REPORTABLE (77)

Judgment No. SC 89/05
Civil Appeal No. 31/05

NET*ONE CELLULAR (PRIVATE) LIMITED v

(1) COMMUNICATIONS AND ALLIED SERVICES WORKERS UNION OF ZIMBABWE
(2) FIFTY-SIX NET*ONE EMPLOYEES

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & ZIYAMBI JA
HARARE, SEPTEMBER 26, 2005 & MARCH 9, 2006

E T Matinenga, for the appellant

T Biti, for the respondents

CHIDYAUSIKU CJ: This is an appeal from the Labour Court in terms of s 92D of the Labour Relations Act [*Chapter 28:01*], hereinafter referred to as "the Act". The judgment being appealed against is in respect of an appeal from a determination of an arbitrator to the Labour Court in terms of s 98(10) of the Act.

The facts of this case, which are common cause, are as follows –

On 20 May 2004 employees of the appellant, including the second respondents (hereinafter referred to as "the employees") gave notice of an intention to go on strike due to some labour disputes. The employees and the appellant engaged in

discussions, which failed to resolve the matter. On 15 June 2004 the employees went on strike. Thereafter the appellant commenced disciplinary proceedings in respect of each of the employees. As a result of the disciplinary hearings, fifty-six employees were dismissed from employment.

The first respondent then filed a complaint of unfair dismissal of the employees with a labour officer. The labour officer met the parties but failed to settle the matter through conciliation. The labour officer then referred the matter to compulsory arbitration in terms of s 93(5) of the Act. The arbitrator ruled in favour of the employees and ordered that the appellant reinstate the fifty-six employees. The appellant then appealed to the Labour Court.

The Labour Court upheld the arbitrator's determination. In particular the Labour Court held that the arbitrator was correct in holding that the appellant had an applicable Code of Conduct ("the Code") and that the dispute between the appellant and the employees should have been resolved in terms of Part XIII of the Act, as provided for in the Code. The appellant dismissed the employees in terms of s 12B of the Act, as read with Statutory Instrument 130 of 2003.

The appellant now appeals against the decision of the Labour Court upon a number of grounds set out in the notice of appeal, but which may conveniently be summarised as follows –

(a) The Labour Court erred in failing to determine whether the collective job action was lawful or not;

(b) The Labour Court erred in upholding the arbitrator's determination that the appellant had an applicable Code of Conduct;

(c) The Labour Court erred in upholding the arbitrator's determination that the dispute between the appellant and the employees should only have been determined in terms of Part XIII of the Act and not in terms of s 12B of the Act; and

(d) Both the Labour Court and the arbitrator's awards were invalid by reason of a failure to provide for damages as an alternative to reinstatement.

Mr *Biti*, for the respondents, has also raised a preliminary point of jurisdiction. He contends that this Court has no jurisdiction to hear this appeal.

On the basis of the above contentions of the appellant and Mr *Biti's* submission, I consider the following to be the issues that fall for determination –

(1) Does this Court have jurisdiction to hear this matter?;

(2) Were the fifty-six employees properly cited?;

(3) Was the collective job action by the employees lawful?;

(4) Did the appellant follow the correct procedure in dismissing the employees?; and

(5) Were the arbitrator and the Labour Court required as a matter of law to award damages as an alternative to reinstatement?.

I will now consider the above issues in turn.

(1) DOES THIS COURT HAVE JURISDICTION TO HEAR THIS APPEAL?

The main thrust of Mr *Biti's* submission in this regard was that the real judgment that is sought to be impeached in this appeal is not that of the Labour Court but rather the award made by the arbitrator. He submitted that the arbitration award is a true arbitration award in the technical sense of the word, covered and protected by the Arbitration Act, No. 6 of 1996. He further submitted that, in terms of Article 34 of the Arbitration Act, an arbitration award can only be set aside by a court if the court finds that –

(a) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe; or

(b) the award is in conflict with the public policy of Zimbabwe.

He relied for this proposition on Article 34 of the Arbitration Act, which provides in the relevant part as follows:

"**Article 34 Application for setting aside as exclusive recourse against arbitral award**

(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article;

(2) An arbitration award may be set aside by the High Court only if –

(a) …

(b) the High Court finds that –

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe; or

(ii) the award is in conflict with the public policy of Zimbabwe; or

(3) …".

A proper reading of Article 34 of the Arbitration Act, in my view, reveals that it prescribes the power of the High Court in relation to the setting aside of arbitration awards. A litigant who wishes to set aside an arbitral award by way of an application to the High Court has to satisfy the stringent requirements of Article 34 of the Arbitration Act.

In my view, Article 34 has no application to an appeal against an arbitral award to the Labour Court in terms of s 98(10) of the Act. Section 98(10) provides:

"98 (10) An appeal on a question of law shall lie to the Labour Court from <u>any</u> decision of an arbitrator appointed in terms of this section." (the emphasis is mine)

In terms of s 98(10) of the Act, all that an appellant who wishes to impeach an arbitral award by way of appeal to the Labour Court has to do to confer jurisdiction on the Labour Court is to establish that the litigant is appealing on a point of law.

Once a matter has been heard by the Labour Court, an appeal lies to this Court in terms of s 92D of the Act. The origin of the judgment being appealed against is irrelevant. Section 92D provides as follows:

> "**92D Appeals against decisions of Labour Court**
>
> An appeal on a question of law shall lie to the Supreme Court from any decision of the Labour Court." (the emphasis is mine)

The language of both s 98(10) and 92D of the Act could not be clearer. It confers on the Labour Court and on this Court jurisdiction to hear an appeal impeaching an arbitral award on a question of law. The only limitations imposed by ss 92D and 98(10) are that the appeals must be on questions of law.

It has not been argued that the appeal from the arbitrator's determination to the Labour Court and the appeal to this Court were not on questions of law. The restrictions found in Article 34 of the Arbitration Act only apply to the High Court.

I am therefore satisfied that there is no merit in Mr *Biti's* submission that this Court has no jurisdiction to hear this appeal.

(2) WERE THE FIFTY-SIX DISMISSED EMPLOYEES PROPERLY CITED?

There is no room for doubt that the fifty-six dismissed employees have a substantial interest in this matter. Any decision of the arbitrator, the Labour Court and this Court will have a substantial impact on the interests of the fifty-six employees. Because the employees have a substantial interest in the outcome of this matter they have every right to be parties to this case. Indeed, if the employees had not been cited, it would have been proper for the arbitrator or the Labour Court to have ordered, *mero motu*, the joinder of the fifty-six dismissed employees.

I accordingly see no merit in the contention by the appellant that the fifty-six dismissed employees should not be party to these proceedings.

(3) WAS THE COLLECTIVE JOB ACTION BY THE FIFTY-SIX DISMISSED EMPLOYEES LAWFUL?

The issue of the legality of the collective job action was, as the appellant correctly submitted, sidestepped by the Labour Court. The Labour Court should not have sidestepped the issue. In my view, if it had not done so, it most probably would have come to a different conclusion.

In my view, the issue of the legality of the collective job action is relevant to the issue of the legality or otherwise of the dismissal of the employees.

The appellant dismissed the employees for absence from work for five or more consecutive days without reasonable excuse or cause. The absence from work by reason of participation in lawful industrial action would have given an adequate defence to the charge preferred against the employees. Participation in an illegal collective job action does not provide a defence to the charge faced by the employees.

It is common cause that the employees notified the appellant in writing of their intention to go on strike within fourteen days by letter dated 20 May 2004. The reasons for the intended strike are set out in the letter, which reads:

> "**RE: FOURTEEN (14) DAYS NOTICE TO EMBARK ON JOB ACTION BY NET ONE WORKERS**
>
> The above mentioned subject refers.
>
> The fourteen (14) days notice is issued by (the) Communications and Allied Services Workers Union of Zimbabwe (CASWUZ) in terms of the Labour Act [*Chapter 28:01*] of 2002, section 104 subsection (1) and subsection (4)(b) which read:
>
> > Subsection (1): Subject to this Act all employees, workers committees and trade unions shall have the right to resort to collective job action to resolve disputes.
> >
> > Subsection (4)(b): Nothing in subsection (1), (2) or (3) shall be deemed to prevent collective job action from being resorted to in defence of am immediate threat to the existence of a workers committee or a registered trade union.
>
> Reasons for taking job action in Net-One
>
> - Net One Management's refusal to engage and negotiate with employee representatives for the second quarter of 2004 as agreed to.
> - Refusing to respond to employees' request for works council meetings.
> - Unwarranted victimization of worker representatives."

The letter was addressed to the General Manager of the appellant and written by the deputy general secretary of the first respondent, obviously acting for and on behalf of the employees.

Following this letter, negotiations between the appellant and the respondents commenced and continued for some time. The date of the commencement of the collective job action, i.e. 3 June 2004, elapsed while the parties were still engaged in negotiations. Nothing happened on that day.

On 15 June 2004 the employees went on strike. The reasons for the strike are set out in a letter dated 17 August 2004. The letter is addressed to Minister Mutimhiri and sets out the reasons for the collective job action. It reads as follows:

> "**SUBJECT: REQUEST FOR ASSISTANCE**
>
> ---
>
> We as Net One employees do hereby seek your assistance in our case, as stated below:
>
> 1) We are 56 professional employees out of about 100 who are apparently dismissed from employment for what our Management is referring to as a political stance, siding (with) the MDC.
>
> 2) On 15th of June 2004 we embarked on a job action collectively for the following reasons –
>
> (i) Reneging of Management on salary negotiations;
>
> (ii) Corrupt activities of Management;

(iii) Imposition of Conditions of Service without involving employees;

(iv) Victimisation of employees which led to the resignation en-masse of the Workers' Committee.

3) After the resignation of the Committee we approached our Workers' Union – (the) Communications and Allied Services Workers' Union – for advice.

The Union informed us that they had also tried to engage our Management in talks but in vain. The only option left was to try to bring the Management to the negotiating table through the Ministry of Labour's intervention (conciliatory hearings).

Whilst the Ministry of Labour was trying to solve the issues, our Management kept on postponing the conciliatory hearings whilst at the same time politicizing the issue, saying we were MDC sympathisers. We were so troubled by this, since we strongly believe that this is a purely labour issue and does not need all this politicking.

4) The Management went on to suspend and dismiss us without pay and benefits before the issue was resolved.

5) It is our desire to have Net One run professionally and efficiently rather than the present situation where Econet and Telecel have distinct advantages over us.

We feel Net One can contribute immensely to the revival of the economy of (if?) the Management is professional.

6) We will therefore appreciate mostly if you can mediate and help our case have a deserved hearing."

It is significant that the reasons for the collective job action set out in the above letter are different from those set out in the notice of intention to embark on collective job action. This is in clear violation of s 104 of the Act. It is also quite clear that the employees did not comply with the requirements of s 104 of the Act in a number of respects, before embarking on the collective job action. Section 104 of the Act sets

out the procedures to be complied with by employees intending to embark on collective job action. It provides thus:

> "104 (1) Subject to this Act, all employees, workers committees and trade unions shall have the right to resort to collective job action to resolve disputes of interest.
>
> (2) Subject to subsection (4), no employees, workers committee, trade union, employer, employers organisation or federation shall resort to collective job action unless –
>
> (a) fourteen days' written notice of intent to resort to such action, specifying the grounds for the intended action, has been given –
>
> (i) to the party against whom the action is to be taken; and
>
> (ii) to the appropriate employment council; and
>
> (iii) to the appropriate trade union or employers organisation or federation in the case of members of a trade union or employers organisation or federation partaking in a collective job action where the trade union or employers organisation or federation is not itself resorting to such action; and
>
> (b) an attempt has been made to conciliate the dispute and a certificate of no settlement has been issued in terms of section ninety-three."

The Act provides that fourteen days' written notice of an intended industrial action be given to the employer.

The employees did not give the requisite written notice of their intention to go on strike on 15 June 2004. The notice given on 20 May 2004 had expired and could not be carried forward indefinitely. See *Moyo and Ors v CA Batteries* SC 66/02.

The reasons for the collective job action given in the letter to Minister Mutimhiri for embarking on the collective job action on 15 June 2004 are different from the reasons given in the notice of 20 June 2004. This is a clear contravention of s 104(2)(a). Clearly, the reasons given to Minister Mutimhiri should have been communicated to the appellant before the commencement of the collective job action, as is required by the Act.

There was no certificate of no settlement before the industrial action was commenced, as is required by s 104(2)(b).

I am satisfied, therefore, that the employees did not comply with the requirements of s 104 of the Act before embarking on the collective job action. The failure to comply with s 104 of the Act rendered the collective job action unlawful. The employees' collective job action was, therefore, patently unlawful for want of compliance with s 104 of the Act.

On this basis, the arbitrator clearly misdirected herself when she held that the collective job action was lawful. Her judgment in part reads:

> "The employees were absent for five or more consecutive days, however, with a reasonable cause. The withdrawal of service by the employees (was) intended to persuade the employer to accede to some demands. This concerted action which is protected in terms of section 104(1) and the notice should be considered as reasonable. The legality of the action is determined in terms of section 106 and section 107 where the Labour Court is empowered to order as they did but in terms of section 107(3)(a). Section 12B does not address collective job actions. The initiative should come from the Minister or through an application made by

> the affected person. The arbitrator does not have the jurisdiction to declare or accept the verdict in the absence of due process.
>
> The dismissal was unfair since (the) employer was notified of the collective job action, hence the absence had a reasonable cause."

The Labour Court did not endorse this misdirection of the arbitrator. It merely commented that the reasoning of the arbitrator in this regard was suspect. The reasoning of the arbitrator is not only suspect, it is confused and her conclusion is clearly wrong.

However, the Labour Court came to the same conclusion as the arbitrator but for different reasons. The Labour Court, as I have said, sidestepped the issue of the legality of the collective job action by the employees. The court *a quo* set aside the dismissal of the employees by the appellant via a different reasoning process. I shall revert to this aspect of the matter hereunder.

(4) DID THE APPELLANT FOLLOW THE CORRECT PROCEDURE IN DEALING WITH THE DISMISSAL OF THE EMPLOYEES?

Having concluded that the collective job action by the employees was unlawful, the next issue that falls for determination is whether in dismissing the employees the appellant followed the correct procedure.

The arbitrator's conclusion was predicated on her finding that the collective job action was lawful. In other words, the employees had a reasonable excuse

or cause to absent themselves from work for a period in excess of five consecutive days. She concluded that the employees absented themselves from work in pursuance of a lawful collective job action.

The Labour Court, as I have already indicated above, did not follow the reasoning of the arbitrator in arriving at the same conclusion. The Labour Court sidestepped the issue of the legality or otherwise of the collective job action. It confirmed the arbitrator's determination on the basis that the appellant had not followed the correct procedure when it dismissed the employees.

The appellant charged the employees individually with absence from work for five consecutive days without reasonable excuse or cause. I pause to point out that the employees were not charged with taking part in or inciting an unlawful collective job action, a charge that falls squarely under clause 8 of the Code The employees were charged with absence from work for more than five consecutive days, an offence under clause 2 of the Code and s 12B of the Act. Disciplinary hearings were conducted in respect of each individual employee. At the conclusion of the disciplinary hearing each of the fifty-six employees was found guilty and dismissed.

It was not in dispute that due process was followed in respect of each of the employees. In this regard, the appellant, however, purported to act in terms of s 12B of the Act, as read with Statutory Instrument 130/2002.

It was contended for the employees, both in the court *a quo* and before this Court, that the appellant followed the wrong procedure in dismissing the employees. In particular, it was argued that the appellant should have followed the procedure set out in the Posts and Telecommunications Sector Employment Code of Conduct ("the Code"), which, it was argued, was applicable to this case. It was further argued for the employees that in terms of the Code this case should have been dealt with in terms of Part XIII of the Act and not in terms of s 12B of the Act. In other words, it was argued that the appellant should have applied for a show cause order in terms of Part XIII of the Act, as opposed to charging the employees individually for contravening s 12B of the Act as it did.

On the other hand, the appellant argued, both in the court *a quo* and before this Court, that the Code did not apply to this case. The appellant argued that there was no Code of Conduct applicable in this case. In the absence of an applicable Code of Conduct, the appellant contended that s 12B of the Act, as read with Statutory Instrument 130/2002, was applicable. It is common cause that s 12B of the Act provides for a situation where no Employment Code of Conduct exists and renders absence from work for five days a dismissible offence.

The Labour Court accepted the respondents' submission that there was a Code of Conduct applicable and that in terms of that Code of Conduct the dispute between the parties should have been dealt with in terms of Part XIII of the Act. The court *a quo* reasoned and concluded as follows:

"Second issue

It is common cause that prior to the Postal and Telecommunications Act [*Chapter 12:05*] (hereafter called the PTC Act), the appellant operated as a statutory body popularly called the PTC. The PTC Act was promulgated as No. 4 of 2000 broke up the PTC into several entities including the appellant. In the process the appellant took over some of the employees of the PTC. Section 111(4) of the PTC Act reads as follows:

> 'Until such time as conditions of service are drawn up by the appropriate successor company and the Authority, as the case may be –
>
> (a) the terms and conditions applicable to the employees of the Corporation shall continue to apply to every person transferred to the appropriate successor company as if every such person were still in the service of the Corporation.' (the emphasis is mine)

The 'Corporation' referred to is the PTC. The PTC had a Code of Conduct applicable to its employees. Therefore that Code, as provided in the said section of the PTC Act, continued to apply to the PTC's members transferred to the appellant. The appellant argued that it was a new entity which was yet to register its own Code. Such a submission flies in the face of the clear provision of the PTC Act. I therefore agree with (the) respondent and find that the Code applied to the members.

Third issue

Part II, Category 4 of the Code prescribes the penalty of dismissal for the offences set out therein. However, clause 8 therein reads as follows:

> "Instigating and/or taking part in an unlawful job action – to be handled in terms of the Labour Relations Act [*Chapter 28:01*].

Collective job actions, whether lawful or unlawful, are covered by Part XIII of the Act.

In other words, clause 8 of the Code itself incorporates the provisions of Part XIII of the Act. The Part requires an employer who wishes to terminate a strike to apply to the appropriate authority for a show cause order calling upon the strikers to show cause why the strike should not be stopped. If the authority grants the application, a return day is set when the parties appear in this court to argue about the legality and disposition of the strike including disciplinary action, if warranted, against the strikers. (The) appellant did not make use of these provisions. It sought to hold its own hearings at which the members were

> dismissed. This action violated the clear provisions of Part XIII of the Act as incorporated in the Code. Accordingly, though the arbitrator's reasoning was suspect, the result of the award was correct in that it invalidated the unfair dismissals. The appeal to this court is therefore unsustainable. Accordingly, the appeal is hereby dismissed. Each party shall pay its own costs."

The Labour Court was probably correct in concluding that the Code applied to this case by operation of law, namely s 111(4) of the Posts and Telecommunications Act.

The appellant in this regard had argued that a Code of Conduct does not constitute conditions of service and that it is merely a legal framework for regulating the conduct of employees at their work or employment. The ordinary meaning of "conditions of service" relates to salary, pension, leave conditions, etcetera. A Code of Conduct, as the appellant submitted, relates to the legal framework that governs the conduct of employees.

This submission is cogent. However, s 111(4) specifically provides that the terms and conditions of service of the employees should remain as if every such employee were still in the service of the Corporation. When the employees were in the service of the Corporation, the Posts and Telecommunications Corporation, they worked under a Code of Conduct. In the absence of a new Code of Conduct, and for the purposes of the existence or otherwise of a Code of Conduct, the employees are to be treated as if they were still in the service of the Corporation and therefore bound by the Code of Conduct of the Corporation. I, therefore, agree with the conclusion that the Code of Conduct is applicable.

However, that is not the end of the matter. As I have already stated, the employees were charged with and convicted of absenting themselves from employment for a period in excess of five consecutive days without excuse. Absence from work is a dismissible offence, not only in terms of s 12B of the Act, but also in terms of the Code.

Part II Category 4 of the Code prescribes the penalty for offences set out therein. In particular, clause 2 provides that absence from work for five days is a dismissible offence.

"2. Absence from work for five or more consecutive days without permission or reasonable excuse" is a dismissible offence.

Clause 8, cited above, provides that instigating and/or taking part in an unlawful job action should be handled in terms of the Labour Relations Act. In my view, clause 8 of the Code does not bar the appellant from charging employees with the offence of absence from work without cause in terms of clause 2 of the Code. The employees *in casu* were not charged with instigating or taking part in an unlawful collective job action, which would have required the matter to be dealt with in terms of clause 8 of the Code and Part XIII of the Act.

This Court has held that proceeding in terms of Part XIII of the Act does not bar an employer from taking disciplinary action against an employee in terms of the

Code. In the case of *Zimbabwe Iron & Steel Co Ltd v Dube and Ors* 1997 (2) ZLR 172 (S), this Court held:

> "… a disposal order in terms of s 107(5)(a) of the Labour Relations Act in which the dismissal of striking employees had not been ordered by the appropriate authority, does not bar the employer from subsequently taking disciplinary action against such employees under a registered code of conduct which makes it a dismissible offence to take illegal industrial action. There is no provision in Part XIII of the Act to the effect that a disposal order grants immunity from the unlawful collective job action referred to in it."

By parity of reasoning, there is nothing in Part XIII of the Act which bars the appellant from taking disciplinary action against employees for absenting themselves from work for a period in excess of five consecutive days in terms of clause 2 of the Code, which is precisely what the appellant did in this case, or in terms of s 12B where no Code of Conduct exists.

Clause 8 of the Code, even when correctly invoked, does not grant immunity to the employees from being disciplined for absence from duty for a period in excess of five consecutive days in contravention of clause 2 of the Code or s 12B of the Act.

The appellant purported to act in terms of s 12B of the Act - s 12B (2)(b)(v) -, which is identical in the relevant part -with category 4 clause 2 of the Code. Section 12B(2)(b)v) reads:

> "(2) An employee is unfairly dismissed –
>
> (a) …

(b) if, in the absence of an employment code, the employer fails to show that, when dismissing the employee, he had good cause to believe that the employee was guilty of – …

(v) absence from work for a period of five or more working days without leave for no reasonable cause".

Thus, in essence, the impugned conduct of the appellant is that it wrongly cited s 12B of the Act instead of clause 2 of the Code. Does such conduct, namely wrongly citing the contravention of s 12B of the Act instead of clause 2 of the Code of Conduct that constitutes a contravention of both provisions, constitute an unfair labour practice?

Unfair labour practice by an employer is defined in s 8 of the Act. Section 8 of the Act reads:

"**8 Unfair labour practices by employer**

An employer or, for the purposes of paragraphs (g) and (h), an employer or any other person, commits an unfair labour practice if, by act or omission, he –

(a) prevents, hinders or obstructs any employee in the exercise of any right conferred upon him in terms of Part II; or

(b) contravenes any provision of Part II or of section eighteen; or

(c) refuses to negotiate in good faith with a workers' committee or a trade union which has been duly formed and which is authorised in terms of this Act to represent any of his employees in relation to such negotiation; or

(d) refuses to co-operate in good faith with an employment council or employment board on which the interests of any of his employees are represented; or

(e) fails to comply with or to implement –

(i) a collective bargaining agreement; or

(ii) a decision or finding of an employment council or employment board on which any of his employees are represented; or

(iii) a decision or finding made under Part XII; or

(iv) any determination or direction which is binding upon him in terms of this Act; or

(f) bargains collectively or otherwise deals with another trade union, where a registered trade union representing his employees exists; or

(g) demands from any employee or prospective employee any sexual favour as a condition of –

(i) the recruitment for employment; or

(ii) the creation, classification or abolition of jobs or posts; or

(iii) the improvement of the remuneration or other conditions of employment of the employee; or

(iv) the choice of persons for jobs or posts, training, advancement, apprenticeships, transfer, promotion or retrenchment; or

(v) the provision or facilities related to or connected with employment; or

(h) engages in unwelcome sexually-determined behaviour towards any employee, whether verbal or otherwise, such as making physical contact or advances, sexually coloured remarks, or displaying pornographic materials in the workplace."

I see nothing in the above definition of unfair labour practice that renders the failure to cite the correct provision of the law in the peculiar circumstances of this case an unfair labour practice.

The employees failed to report for duty for a period in excess of five consecutive working days. Such conduct constitutes a dismissible offence in terms of clause 2 of the Code and in terms of s 12B of the Act. The appellant erroneously cited the Act instead of the Code. This is a matter of form and not substance. There is no suggestion that there was no due process.

I am satisfied that the appellant did not commit an unfair labour practice when it dismissed the fifty-six employees. Citation of the wrong section of the Act on the facts of this case is not an unfair labour practice.

(5) WERE THE ARBITRATOR AND THE LABOUR COURT REQUIRED AS A MATTER OF LAW TO AWARD DAMAGES AS AN ALTERNATIVE TO AN ORDER FOR REINSTATEMENT?

Section 89(2)(c)(iii) of the Act provides that in the exercise of its functions the Labour Court may order reinstatement or employment in a job. In particular, the proviso to the above section provides:

> "Provided that any such determination shall specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement or employment".

It is quite clear from the above section that the Labour Court is enjoined to make an award of damages as an alternative to reinstatement.

Section 98(9) of the Act provides:

"(9) An arbitrator appointed by the Labour Court shall, in hearing and determining any dispute, determine it as if the arbitrator was the Labour Court."

Thus, s 98(9) of the Act places the arbitrator in the same position as the Labour Court, which is enjoined in s 89 of the Act to award damages as an alternative to an order for reinstatement. There is no doubt, therefore, that an arbitrator appointed in terms of s 98(9) of the Act is required as a matter of law, namely s 89 of the Act, to award damages as an alternative to reinstatement.

The arbitrator in this case was not appointed in terms of s 98(9) of the Act as he was not appointed by the Labour Court. The appointment was in terms of s 93(5) of the Act, which provides as follows:

"93 (5) After a labour officer has issued a certificate of no settlement, the labour officer, upon consulting any labour officer who is senior to him and to whom he is responsible in the area in which he attempted to settle the dispute –

(a) shall refer the dispute to compulsory arbitration if the dispute is a dispute of interest and the parties are engaged in an essential service; or

(b) may, with the agreement of the parties, refer the dispute to compulsory arbitration; or

(c) may refer the dispute to compulsory arbitration if the dispute is a dispute of right;

and the provisions of section ninety-eight shall apply to such reference to compulsory arbitration." (the emphasis is mine)

Thus, clearly an arbitrator appointed in terms of s 93 of the Act is required to comply with s 98, and subs (9) thereof places an arbitrator in the same position as the

Labour Court, which in turn is bound by the provisions of s 89 of the Act that makes the award of damages compulsory.

Apart from the fairly clear language of the Act, it could not have been the intention of the legislature to make s 89 of the Act applicable to an arbitrator appointed in terms of s 98(9) of the Act but not applicable to an arbitrator appointed in terms of s 93(5) of the Act.

In the result, I am satisfied that the arbitrator in this case was required as a matter of law to award damages as an alternative to reinstatement. She did not do so and her failure to do so renders her determination legally deficient; but, as I have already said, her determination was seriously flawed by the erroneous conclusion that the collective job action was lawful.

CONCLUSION

In the result, I would allow the appeal and set aside the arbitrator's award. For the avoidance of doubt, it is declared that the dismissal of the fifty-six employees was lawful.

The appellant has been substantially successful and is therefore entitled to costs. The costs of this appeal are awarded against the respondents jointly and severally, the payment by one absolving the other.

CHEDA JA: I agree.

ZIYAMBI JA: I agree.

Gula-Ndebele & Partners, appellant's legal practitioners

Honey & Blanckenberg, respondents' legal practitioners