this score, namely that the Respondent has no right in the legal sense to make this demand simply because the conditions of employment do not afford the Respondent that right. Putting it differently the contract between the parties does not give the Respondent the right to change the terms and conditions of their contract. The only way by which this change can be effected is by way of negotiation and mutual agreement in the way provided for in the Act.

There is therefore in my opinion no right upon which the Labour Court can adjudicate except the insistence of the Applicant to stand on his rights in terms of the contract. But that is not the dispute between the parties as I have

tried to point out. The Respondent fully accepts that he has no right in the legal sense to change the conditions of employment, and that the only way open for him is the route laid down by the Act. Had he not done so and had he changed such conditions unilaterally or intimated his intention to do so unilaterally the dispute between the parties would have fallen fair square within the definition of "dispute of right" being "a dispute relating to the application or the interpretation of any term and condition of a contract of employment .... including the denial or infringement ..... of any right conferred by any term and condition of a contract of employment....."

Mr Heathcote conceded, correctly in my view, that when employees negotiate for higher wages or better conditions of employment the dispute in such a case is not one relating to rights but is one relating to interests and consequently such employees would be entitled to strike in order to induce their employer to agree to their demands, because they have no contractual right to make such a demand. Conversely, unless the contrary intention appears from the Act, the employer may use the process provided for by the Act to negotiate a change of the conditions of employment of his employee or employees. In my opinion this is precisely what the Act provides for and I could find no proof that in regard to the negotiating process there is any intention to treat employers differently from employees in the Act.

This issue can also be tested in a different way. As I have tried to point out, unless provided for in his conditions of

employment, an employer in the position of the Respondent would have no right to take the matter to the Labour Court. But looking also at Section 18 which cloths the Labour Court with exclusive jurisdiction in certain matters I could not find a niche to put the present matter in. Although the Court's powers are wide it does not afford in my opinion a Respondent a hearing or assistance to change the terms and conditions of employment of an employee, in these circumstances.

Mr Heathcote also referred the Court to the provisions of Section 45, which I shall term unfair dismissals, and more particularly Section 45(2) (c) which provides that it shall be an unfair dismissal if an employee is dismissed

> "by reason of any act performed or omission committed which is by or under . . . any term and condition of a contract of employment, authorized or permitted, or the exercise of any right conferred upon such employee by or under any such ... term and condition."

The answer to this seems to me that this section must be read in conjunction with the rest of the Act, also the provisions of Section 79 and 81 of the Act. No doubt where a person is summarily dismissed in a situation which brings him or her within the ambit of this section it will result in a finding of an unfair dismissal. Where an employer follows <u>bona fide</u> and fairly the mechanisms provided for in the Act to negotiate and it results in a dismissal it will in my opinion be a different situation. I do not hereby say that where an employer follows the mechanisms provided for

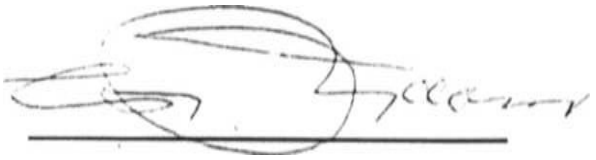
by the Act and which may result in a dismissal that for that reason the provisions of Section 4 5 will not apply. I am saying thereby that Section 45 is not an indication that disputes concerning conditions of employment relate exclusively to disputes of rights.

I was also referred to various decisions and writers on the Labour Relations Act of the Republic of South Africa. As for the purposes of either lock-out or strike no distinction is drawn between disputes relating to rights and disputes relating to interests, as is the case in our Act, decisions on this issue must be applied with care. However in Labour and Employment Law by Walls, p. 47, footnote 6, the following distinction between disputes relating to rights and disputes relating to interests is given which in my opinion is apposite and which confirms the conclusion to which I have come, namely:

> "Conflict of rights (or legal disputes) are those arising from the application or interpretation of an existing law or collective agreement (in some countries of an existing contract of employment as well) whilst interest or economic disputes are those arising from the failure of collective bargaining, i.e. when the parties' negotiations for the conclusion, renewal revision or extension of a collective agreement end in deadlock."

See further Industrial Law Journal Vol. 8 part 2 p. 186. See also Rycroft and Jordaan, A Guide to South African Labour Law, p. 129.

In the result I have come to the conclusion that the dispute between the parties is one relating to a dispute of interest and that consequently the Respondent is in terms of the provisions of the Act entitled to impose a lock-out as provided for in Section 81(1) of the Act. Consequently the Applicant's application is dismissed.



PRESIDENT OF THE LABOUR COURT

ON BEHALF OF APPLICANT **ADV R HEATHCOTE**

Instructed by Weder, Kruger &

ON BEHALF OF RESPONDENT **ADV D F SMUTS**

Instructed by Lorentz & Bone