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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE CHAMBER OF MINES OF SOUTH AFRICA — Appellant

and

NATIONAL UNION OF MINEWORKERS — 1st Respondent

and

MINISTER OF MANPOWER — 2nd Respondent

CORAM: RABIE, CJ, JANSEN, VILJOEN, HOEXTER, JJA et GALGUT, AJA

HEARD: 4 November 1986

DELIVERED: 28 November 1986

J U D G M E N T

HOEXTER, JA .....

HOEXTER, JA

The appellant is the Chamber of Mines of South Africa ("the Chamber"), which is an employers' organization within the meaning of sec 1 of the Labour Relations Act, No 28 of 1956 ("the Act"). The first respondent is the National Union of Mineworkers ("the Union"), a trade union within the meaning of sec 1 of the Act which was, on 23 April 1986, registered by the industrial council as a union under sec 3 of the Act. The second respondent is the Minister of Manpower ("the Minister"). The Chamber represents a large number of mines in the gold-mining and coal-mining industries. Among the Chamber's members are 20 gold-mines and 8 collieries which have recognised the Union. The prohibition of strikes or lock-outs in certain circumstances is governed by the provisions of sec 65 of the Act. The present appeal raises the question whether in April 1986 the Union was legally entitled to call a strike over the issue to be described hereunder.

In .....

In order to appreciate the issues involved it is necessary to give a short history of certain negotiations between the Chamber and the Union over a period of some four years. The salient facts are these. During each of the years 1983, 1984 and 1985 the Chamber and the Union took part in annual industry level negotiations affecting wages and other conditions of employment of members of the Union. One of the matters raised in such negotiations was a demand by the Union that in every year the first day of May should be a paid holiday for workers in the gold-mining and coal-mining industries. In what follows reference will be made to this demand as "the May-day issue".

During the 1985 round of negotiations a deadlock was reached and the Union then applied in terms of sec 35 of the Act to the Minister for the establishment of a conciliation board in both the gold-mining and coal-mining industries to consider, and, if possible, to settle certain disputes

existing between the Union and the Chamber. A conciliation board for each industry was established in June 1985. The disputes were not settled by such conciliation boards and the latter reported thereon in writing to the Minister. Later in 1985 the mining companies of two groups (Anglo-American and Rand Mines Limited) represented in the Chamber reached agreement with the Union in regard to the matters in dispute between them; but as between the Union and the mining companies of the General Mining Union Corporation Limited, Anglo-Vaal Limited, and the Goldfields of South Africa Limited the disputes remained unresolved.

The Union's fourth National Congress was held during February 1986. It ended on a somewhat militant note. From press reports of what the Union's President and General Secretary respectively were alleged to have said at the Congress the Chamber considered that the Union "displayed an intention to encourage its members not to work on 1 May 1986".

On .....

On 26 February 1986 the Union sent a letter ("the ultimatum") to the Chamber couched in the following terms:-

> "Dear Sir,
>
> DEMAND FOR A PAID HOLIDAY ON 1 MAY
>
> As you are aware, one of our union's demands at last year's industry's negotiations was that 1 May each year should become a paid holiday for mineworkers. This demand was not acceded to.
>
> The supreme policy-making body of the union, the National Congress, met between 14 and 16 February 1986 and instructed the National Executive Committee to re-direct such a demand to Chamber.
>
> We hereby re-iterate the demand and wish to inform you that should the demand not be met by midday on Friday 28 February 1986, the union will regard itself as being in dispute with the Chamber on the issue."

On the very next day (27 February 1986) following the despatch of the ultimatum to the Chamber the Union applied to the Minister in terms of sec 35 of the Act for the establishment of a conciliation board:-

> ".....for the consideration and determination of a dispute which exists in the Mining Industry between the applicant and the members of the Chamber of Mines."

The form of an application for the establishment of a conciliation board is prescribed in regulation 6 of the regulations made by the State President in terms of sec 81 of the Act. Regulation 6 provides that every such application shall be accompanied by a concise statement ("the statement"), duly signed, giving:-

> "(a) information in regard to the matter in dispute; and
> (b) particulars of the steps taken to arrive at a settlement."

The statement which accompanied the Union's application for a conciliation board was signed by its General Secretary and its President. It reads as follows:-

> "1. The National Union of Mineworkers hereby applies for the appointment of a conciliation board arising out of the failure by the members of the Chamber of Mines to accede to a demand over the introduction of a paid holiday on 1 May each year.
>
> 2. At the industry negotiations held in the second quarter of 1985 between the National Union of Mineworkers and members of the Chamber, conducted in terms of a recognition agreement entered into between the parties on 9 June 1983 (as amended), the Union tabled a a demand that mineworkers employed by the

Chamber's members, and in particular members of the Union, should enjoy a paid holiday on 1 May each year. The demand was rejected.

3. At the annual National Congress of the Union held between 14 and 16 February 1986, the Union resolved to raise the demand afresh with the Chamber. Accordingly, the Union directed such a demand to the Chamber under a letter dated 26 February 1986. In the letter, a copy of which is annexed hereto marked "A", the Union called upon the Chamber to provide a positive response by midday 27 February 1986. Such a response was not forthcoming. As such the Union is of the view that a dispute now exists over an employment benefit which the union wishes to see introduced.

4. The National Executive Committee of the Union has therefore resolved to ask that a conciliation board be established:
'To consider the dispute which has arisen between the National Union of Mineworkers and its members on the one hand and the members of the Chamber of Mines on the other hand over the latter's refusal to accede to the demand that mineworkers employed by the latter, and in particular members of the said Union, should enjoy a paid holiday on 1 May each year.'"

On 28 February 1986 the Chamber applied to the Minister in terms of sec 35 of the Act for the establishment of a conciliation board for the consideration and determination of a dispute in the mining industry between the Chamber and

the Union. To its statement accompanying the application the Chamber appended a copy of the ultimatum. In paragraph 4 of its statement the Chamber stated:-

> "The established practice of the mining industry has been that issues which have cost implications (wage increases and other changes in conditions of employment) for mines, members of the Chamber, are implemented as a result of negotiations with representative employee organisations only once per annum, namely at the time of the annual wage review, the effective date of which is the May pay month for members of the unions affiliated to the Council of Mining Unions, the June pay month for officials and 1 July for employees in job categories 1 - 8."

In paragraph 7 of the statement the Chamber contended that the terms of the ultimatum were contrary to the established industry practice detailed in paragraph 4; and in paragraph 8 of the statement the Chamber alleged that the demand contained in the ultimatum represented an unfair labour practice inasmuch as it constituted a change in an established labour practice:-

"that .....

"....that may have the effect that:
(a) the business of mines, members of the Chamber may be unfairly affected or disrupted thereby;
(b) that labour unrest may be created or promoted thereby;
(c) the relationship between mines, members of the Chamber, and both the Union and employees may be detrimentally affected."

In paragraph 15 of the statement the Chamber stated that it had received the ultimatum late on the afternoon of 26 February 1986; and it contended that the Union "had displayed an unreasonable attitude in giving the Chamber one and a half days to concede on a demand that has considerable cost implications."

On 6 March 1986 the Chamber filed an application with the industrial court in which it cited the Union as the respondent for an order:-

"(a) in terms of section 43(4)(b)(iii) of the Act to restore labour practice prevailing prior to 26 February 1986, namely that issues which have cost implications (wage increases and other changes in conditions of employment) for mines, members of the Chamber, are negotiated with representative employee organisations for implementation

at the time of the annual wage review, namely, with effect from 1 July for employees, members of the Respondent.

(b) directing that the order contained in (a) is to operate retrospectively to 26 February 1986."

In response to the Union's application on 27 February 1986 for the establishment of a conciliation board in regard to the May-day issue, on 13 March 1986 and in terms of sec 35(3) of the Act, the Chamber made written representations to the Minister opposing the establishment of such a conci= liation board. I quote therefrom:-

> "The Chamber is opposed to the establishment of the conciliation board applied for by the Union because it considers that the dispute alleged by the Union to have existed at the time of its application is not a dispute within the meaning of section 35 of the Labour Relations Act for the following reasons:"

The reasons relied upon were set forth in three paragraphs respectively lettered (a), (b) and (c). Paragraph (a) recapitulated the established practice in the mining industry that issues having cost implications are negotiated for

implementation .....

implementation at the time of the annual wage review; and alleged that by its actions since 14 June 1983 the Union had indicated its acceptance of this practice. Paragraph (b) called attention to the terms of the ultimatum and then went on to say:-

> "The statement in paragraph 3 of the Union's statement attached to its application that it called upon the Chamber to provide a positive response by midday on 27 February 1986 is therefore clearly incorrect.
>
> The Chamber considers that having set the deadline of midday on 28 February 1986 the Union in effect undertook not to allege that a dispute existed on the issue in terms of section 35 until its demand was rejected by the Chamber or the deadline had passed, whichever occurred first. By making the application on 27 February 1986 the appli= cation was invalid in terms of section 35 because the Union by its own conduct (namely the deadline set by it) was prevented from alleging that a dispute existed at that stage."

In paragraph (c) the Chamber stated that upon delivery to it of the ultimatum it had less than 48 hours in which to consider the Union's demand. It added:-

> "The Chamber considers this to be an unreasonably short period of time in which to consider and respond to a demand of this nature."

Early .....

Early in April 1986 the Chamber was informed by letter that on 1 April 1986 the Minister had approved the establishment of a conciliation board to consider and determine a dispute between the Chamber and the Union concerning an alleged unfair labour practice regarding:-

> "(A) The Union's ultimatum contrary to the pattern of negotiations in the Mining Industry, that the Chamber of Mines respond within an unreasonably short time to a demand that 1 May be introduced as a paid holiday for Mine Workers and
>
> (B) The parties' inability to come to an agreement concerning the introduction of 1 May as a paid Public Holiday: <u>provided that for purposes of these terms of reference Part (B) of the dispute shall not be deemed to involve an unfair labour practice.</u>" (My underlining.)

Meanwhile, and on 1 April 1986, the Chamber had written a letter to the Union stating that the latter's conduct suggested that it intended to call or support a strike on 1 May in regard to the May-day issue; and inquiring whether the Union in fact intended to call or support such a strike. The second paragraph of the letter said:-

"Unless .....

"Unless you advise the Chamber by not later than Friday, 4 April 1986, that your Union will not call or support such a strike, the Chamber intends to take such legal steps as may be necessary to protect its members' interests."

The Union's response to the above letter came on 4 April 1986 in the form of a telex addressed to the Chamber's attorneys by the attorneys of the Union. I quote that portion of the telex relevant for present purposes:-

"AS YOU ARE AWARE, PURSUANT TO A RESOLUTION TAKEN AT ITS ANNUAL CONGRESS, OUR CLIENT HAS DEMANDED THAT 1 MAY EACH YEAR BECOME A PAID HOLIDAY. FURTHER TO THAT DEMAND, OUR CLIENT LODGED AN APPLICATION FOR A CONCILIATION BOARD ON 27 FEBRUARY 1986. THE MINISTER OF MANPOWER DID NOT APPOINT THAT BOARD WITHIN 30 DAYS OF THE LODGING OF THE APPLICATION AND THEREFORE OUR CLIENT AND ITS MEMBERS ARE NOW ENTITLED TO PARTICIPATE IN LAWFUL STRIKE ACTION OVER THE ISSUE.

NOTWITHSTANDING THIS ENTITLEMENT, THE NATIONAL EXECUTIVE COMMITTEE OF OUR CLIENT DOES NOT INTEND TO ADVOCATE ANY INDUSTRIAL ACTION UNTIL IT HAS HAD AN OPPORTUNITY OF DISCUSSING THE DEMAND WITH REPRESENTATIVES OF THE CHAMBER DURING THE COURSE OF STATUTORY OR OTHER PROCEEDINGS. WITH SPECIFIC REFERENCE TO THE QUESTION POSED IN YOUR LETTER OF 1 APRIL 1986, WE ARE ACCORDINGLY INSTRUC= TED TO INFORM YOU THAT THE UNION HAS NOT YET

TAKEN A DECISION TO CALL OR SUPPORT A STRIKE BY ITS MEMBERS ON THE MATTER IN QUESTION."

On 9 April 1986 the Department of Manpower addressed a letter to the Chamber in connection with the Union's application on 27 February 1986 for the establishment of a conciliation board in regard to the May-day issue. The letter stated that the Union's said application -

> ".....was lodged before expiry of the Trade Union's ultimatum and no dispute regarding the 1 May issue existed at that time. Accordingly, the application is regarded as fatally defective since the Union had no grounds at the date of application for applying for a Conciliation Board."

The Chamber's application of 6 March 1986 against the Union for an order in terms of sec 43(4)(b)(iii) of the Act was set down for hearing in the industrial court on 11 April 1986. Following upon informal suggestions conveyed to the parties by members of the Court in chambers prior to the hearing, an agreement in regard to the application was

reached .....

reached between the Chamber and the Union. When the matter was called in Court on that date, and by consent, no order was made on the Chamber's application.

By notice of motion dated 17 April 1986, in which the Union was cited as the first respondent and the Minister as the second respondent, the Chamber applied as a matter of urgency in the Witwatersrand Local Division on 18 April 1986 for a rule nisi calling upon the respondents to show cause on 25 April 1986 why there should not be made final an order -

(1) setting aside the establishment of the conciliation board by the Minister on 1 April 1986;
(2) declaring that the Union "has not to date acquired the right lawfully to call or participate in a strike in regard to the issue of 1 May as a paid holiday;"
(3) interdicting the Union from instigating, calling for or organising any such strike "until it acquires the right to do so;"
(4) ordering the Union to pay the costs of the application, including the costs of two counsel.

The Minister did not oppose the Chamber's application. The Union did not oppose the granting of the first order (the

setting .....

setting aside of the establishment of a conciliation board by the Minister on 1 April 1986), but it resisted the rest of the relief sought in the application. Answering and replying affidavits were filed and in due course the matter was argued before VERMOOTEN, AJ, on 24 and 25 April 1986. On 28 April 1986 the learned Judge made an order granting the Chamber's first prayer (the setting aside of the Minister's establishment of a conciliation board on 1 April 1986) but dismissing the remainder of the application. The Chamber was ordered to pay the costs, including the costs in respect of the first order sought. A report of the judgment of the Court a quo is to be found in (1986) 7 ILJ 304. With leave of the Court below the Chamber appeals against the refusal of the Court below to grant a declaratory order in terms of the second prayer and the order that the Chamber should bear the costs of the application. There is no appeal against the refusal by the Court below to grant the interdict sought

in the Chamber's third prayer. The appeal is resisted by the Union alone. There is no appearance by the Minister.

In granting prayer 1 the learned Judge concluded that the terms of reference fixed by the Minister when on 1 April 1986 he approved the establishment of a conciliation board in response to the Chamber's application therefor on 28 February 1986 did not properly reflect either of the disputes alleged by the Chamber in its application; and, furthermore, that in paragraph (B) of such terms of reference the Minister had not been entitled to subjoin the proviso underlined in the quotation of the terms of reference earlier in this judgment. However, since the first prayer had been opposed by neither the Union nor the Minister the Court below considered that the costs in regard thereto should also be borne by the Chamber.

In the Court a quo the Union contended that it was lawfully entitled to call a strike in regard to the May-day issue on 1 May 1986 by reason not only of its application of

27 February 1986 for the establishment of a conciliation board, but also on the strength of the establishment of the conciliation boards at its instance in June 1985. The learned Judge concluded that both legs of the Union's argument were sound. In the judgment of the Court below reference is made to the Union as "NUM". Dealing with the Union's contention based on the events of 1985 the learned Judge said the following (at 307B/C):-

> "NUM submits that the prerequisites of s 65(1)(d)(ii)(aa) have been met in that:-
>
> (a) application has been made under S. 35 for the establishment of a conciliation board for the consideration of the said matter, that is the dispute concerning the 1 May demand; and
>
> (b) the conciliation board has reported thereon to the minister in writing.
>
> .....
> .....
>
> A strike on the issue would accordingly be lawful. The fact that the strike would only have been called after a considerable interval does not affect the issue. Once the prerequisites

> of s 65(1)(d)(ii) have been met it is lawful to strike on the issue in dispute for as long as it remains in dispute. I agree with Mr Trengove, who appeared on behalf of NUM, that the right to strike lawfully, once acquired, does not become stale."

Dealing next with the Union's application of 27 February 1986 the learned Judge observed (at 307 I - 308A):-

> "The validity of that application is in dispute. It is .....common cause that for more than 30 days thereafter the minister neither granted nor refused the application, and it is further common cause that on 4 April 1986, the minister refused the application. In other words, provided the application was an application under s 35 for the establishment of a conciliation board within the meaning of s 65(1)(d)(ii), it became lawful for NUM to call a strike in support of its 1 May demand .....upon expiry of 30 days after its application."

The Court below rejected the Chamber's contention that, having regard to the terms of the ultimatum, the Union's application on 27 February had been premature and defective, remarking in this connection (at 308 C/D):-

> " .....a .....

> ".....a dispute clearly existed when NUM launched its application even before the letter of 26 February 1986.
>
> To limit the enquiry into the existence or otherwise of a dispute to the events of 26 and 27 February 1986, is quite unrealistic. The May Day dispute is a long-standing one which has never been resolved. It existed long before the letter of 26 February 1986 was written and did not arise only when the ultimatum set in that letter expired."

The learned Judge further expressed the opinion (at 308D/309C) that in any event it made no matter whether or not on 27 February 1986 a dispute between the Union and the Chamber in fact existed. In terms of sec 35(1) of the former Industrial Conciliation Act, No 36 of 1935, an application to the Minister of Labour and Social Welfare for the establishment of a conciliation board could be made whenever "a dispute exists". See: Durban City Council v Minister of Labour and Another 1953(3) SA 708 (N). Contrasting the words "a dispute exists" in the former sec 35(1) with the words of the present sec 35(1) - ("Whenever a dispute is alleged to exist"); and comparing

the latter with the provisions of sec 35(4), in terms whereof approval of the establishment of a conciliation board depends upon the Minister being satisfied "that .... a dispute exists in regard to any matter concerning the relationship between employer and employee", the learned Judge concluded (at 309C) -

> ".....that contrary to the position under Act 36 of 1937, it is now sufficient if there is an allegation that a dispute exists at the time when the application for a conciliation board is lodged."

I proceed to consider the validity of the findings made by the Court a quo. Having acquired the right to call for a strike on the May-day issue in 1985 on the strength of what had happened in that year, it was for the Union to elect whether or not to use that right. The learned Judge considered that the exercise of that election by the Union could be indefinitely deferred. It seems to me, with respect, that the soundness of that approach may be open to

doubt. That approach puts upon sec 65 of the Act a construc= tion which, when viewed from the angle of labour relations between employer and employee, seems to entail curious and distinctly pernicious consequences. I wish, however, to say nothing more here in this regard. Assuming that in 1986 there remained available to the Union a right of election flowing from the events of 1985, on the facts of the present case it is clear, in my opinion, that in February 1986 the Union irrevocably exercised such right of election by deciding not to call a strike on the strength of the events of 1985; and that this decision was unequivocally communicated by the Union to the Chamber.

One or other of two parties between whom some legal relationship subsists is sometimes faced with two alternative and entirely inconsistent courses of action or remedies. The principle that in this situation the law will not allow that party to blow hot and cold is a fundamental one of general application. A useful illustration of the principle is offered in the relationship between master and

servant when there comes to the knowledge of the former some conduct on the part of the latter justifying the servant's dismissal. The position in which the master then finds himself is thus described by BRISTOWE, J in Angehrn and Piel v Federal Storage Co 1908 TS 761 at 786 -

> "It seems to me that as soon as an act or group of acts clearly justifying dismissal comes to the knowledge of the employer it is for him to elect whether he will determine the contract or retain the servant ..... He must be allowed a reasonable time within which to make his election. Still, make it he must, and having once made it he must abide by it. In this, as in all cases of election, he cannot first take one road and then turn back and take another. Quod semel placuit in electionibus amplius displicere non potest (see Coke, Litt. 146, and Dig. 30,1,84,9; 18,3,4,2; 45,1,112). If an unequivocal act has been performed, that is, an act which necessarily supposes an election in a particular direction, that is conclusive proof of the election having taken place."

The above statement of the principle may require amplification in the following respect indicated by Spencer Bower, Estoppel by Representation (1923), para 244 at pp 224/5 -

"it .....

> "It is not .....quite correct to say nakedly that a right of election, when once exercised, is exhausted and irrevocable, or in Coke's phraseology: quod semel in electionibus placuit amplius displicere non potest, as if mere mutability were for its own sake alone banned and penalized by the law as a public offence, irrespective of the question whether any individual has been injured by the volte-face... It is not so. A man may change his mind as often as he pleases, so long as no injustice is thereby done to another. If there is no person who raises any objection, having the right to do so, the law raises none."

Despite a contrary suggestion made by Mr Trengove, who appeared for the Union, I see no reason for concluding that the principle of estoppel by election or waiver, based as it is on considerations of elementary fairness, should be regarded as a trespasser in the legal field of labour relations. Applying it to the facts of the instant case I am satisfied that in addressing the ultimatum to the Chamber on 26 February 1986 the Union performed an unequivocal act indicating that, in relation to the possibility of calling a strike on the May-day issue, the Union had deliberately elected not to rely upon the events of 1985.

The .....

The proof of election so provided appears to me to be cogent enough. However, if any further evidence of such an election be required it is, I think, amply furnished by

(a) paragraph 3 of the statement which accompanied the Union's application for a conciliation board on 27 February 1986 and

(b) the telex sent on 4 April 1986 by the Union's attorneys to the Chamber's attorneys.

That telex message states in the plainest terms upon what "entitlement" to participation in a lawful strike the Union rested its case. In the telex the Union's claim to exemption from the prohibitions embodied in sec 65 of the Act was based solely on the Union's application for a conciliation board on 27 February 1986 and the developments subsequent thereto. Sec 65 defines the circumstances in which strikes are prohibited with reference, inter alia, to "the matter giving occasion for the strike" (see: sub-sections (1)(a); (1)(b); (1)(d)). In seeking to apply the provisions of sec 65(1)(d)(ii) to a given factual situation it is necessary to see how the "dispute" has been defined in the anterior application under sec 35 for the establishment of a conciliation board. While the May-day

issue was no doubt a long-standing one which existed before the ultimatum was served upon the Chamber on 26 February 1986, the fact of the matter is that when on the following day the Union sought the establishment of a conciliation board the dispute whose existence the Union averred related solely to the Chamber's alleged failure to meet the demand set forth in the ultimatum. The only further question on this part of the case is whether as a result of the Union's election not to rely upon the events of 1985 a retraction thereof would involve injustice to the Chamber. In my view it is clear that upon receiving notification of the Union's election the Chamber acted to its prejudice. The Chamber went to Court in April 1986 to seek a declaration against the Union in the belief, induced by the Union's representation to it, that the Union's claim that it had acquired the right lawfully to call for a strike would be determined on the basis of and by reference exclusively to the ultimatum and what followed thereon.

If the Union were allowed to retract its election the Chamber would have been put to needless trouble and expense, thereby altering its position for the worse. In my opinion, therefore the Union is precluded from asserting its right to a course of action based upon the events of 1985, which course it has unequivocally elected to discard; and upon which election the Chamber has acted to its detriment.

It remains to consider the validity of the second leg of the argument advanced on behalf of the Union. The Union claims that by April 1986 it had acquired the right lawfully to call for a strike because (1) on 27 February 1986 it applied in terms of sec 35 for the appointment of a conciliation board and (2) the Minister did not within 30 days thereafter approve or refuse to approve the establishment for a conciliation board. The correctness of the Union's claim depends upon whether or not the Union's application in terms of sec 35 was a valid application. In my view the Minister was right in adjudging that the Union's application was:-

"....fatally .....

> "...fatally defective since the Union had no grounds at the date of the application for applying for a conciliation board."

The Minister rightly so concluded for the very reasons relied upon in para (b) of the Chamber's written representation to the Minister opposing the Union's application, namely:-

> "By making the application on 27 February 1986 the application was invalid in terms of sec 35 because the Union by its own conduct (namely the deadline set by it) was prevented from alleging that a dispute existed at that stage."

That reasoning is unassailable. Having put the Chamber on terms the Union had to abide by those terms. Instead it flouted them. But then it is said the Union's application under sec 35 contained an allegation that a dispute existed; that the formal requirements of the section were thereby satisfied; and that any inquiry into the correctness of the allegation is unnecessary and irrelevant. It is, however, not possible, I consider, to turn a blind eye to what is contained in the rest of the application. The Court is

here concerned with substance rather than form. An application under sec 35 is required to give, by way of an appurtenant statement, information in regard to the matter in dispute. If it is manifest upon the face of such statement that no dispute in fact exists there is not in law a valid application under sec 35. That is the position here. The accompanying statement is entirely destructive of the allegation that on 27 February a dispute existed. That fatal flaw cannot be cured by the formal but false averment to the contrary.

For the aforegoing reasons I come to the conclusion that the Court below erred in declining to grant the declaration sought by the Chamber in its second prayer, and the appeal must succeed. In this Court the Chamber was represented by three counsel but Mr Welsh, who argued the appeal for the Chamber, properly conceded that the costs of two counsel only should be allowed. As to the matter of costs in the Court below, it is true that the Union did not oppose the grant of the relief sought against the Minister

in the Chamber's first prayer. On the other hand, as between the real contestants, the Chamber and the Union, the substantial issue related to the relief sought in the second prayer. Inasmuch as the second prayer should have been granted I consider that the Union should bear all the costs of the application in the Court below.

Accordingly the appeal succeeds with costs, including the costs of two counsel. The following paragraphs are substituted for paragraphs 2 and 3 of the order of the Court below:-

> "2. It is declared that the first respondent has not to date (28 April 1986) acquired the right lawfully to call or participate in a strike in regard to the issue of 1 May as a paid holiday.
> 3. The Union must pay the costs, including the costs of two counsel."

G G HOEXTER, JA

RABIE, CJ)
JANSEN, JA) Concur
VILJOEN, JA)
GALGUT, AJA)