

# PROTECTION FROM UNFAIR DISMISSAL AND THE REMEDY OF REINSTATEMENT UNDER ZIMBABWEAN LAW

MUNYARADZI GWISAI<sup>1</sup>

## ABSTRACT

*This article looks at the remedy of reinstatement for unfair and unlawful dismissal and its central significance in the realisation of employees' right to protection from unfair dismissal. The paper argues that the right to protection from unfair dismissal lies at the cornerstone of modern Zimbabwean labour law as was shown by the massive public outcry in the wake of the Supreme Court decision of Nyamande and Anor v Zuva Petroleum (Pvt) Ltd SC 43-15, which upheld the continued application of the common law "Notice Rule" of termination on notice by the employer. The paper argues that without an effective remedy to unfair dismissal, in the form of reinstatement, the right to protection from unfair dismissal will remain a mirage. The paper makes a survey of the history of reinstatement law starting with the traditional common law position which rejected the remedy outright and the modern common law one wherein the remedy has been recognised as a competent remedy. The paper then discusses the history of the remedy in statutes including the implications on the remedy of the new rights to protection from unfair dismissal and to fair labour standards under the Labour Act (No. 17 of 2002) and Constitution of Zimbabwe Amendment (No. 20) Act, 2013. It discusses the different approaches taken by courts and asserts that only the broad approach is consistent with the underlying principle of right to employment security recognised under the Labour Act and Constitution.*

## INTRODUCTION

The right of employees to protection from unfair dismissal is a cornerstone of the labour law regime that underlies the Labour Amendment Act (No. 17 of 2002), which probably represents the most advanced labour legislative reform in the history of labour relations in Zimbabwe.

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<sup>1</sup> Munyaradzi Gwisai is a registered legal practitioner and lectures in Labour Law and Labour Relations, Faculty of Law, University of Zimbabwe, and Briggs Zano Working Peoples College.

There are powerful constitutional and legislative basis for the right. Constitutionally the right is implicit in section 65 (1) of the Constitution which provides that every “*person has the right to fair and safe labour practices and standards...*” Expressly the right provided for in section 12B (1) of the Labour Act [*Chapter 28:01*]. This provides that ‘*Every employee shall have the right not to be unfairly dismissed.*’

Subversion of the employees’ right to protection from unfair dismissal and employment security has been a key feature of the current Zimbabwean labour relations system which is dominated by unitarist and neoliberal norms. This was amply demonstrated in the now notorious Supreme Court decision of *Nyamande and Anor v Zuva Petroleum (Pvt) Ltd*,<sup>2</sup> which led to unprecedented job massacres and forced the State to legislatively reverse the effects of the decision by enactment of the Labour Amendment Act (No. 5 of 2015.) But as the *Zuva* decision showed, this has led to major controversies and serious legitimacy questions not only relating to labour law but the entire legal system. Commenting on this matter, MALABA CJ aptly observed:

The reaction to the *Zuva* judgment was a rush by employers... to terminate employment relationships on notice.... As large numbers of employees were left jobless and uncompensated for the years they had worked for their respective employers save for their salaries paid in lieu of notice, there was widespread public outcry... The actions of employers revealed a national crisis characterised by lack of protection for the employees who lost employment... Termination of sources of livelihood wrought severe financial hardships to households. That gave the Legislature the rational basis for the enactment of the legislation and for giving it retrospective effect.<sup>3</sup>

Thus the issue of employment security has become of profound importance on the Zimbabwe labour law landscape. Besides the area of the “notice rule” that was dealt with in the *Zuva* decision, another critical area of the law of fair dismissal is that pertaining to the remedies available for unfair dismissal. In particular the extent to which the law recognises the remedy of reinstatement for both wrongful and unfair dismissal. As with termination of the employment relationship on notice, this area has also been characterised by judicial conservatism and resistance to the clear direction of reform underlying

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<sup>2</sup> SC 43 - 15.

<sup>3</sup> *Greatermans Stores (1979) (Pvt) Ltd t/a Thomas Meikles Stores and Anor vs The Minister of Public Service, Labour and Social Welfare and Anor* CCZ 2 - 18.

the Labour Act and the Constitution. For this reason it is an area that deserves a closer look to avoid future judicial tragedies as happened with the *Zuva* judgment.

In this article I trace the history of the remedy of reinstatement from a common law and legislative perspective and how the courts have treated the same as well as the implications of the right to protection from unfair dismissal by reference to the Labour Act and Constitution of Zimbabwe Amendment Act No. 20 of 2013 and applicable international law instruments. I argue that the import of the above raises radical implication on the remedy of reinstatement which the courts must now recognise.

#### REINSTATEMENT: UNDERSTANDING THE TERM

Generally the most effective remedy for wrongful dismissal or unfair dismissal is that of reinstatement. Yet traditionally this remedy has been unavailable under common law.

Reinstatement means “that the employee be replaced in her (his) post and remunerated.”<sup>4</sup> The employee is restored in their old job so that she or he “can perform the work attaching to that post.”<sup>5</sup> An order for reinstatement requires the employer to treat the employee in all respects as if she or he had not been dismissed. The employee is “put back into the job which he or she occupied, restored to the benefits they enjoyed and compensated for those lost in the interim.”<sup>6</sup>

It has been held that the term “reinstatement” simply means restoring the employee on the payroll.<sup>7</sup> It does not mean giving the employee actual work to do, unless special circumstances exist such as where the employee’s remuneration depends on actual work being given or the advancement of their professional or artistic development.<sup>8</sup>

<sup>4</sup> *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344 (S).

<sup>5</sup> *Bramdaw v Union Government* 1931 NPD 57 at 78; *Zvoma v Amalgamated Motor Corporation (Pvt) Ltd* 1988 (1) ZLR 60 (H) at 74. In *Chegutu Municipality v Manyora* 1996 (1) ZLR 262 (S) at 265B it was held that, “to reinstate a person means in effect to put a person again into his or her former job.”

<sup>6</sup> S Deakin & G Morris, *Labour Law*, 4th ed (Hart Publishing, 2005) 518. In *Chiriseri & Anor v Plan International S-56-02, SANDURA JA*, held, “where an order of reinstatement is retrospective in effect, the damages to be paid in lieu of reinstatement must include back pay and benefits.”

<sup>7</sup> *Munhumutema v Tapambwa & Ors* 2010 (1) ZLR 509 (H) at 513E-G, per MUTEWA J; *Standard Chartered Bank Zimbabwe Ltd v Matsika* 1997 (2) ZLR 389 (S).

<sup>8</sup> *Standard Chartered Bank Zimbabwe Ltd v Matsika* 1997 (2) ZLR 389 (S).

To that extent reinstatement is equivalent to the remedy of specific performance under contract law. Specific performance is a well-established remedy for breach of contract, available at the preference of the innocent party, but subject to the discretion of the court. This was well put in *Farmers Co-operatives Society v Berry*:<sup>9</sup>

Prima facie every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, as far as is possible, a performance of his undertaking in terms of the contract.

Wrongful dismissal is when the employee is dismissed without notice or the employer is unable to substantiate the alleged misconduct leading to the dismissal.<sup>10</sup>

Unlawful dismissal is similar and applies when the worker is dismissed without due notice or the employer fails to show lawful cause for dispensing with the notice,<sup>11</sup> such as when the employer is unable to substantiate the alleged misconduct. It may also be dismissal in contravention of statutory provisions.

Unfair dismissal relates to a mode of dismissal derived from statutes whereby dismissal may be unfair because there is no fair or valid reason for the dismissal, (substantive fairness).<sup>12</sup> Dismissal may be unfair because the method used to effect the dismissal is not fair, (procedural fairness). The concept of fair dismissal is ultimately derived from international labour law norms.<sup>13</sup> It is unknown to common law.<sup>14</sup>

Reinstatement is available under both common law and statute law. Statutes have adapted but also substantially modified the common law.

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<sup>9</sup> 91912 AD 343. See also, *National Union of Textile Workers and Ors v Stag Packings (Pty) Ltd & Ors* 1982 (4) SA 151 (T); *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344; and *Mudukuti v FCM Motors (Pvt) Ltd* 2007 (1) ZLR 183 (H) at 194B-C.

<sup>10</sup> S Deakin & G Morris, (2005) at 403.

<sup>11</sup> J Grogan, *Workplace Law*, 10th ed, (Juta, 2009) 164.

<sup>12</sup> *Chamwaita v Charhons (Pvt) Ltd* LC/H/215/2009 at p 6.

<sup>13</sup> Initially under the Termination of Employment Recommendation, 1963 (R 119) and subsequently the Termination of Employment at the Initiative of the Employer Convention, 1982 (C 158).

<sup>14</sup> J Grogan (2009) citing *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 ILJ 2407 (SCA).

### REINSTATEMENT UNDER COMMON LAW

Two approaches to the issue of reinstatement are evident under the common law regime, the traditional and the modern position.

The traditional or classical position held that reinstatement was not available as a remedy for a wrongfully dismissed employee. The employee was restricted to damages.<sup>15</sup> The only exception being for civil servants. The *locus classicus* for this position was the case of *Schierhout v Minister of Justice*.<sup>16</sup> In *Commercial Careers College (Pvt) Ltd v Jarvis* 1989 (1) ZLR 304 (S) at 348 GUBBAY JA (as he then was) summarised the position thus:

Prior to the advent of the decision ... in *National Union of Textile Workers & Ors v Stag Packings (Pty) Ltd & Ors* 1982 (4) SA 151 (T) it had become commonplace to assert that in the case of a common law employee who had been wrongfully dismissed no court of law could compel the employee to allow him to perform his duties; for to do so would amount to an order for specific performance of a contract for personal services of a continuing nature, a remedy not available to the employee, who was therefore restricted to a claim in damages.<sup>17</sup>

Under the classical position, reinstatement was not available, as a rule of law or legal principle. This was unlike in other contracts where the court "will as far as possible give effect to a plaintiff's choice to claim specific performance," subject to the discretion of the court.<sup>18</sup>

Several reasons were advanced for denying the remedy. Firstly that "such a contract is for personal services of a continuing nature and because of the close personal relationship between persons who have lost trust in each other, which makes it difficult for the court to provide constant supervision for the enforcement of its order".<sup>19</sup> Denial was

<sup>15</sup> *National Union of Textile Workers & Ors v Stag Packings (Pty) Ltd & Ors* 1982 (4) SA 151 (T) at 158H; *Myers v Abrahamson* 1952 (3) SA 121 at 123 - 125; See generally - A Rycroft and B Jordaan, *A Guide to South African Labour Law* 2nd ed, (Juta, 1992) 101 - 103; and R Christie (2006) 528.

<sup>16</sup> 1926 AD 99 at 107 (INNES CJ).

<sup>17</sup> ADAM J had earlier on dealt comprehensively with the applicable case law in *Zvoma v Amalgamated Motor Corporation (Pvt) Ltd* 1988 (1) ZLR 60 (H).

<sup>18</sup> *Haynes v Kings Williamstown Municipality* 1951 (2) SA 371 (A) at 378 - 380, cited in the *Zvoma* case at 72. Also *Farmers Co - operatives Society v Berry* 1912 AD 343 at 350.

<sup>19</sup> *Zvoma v Amalgamated Motor Corporation (Pvt) Ltd* *supra* at 69, citing *National Union of Textile Workers & Ors v Stag Packings (Pty) Ltd & Ors*, at 154; and *Schierhout v Minister of Justice* at 107 - 109.

thus based on the “inadmissibility of compelling the employer to employ another whom it does not trust in a position which imports a close relationship”.

Secondly was the reason of absence of mutuality of remedies. No court could force an employee to work faithfully and diligently. Further it was unjust to compel the employer to reinstate an employee it no longer wanted, when the same remedy could not be effected against an employee who was in breach of her or his contract. The later would amount to forced labour or slavery which is prohibited under statutes and public policy considerations.

Finally was the argument that damages provided an adequate substitute for specific performance. After all the employee did not have a guarantee of employment for life for the contract could be terminated without any reason on tender of the due notice, the notice rule.<sup>20</sup>

The reason for the exception for civil servants was elaborated in *Schierhout v Minister of Justice* at 107. It is premised on the fact that the civil servant “contracts at his appointment that he will serve the State in accordance with statutes (and)... retains his position until duly removed or superannuated.” The civil servants’ employment tenure is protected by statutes and regulations which contain elaborate and entrenched provisions against arbitrary dismissal, which is what “differentiates the position of a civil servant from that of an ordinary employee.” The effect being that any dismissal not in compliance with statutes is a nullity. “So that what is done contrary to that prohibition of the law is not only of no effect, but must be regarded as never having been done.”

The above conclusion is further supported by the special nature of the relationship of civil servants and the State. It is not a relationship of a personal nature or a close personal relationship as of the ordinary employee.

The net effect is that under common law reinstatement is the automatic remedy for a wrongfully or unlawfully dismissed civil servant - *Chairman of the PSC v Marumahoko, PSC & Anor.*<sup>21</sup>

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<sup>20</sup> A Rycroft and B Jordaan, (1992) 101; S Deakin & G Morris, (2005) at 400, citing *Reda v Flag Ltd* [2002] ITLR 747 [Privy Council].

<sup>21</sup> 1991 (1) ZLR 27 (H).

### **Modern Common Law Position**

The classical position was subsequently rejected, hesitantly initially,<sup>22</sup> but definitively in the decision of the full Transvaal bench in *National Union of Textile Workers and Ors v Stag Packings (Pty) Ltd & Ors*.<sup>23</sup>

The court described the position in *Schierhout v Minister of Justice* of denying reinstatement to the ordinary employee as “erroneous” with *DIJKHORST J* holding at 158H:

In my view the approach to the application of the discretion in respect of specific performance laid down in Haynes case is equally applicable to the case of the wrongful dismissal of an ordinary servant. This does not mean that the factors in Schierhout’s case, why in such a case an order for specific performance should generally speaking not be granted, should be disregarded. They are weighty indeed and in the normal case they might well be conclusive. But that is a far cry from saying that the court should therefore close its eyes to other material factors and refuse to evaluate them.

The above sentiments were endorsed by Zimbabwean courts, starting with *Zvoma v Amalgamated Motor Corporation (Pvt) Ltd*,<sup>24</sup> but fully in *Commercial Careers College (Pvt) Ltd v Jarvis*.<sup>25</sup> In the latter case the court endorsed the conclusion in *National Union of Textile Workers* affirming that there is “no legal principle for not ordering specific performance of an employment relationship”. The court stated that - “This bold decision has much to commend it and is to be welcomed.”

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<sup>22</sup> One of the first cases to cast doubt on the classical position was in *Myers v Abrahamson* 1952 (3) SA 121 at 123 - 125 where the court stated, “I doubt whether the practice of the Court in allowing only the particular remedy of damages to the wrongfully dismissed employee can rightly be elevated to a rule of law.” *Stewart Writson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) was more decisive and followed in subsequent decisions. See - *SACCAWU & Ors v Steers Fast Food* (1993) 2 LCD 125 (LAC); *Grinaker Electronic Holdings (Pty) Ltd t/a Grinel v EAWTUSA* (1991) 12 ILJ 1284 (LAC) and *Haworth & Associates CC v Mpanya & Ors* (1992) 13 ILJ 604 (LAC). This position subsequently received legislative endorsement under s 193(2) of the RA, 1995, which made it explicit that the reinstatement or re-employment is the primary remedy for unfair dismissal subject to some very narrowly tailored exceptions. See also Basson et. al (2002) 372.

<sup>23</sup> 1982 (4) SA 151 (T).

<sup>24</sup> At 73-74. Also, *Art Corporation Ltd v Moyana* 1989 (1) ZLR 304 (S) at 313.

<sup>25</sup> 1989 (1) ZLR 304 (S) at 314.

### ***Restrictive Approach***

Although the courts changed their position of rejecting reinstatement as a principle, the hostility to the remedy continued. This was reflected in a line of cases that followed a restrictive approach in applying the remedy, and a broad one that applied it broadly as the primary remedy for wrongful dismissal.

The restrictive approach applies the remedy of reinstatement but limiting it to exceptional circumstances. For instance in the *Zvoma* case at 75 it was held that "...unless there is a clear and express statutory right of reinstatement, generally the considerations outlined in *Schierhout's* case by INNES CJ would normally weigh heavily against the grant of specific performance." In *Hama v NRZ* , the court held

Although reinstatement is clearly the primary remedy for unfair dismissal provided by law, very few successful applicants are awarded it. The usual remedy for successful applicants is compensation. Reinstatement is not the only or inevitable remedy for wrongful dismissal. It is a remedy.<sup>26</sup>

Similar positions are evident in other jurisdictions.<sup>27</sup>

### ***Broad Approach – Reinstatement as Principal Remedy***

Other courts have pursued a broad approach, which takes reinstatement as the primary remedy for wrongful dismissal and unfair dismissal. This is especially for "statutory" employees whose conditions of employment are protected by labour legislation including protection from unfair dismissal. The position of such employees can hardly be distinguished from that of civil servants given their level of protection from arbitrary dismissal. In cases of unfair dismissal reinstatement must be the primary remedy. The reasons for this were aptly captured by GUBBAY CJ in *Commercial Careers College (Pvt) Ltd v Jarvis, supra*:

Even if one were to favour the restrictive approach, which I do not, it is important to appreciate that *in casu*, the position of the employee is somewhat different from the ordinary employee, for the tenure of her employment is protected by legislature... Consequently it may be argued with some force that the employee falls into the same category as that of a public servant, making the principle discussed by INNES CJ ... applicable.

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<sup>26</sup> 1996 (1) ZLR 664 (S). See also, *United Bottlers v Kaduya* 2006 (2) ZLR 150 (S) CHIDYAUSIKU CJ.

<sup>27</sup> *O'Laoire v Jackel International Ltd* [1990] ICR 197, 201, cited in Deakin & Morris (2005) 519.

In the above matter the court decided to leave the question open, and holding that there were sufficient factors that indicated granting reinstatement at the discretion of the court, and in that case proceeded to order reinstatement.

The modern common law position has been affirmed in various decisions of the Zimbabwean courts. In *Art Corporation v Moyana*,<sup>28</sup> the court held that, "the obvious remedy for unjustified (unfair) involuntary termination is re-employment, if the employee so wishes, otherwise compensation... reinstatement is clearly the primary remedy for unfair dismissal."<sup>29</sup> In *Olivine Industries (Pvt) Ltd v Nharara*<sup>30</sup> it was held that where "an employee is found to have been wrongfully dismissed, reinstatement is normally ordered."

The broad approach articulated by GUBBAY CJ in fact received legislative endorsement under s 29 of the Labour Amendment Act (No.7 of 2005) which placed the onus to prove that the employment relationship is no longer tenable, on the employer, including the possible imposition of punitive damages where reinstatement is not ordered. As argued below, the substituted s 89 (2) (c) (iii) LA makes reinstatement the first and primary remedy for unfair dismissal. This position is also affirmed in other jurisdictions which provide for fair dismissal legislation, notably South Africa and the United Kingdom.<sup>31</sup>

Reinstatement is therefore the first and primary remedy for wrongful or unlawful dismissal, unless the employee does not desire such remedy and subject to the court's discretion. In appropriate circumstances the court or a determining authority may thus issue a straight order of reinstatement, as was done in *Commercial Careers College (Pvt) Ltd v Jarvis, supra*. In *Blanket Mine (Pvt) Ltd v Tlou* it was held:<sup>32</sup>

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<sup>28</sup> 1989 (1) ZR 304 (S).

<sup>29</sup> *Art Corporation v Moyana*, 1989 (1) ZR 304 (S); *Ruturi v Heritage Clothing (Pvt) Ltd* 1994 (2) ZLR 374 (S).

<sup>30</sup> 2006 (1) ZLR 203(S) at 205G.

<sup>31</sup> See J Grogan (2009) at 174 stating, "Section 193 (2) makes it clear that reinstatement is the preferred remedy for unfairly dismissed employees, and that compensation should only be granted instead only when one or more of the exceptions mentioned in paragraphs (a) to (d)." S Deakin & G Morris (2005) 518 equally state that under s 118 of ERA 1996, "the preferred remedies for unfair dismissal are reinstatement, re-engagement and monetary compensation, in that order" citing *O'Laoire v Jackel International Ltd* [1990] ICR 197, 200.

<sup>32</sup> LC/MT/22/2005 [MATSHANGA P].

I find that it is equitable, reasonable and just that when an employee loses his job in circumstances as the one that happened in casu, then a straight order of reinstatement is perfectly in order.

The fact that reinstatement has in the past been rarely granted reflects judicial attitudes and those of employees in particular circumstances. Many employees may not claim it, simply because it has not been easily granted in the past, thus becoming a self-fulfilling prophecy. Also unlikely to claim are employees of small employers who do not have the benefit of protection from a trade union-protected environment and may fear renewed contact with the manager or owner who dismissed them.

A further reason is the attitude of the courts, which tend to accept without much question employer's reluctance to reinstate and a belief that an imposed reinstatement will not work. However, as Deakin & Morris point out, this perception may not be justified, and in fact "there is evidence that re-employment rarely produces disruption to relations within the undertaking concerned and that most reinstated or re-engaged employees stay with the employer for a reasonable length of time after the order is made."<sup>33</sup>

### ***Onus and Factors to Consider in the Exercise of Discretion***

Consistent with general common law principles, the onus is on the employer, as the party seeking to avoid specific performance, to establish the facts and circumstances, which the court should consider in the exercise of its discretion.<sup>34</sup> A bald statement that the employment relationship is no longer tenable will not do, and was correctly rejected in *Dairibord Zimbabwe Ltd v Muyambi*.<sup>35</sup>

The court then exercises its discretion on whether or not to grant reinstatement.

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<sup>33</sup> S Deakin & G Morris (2005) 52.

<sup>34</sup> *Farmers' Co-op Society (Reg) v Berry* 1912 AD 343, held at 350, 'it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it.' The election is rather with the injured party, subject to the discretion of the Court. Ó

<sup>35</sup> S-22-02 at pg 7. Also, *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) at 442E-443H, cited in *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe (Pvt) Ltd* 1993 (1) ZLR 21 (H) at 30.

The discretion is “not completely unfettered” but has to be exercised judicially and not capriciously or on wrong principles of law in order to ensure that justice is done.<sup>36</sup>

Courts have looked at various factors in the exercise of the discretion. The main issue is whether sufficient evidence has been established to show that the employment relationship “has soured beyond reconciliation”,<sup>37</sup> or “is no longer tenable”<sup>38</sup> or that reinstatement would result “in the continuation of an intolerable personal relationship”.<sup>39</sup>

The above is an objective assessment and may arise even in a situation where “no blame whatsoever attaches to the employee.”<sup>40</sup>

In the aforementioned assessment, the factors cited in the *Schierhout* case are weighty but not exhaustive. Other relevant factors may be considered, such as those mentioned in *Haynes v Kingswilliamstown Municipality*.<sup>41</sup> These include, impossibility of performance; that reinstatement would be unduly and unreasonably harsh on the defendant, or would produce injustice or would be inequitable under all the circumstances.

The Labour Act provides further statutory examples under s 89 (2) (c) (iii), proviso (ii). These are “size of the employer, the preferences of the employee, the situation in the labour market.” The list is not exhaustive as the section also refers to “any other relevant factors.” Under this rubric can be included factors like level of skills, qualifications, age and levels of unemployment in the particular industry. Examples of factors that have been considered by the courts are numerous, including:

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<sup>36</sup> *Zimbabwe Express Services (Pvt) Ltd v Nuanetsi Ranch (Pvt) Ltd* 2009 (1) ZLR 326 (S) at 332 - 333; *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344.

<sup>37</sup> *Hama v NRZ* 1996 (1) ZLR 664 (S). Also - *Olivine Industries (Pvt) Ltd v Gwekwerere & Ors* 2005 (2) ZLR 421 (S) at 428F; *Chitambo v ZESA Holdings (Pvt) Ltd & Anor* LC/H/331/2013.

<sup>38</sup> The phrase used in s 89 (2) (c) (iii) Proviso (ii) LA 2002.

<sup>39</sup> *Commercial Careers College (1980) (Pvt) Ltd v Jarvis*, *supra* at 349F, where GUBBAY CJ commented, “One which would make it impossible for the employee to perform his duties either to his own satisfaction or that of the employer.”

<sup>40</sup> *Commercial Careers College (Pvt) Ltd v Jarvis*, *supra*, at 349F.

<sup>41</sup> 1951 (2) AD 371 (A) at 378H-9A.

- In circumstances of loss of confidence by the employer with a senior employee, denial of reinstatement was held justified.<sup>42</sup> Where there was a “breakdown in the relationship between the appellant and the respondent, with no degree of trust or respect remaining on either side,” as in *Winterton, Holmes and Hill v Paterson*.<sup>43</sup> In this case a professional assistant, engaged in a dispute with the employer, traded insults with senior partners of the firm and tried to get an order for civil imprisonment against them for contempt of court.
- The moral blameworthiness of the parties. Reinstatement was held appropriate because the employer had “dirty hands”, as when the employer acted in flagrant bad faith,<sup>44</sup> or in breach of fundamental rights of employees,<sup>45</sup> or because the moral blameworthiness of the employee was beyond reproach.<sup>46</sup> However reinstatement was held inappropriate where the employee took alternative employment during suspension.<sup>47</sup>
- The nature of the breach or unfair labour practice. Where it involved breach of a fundamental right of the worker, such as to membership of a trade union or to protection from unfair dismissal, then reinstatement was held the most appropriate remedy.<sup>48</sup>
- The size and nature of the employer. The bigger the employer the less likely that it will be held that the relationship is no longer tenable, since personal contact is minimum.<sup>49</sup> The same was held

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<sup>42</sup> *Muringi v Air Zimbabwe Corporation* 1997 (1) ZLR 355 (S) (involving a managing director); *Blue Ribbon Foods Ltd v Dube & Anor* 1993 (2) ZLR 146 (S).

<sup>43</sup> 1995 (2) ZLR 68 (S).

<sup>44</sup> In *Banya v Madhater Mining Co (Pvt) Ltd* LC/H/67/2008 where there was an order for reinstatement by consent but the employer subsequently reneged stating that the employee should have been retrenched. In *Masvingo v Baloyi* LC/MS/01/09 the employer failed to comply with s 92E (2) LA 2002.

<sup>45</sup> *Commercial Careers College (1980) (Pvt) Ltd v Jarvis, supra*, where the employer dismissed the employee the day after a visit from the labour officer after the employee filed a complaint.

<sup>46</sup> *Commercial Careers College (1980) (Pvt) Ltd v Jarvis, supra*.

<sup>47</sup> *United Bottlers v Kaduya* 2006 (2) ZLR 150 (S) at 153C-D; *Zimsun v Lawn* 1988 (1) ZLR 143 (S) 15.

<sup>48</sup> *National Union of Textile Workers and Ors v Stag Packings (Pty) Ltd & Ors* 1982 (4) SA 151 (T); *Jiah & Ors v PSC & Anor* 1999 (1) ZLR 17 (S).

<sup>49</sup> *ZUPCO v Chisvo* 1999 (1) ZLR 67 (S); *Commercial Careers College (1980) (Pvt) Ltd v Jarvis*.

for an employee in a college or state corporation.<sup>50</sup> The opposite may apply for a small employer.<sup>51</sup>

- The seniority of the employee and the nature of the job. The courts are more likely to rule that the employment relationship is no longer tenable in relation to a managerial executive than a junior employee, especially in a small company.<sup>52</sup>
- The intention of the legislature. In *Commercial Careers College (1980) (Pvt) Ltd v Jarvis, supra*, it was held that there was need for “account to be given of the law giver’s object in protecting the tenure of office of employees. To deny the remedy of reinstatement is to circumvent it, albeit upon pain of rendering himself liable to criminal prosecution and to a civil action for damages.”<sup>53</sup> The above is particularly so where denial of reinstatement would result in subversion of a basic constitutional labour right or fundamental right of employees.<sup>54</sup>

#### REINSTATEMENT UNDER STATUTES

The common law principles on reinstatement have been codified, adapted and modified by statutes. Reinstatement is available under statutes, in particular the Labour Act. There are several circumstances under which the remedy of reinstatement may apply under the Labour Act.

The first is when the Labour Court substitutes its own decision for a decision made by a lower tribunal. This may arise under s 89 (2) (a) (ii) of the Act where the Labour Court has power to substitute its own decision in place of that appealed against. Arbitrators enjoy the same power under s 98 (9) of the Act. It may also arise in terms of s 93 (5b) of the Act when the Labour Court determines an application for confirmation of a draft ruling by a labour officer or designated agent.

<sup>50</sup> *Commercial Careers College (1980) (Pvt) Ltd v Jarvis, supra*.

<sup>51</sup> *Girjac Services (Pvt) Ltd v Mudzingwa* 1999 (1) ZLR 243 (S) at 250; *Winterton, Holmes and Hill v Paterson* 1995 (2) ZLR 68 (S), (a law firm).

<sup>52</sup> A senior employee was held properly denied reinstatement in *Muringi v Air Zimbabwe Corporation* 1997 (1) ZLR 355 (S); but not for college tutor in *Commercial Careers College (1980) (Pvt) Ltd v Jarvis*.

<sup>53</sup> See also, *Mushaya v Glens Corporation* 1992 (1) ZLR 162 (H).

<sup>54</sup> For instance dismissal of employee on lawful maternity leave - *ARDA v Murwisi* LC/H/90/04.

The second circumstance applies when a labour officer or designated agent makes a draft ruling on a dispute of right or unfair labour practice in terms of s 93 (5) (c) of the Act.

The third circumstance is when the Labour Court or an arbitrator exercise their powers in terms of s 89 (2) (c) of the Act in relation to a section 93 (7) application. This is where a conciliatory authority has issued a certificate of no settlement but it is not possible for any reason to refer the dispute to compulsory arbitration or the period for conciliation has expired but the conciliatory authority refuses for any reason to issue the certificate of no settlement.

The fourth and final circumstance is where the Labour Court or the appropriate determining authority makes a finding that the dismissal is affected by a fatal procedural irregularity. This may arise from decisions by labour officers or designated agents under the new s 93 (5), or awards of an arbitrator, or a determining authority under an employment codes or other relevant body. It also indirectly arises when the Labour Court exercises its review jurisdiction.

The final circumstance when reinstatement arises under the Labour Act is in terms of the model code made under the Labour (National Employment Code of Conduct) Regulations, 2006.

#### **GENERAL POWER OF LABOUR COURT TO ORDER REINSTATEMENT ON APPEAL**

On appeal, the Labour Court has a general power to confirm or vary the decision appealed against or substitute its own decision in terms of s 89 (2) (a) (ii) of the Act. This reads:

- (2) In the exercise of its functions, the Labour Court may -
  - (a) in the case of an appeal -
    - (i) ...
    - (ii) confirm, vary, reverse or set aside the decision, order or action that is appealed against, or substitute its own decision or order. (Emphasis added).

An arbitrator enjoys similar powers under compulsory arbitration in terms of s 98(9) of the Act. This states that '*In hearing and determining any dispute an arbitrator shall have the same powers as the Labour Court.*'

The above power of the Labour Court under s 89 (2) (a) includes the power to make a straight order for reinstatement, without any

alternative for damages as would be required under s 89(2)(c)(iii) of the Labour Act. This position was affirmed in *obiter* by GARWE JA in *Zimnat Life Assurance Ltd v Dikinya*,<sup>55</sup> confirming the same conclusion that this author had earlier argued for.<sup>56</sup>

Madhuku holds a contrary view, asserting that s 89(2)(a) of the Act does not confer such power on the Labour Court because when operating under that section it would be operating as a court of appeal and not a court of first instance.<sup>57</sup> That the proper basis of the powers of the Labour Court are under s 89(2) (c), where supposedly the Labour Court cannot issue a straight order for reinstatement. That it is a jurisprudential absurdity for the legislature to have conferred an employee who reaches the Labour Court via s 93(7) less rights than the one who lands in the same court as an appellant.

This position is also reflected in *Mandiringa & Ors v National Social Security Authority*<sup>58</sup> where MAKARAU JP (as she then was) stated, albeit *in obiter*, that:

It is therefore the settled position of our law that, in ordering reinstatement in terms of the Labour Act, the Labour Court, labour officers and arbitrators appointed under the Act are bound to assess damages in lieu of reinstatement. Any judgment, determination or award by these officials that fails to do so is liable to be interfered with as misdirection or as failing to comply with the Act in a material way. An award that orders reinstatement of applicant without awarding a specified amount of damages in lieu of reinstatement is incomplete and consequently, incompetent and cannot be registered in terms of s 98(14) of the Act as an order of this court.

The above arguments are not persuasive but bolster a conservative pro-employer interpretation of the Labour Act centred around a constriction of the powers of the Labour Court. This has been the

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<sup>55</sup> S-30-2010.

<sup>56</sup> M Gwisai, *Labour and Employment Law in Zimbabwe: Relations of work under neo-colonial capitalism* (ZLC and UZ, 2006) 124-25.

<sup>57</sup> L Madhuku, *Labour Law in Zimbabwe*, (FES with Weaver Press, Harare, 2015) 238-40.

<sup>58</sup> 2005(2)ZLR 329(H) at 333F. The basis of the decision being *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664(S). The same authority was followed in *Olivine Industries (Pvt) Ltd v Gwekwerere* 2005 (2)ZLR 421(S) at 428F. *Girjac Services (Pvt) Ltd v Mudzingwa* 1999(1) ZLR 243 (S) at 250C-D.

essential direction of the dominant section of the superior courts in the last decade consistent with the demands of neoliberal capitalism.

In the *Mandiringa* and *Gwekwerere* decisions, the court assumed the continued application of the decision in *Hama v National Railways of Zimbabwe*<sup>59</sup> despite the material changes in the wording of the relevant provisions of the statutes. As correctly argued by Mucheche, the court “failed to make a distinction between powers of the Labour Court hearing an application and an appeal” under s 89(2)(c) and s 89(2)(a) respectively.<sup>60</sup> In *Mandiringa* the court though had hesitancy in the firmness of its conclusion.<sup>61</sup>

The distinction Madhuku draws between the jurisdiction of the Labour Court as a court of “appeal” and as a “court of first instance” is, with respect, misplaced. It is now well-established that the appeal jurisdiction of the Labour Court is that of an appeal in the wide sense, going beyond an ordinary appeal, an appeal *stricto sensu*. Citing extensive authorities *MUTEMA P* (as he then was) discussed the different types of appeals in *Chiwara v Crystal Candy*.<sup>62</sup> In the appeal in the ordinary sense there is a rehearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether the decision was right or wrong. No fresh evidence may be heard. On the other hand an appeal in the wide sense, may involve an appeal by way of rehearing or an appeal *de novo*. In the former there is a rehearing on the documents, but with a special power to receive further evidence on the appeal.<sup>63</sup> An appeal *de novo* involves a fresh hearing with the

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<sup>59</sup> 1996 (1) ZLR 664 (S).

<sup>60</sup> C Mucheche, *Law and practice guide on labour dismissal remedies in Zimbabwe: Reinstatement and damages (in foreign currency)*, (African Dominion Publications, Harare, 2014) 52.

<sup>61</sup> MAKARAU JP stated 334 that, “Assuming that I have erred in holding that an award that does not specify an award of damages in lieu of reinstatement is incompetent”

<sup>62</sup> LC/H/213/2009 at p 2-3 Authorities cited included, *Words and Phrases Legally Defined* 3rd Ed Supp 2004, Lexis Nexis, Butterworths p. 49; and specifically - *Quilter v Mapleson* (1882) 9 QB 672 at 676; *Builders Licensing Board v Sperway Constructions (Sydney) Pty Ltd* (1976) 135 CLR at 619. Generally see also, *ALB & Anor v ZAIWU* 1998 92) ZLR 196 (S) at 202 summarising the classification of appeals cited in *S v Mohamed* 1977 (2) SA 531 (A) at 538 and *Metal & Allied Workers Union v Min of Manpower* 1983 (3) SA 238 (N) at 242. Also, *Continental Fashions (Pvt) Ltd v Mupfuri & Ors* 1997 (2) ZLR 405 (S) at 410.

<sup>63</sup> *Wigg v Architects Board of South Australia* (1884) 36 SASR 111 at 113. Applied in *Guta v MBCA Bank* LC/H/79/2009.

parties being entitled to begin again and adduce new evidence, that is a complete rehearing of and fresh determination of the merits of the matter with or without additional evidence or information.<sup>64</sup>

In *Zhakata v Mandoza N.O. and N M Bank Ltd*,<sup>65</sup> Bhunu J held that, "an appeal in the context of the Labour Relations Act is an appeal not in the ordinary sense..." This is correct. On appeal the Labour Court can decide a matter on the record as in the ordinary appeal, but in addition may also conduct a hearing into the matter in terms of s 89(2)(a)(i) of the Act.<sup>66</sup> The Court is not bound by the strict rules of evidence and the court may ascertain any relevant fact by any means which the presiding officer thinks fit and which is not unfair or unjust to either party.<sup>67</sup>

The above wide appeal jurisdiction of the Labour Court is not accidental but designed to facilitate its role as the apex body for the resolution of disputes and unfair labour practices in a manner consistent with the purpose and objects of the Act of achieving social justice and democracy in the workplace as stated in s 2A(1) of the Act. The superior courts have since affirmed this exclusive equity jurisdiction enjoyed by the Labour Court unlike the civil courts.<sup>68</sup>

A restrictive interpretation of the powers of the Labour Court under s 89(2)(a) would fatally cripple the equity jurisdiction of the Labour Court, in particular its power to give effective remedies for breach of rights conferred under the Act, including fundamental employees rights. Such a reading is inconsistent with the purposive interpretation model compelled by s 2A(2) of the Labour Act.

In any case one if one takes into account the history of the section it becomes evident that the legislative intention was always one of clothing the Labour Court with the broadest powers rather than to

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<sup>64</sup> *Sweeney v Fitzhardinge* (1906) 4 CLR; *Simpson Ltd v Arcipreste* (1989) 53 SASR 9

<sup>65</sup> HH - 22 - 05 . See also, *Tuso v City of Harare* HH -1 - 04; *Chahweta v National Foods Ltd* LC/H/173/2009 where ÓappealÓ under the Act was held to include an appeal based on grounds of review.

<sup>66</sup> *Air Zimbabwe Corporation v Mlambo* 1997 (1) ZLR 220 (S).

<sup>67</sup> Section 90A Labour Act 2002.

<sup>68</sup> *Madhatter Mining Co v Tapfuma* S-51-14; *Fleximail Ltd v Samanyau & Ors* S-21-14; *Malimanji v CABS* 2007 (2) ZLR 77 (S) at 79D-E; *Zhakata v Mandoza N.O. & N M Bank Ltd* HH - 22 - 05.

narrow them. The origins of s 89(2)(a) of the Labour Act lies in s 107 of the Labour Relations Act No. 16 of 1985. This read:

In determining an appeal in terms of this Part, the Tribunal may confirm, vary or set aside the decision appealed against and make an order accordingly, and may include in such order any order as to costs that it thinks fit.

The above section was carried through, with some modifications in subsequent amendments of the Labour Relations Act.<sup>69</sup> In *Ruturi v Heritage Clothing (Pvt) Ltd*,<sup>70</sup> the court ruled that s 107 provided the Labour Relations Tribunal with broad powers including the power to make an order for reinstatement, where appropriate. Similarly in *Art Corporation v Moyana*,<sup>71</sup> the court also ruled that the broad powers of a determining authority under the old s 111(1)LRA 1985 to “make such order as it thinks appropriate for determining the dispute or rectifying the unfair labour practice concerned”, included the discretion to grant or decline reinstatement.

The restriction of the general power previously granted under s 111LRA came through the new s 96(1)(c) introduced by the Labour Relations (Amendment) Act, 1992. This provided a proviso requiring a mandatory alternative of damages to reinstatement or employment. The new provision was replicated in s 89(2)(c)(iii) introduced by s 29 of Act No. 17 of 2002 and subsequently further amended by s 29 of Act No. 7 of 2005, which added two further provisos. What is notable about the last two amendments is that the formulation of the application of the section was narrowed to special applications to the Labour Court under s 93(7) of the Act, but not applied to the general powers of the Labour Court as had been the case with s 96(1)(c) of the Labour Relations Act. It was improper therefore to apply the *Hama* precedent automatically to the changed provisions of s 89(2)(c)(iii) of the Labour Act, without first analysing the implications of the change from the wide formulation under s 96(1)(c)LRA, to the narrow formulation under s 89(2)(c)(iii).

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<sup>69</sup> Presently s 89(2)(2)(a)(ii) and (c) LA 2002.

<sup>70</sup> 1994 (2) ZLR 334 (S).

<sup>71</sup> The relevant provisions were s s 107 and 112 LRA. The court had earlier on reached the same decision in relation to a similar provision pertaining to the powers of a labour relations officer - that is s 111 (2) LRA 1985 - *Art Corporation v Moyana* 1989 (1) ZLR 304 (S).

The real jurisprudential absurdity is not in the supposed inconsistency between the powers under s 89(2)(a) and s 89(2) (c) of the Act. As argued below such inconsistency does not arise. The fundamental jurisprudential problem with the approach advocated for by Madhuku is that it creates an inferior set of rights for employees covered by an Act whose ostensible purpose is to advance social justice and equity in the workplace compared to a common law regime, which courts have consistently recognised as offering inferior rights. There is no provision in either sections providing for the ouster, whether expressly or by necessary implication, of the now well established common law principle that reinstatement is a competent remedy for wrongful dismissal, but available at the discretion of the court.

### ***Powers of Labour Court and labour officers under s 93(5)LA 2015***

The Labour Court is empowered under the new s 93(5b) of Act No. 5 of 2015 to confirm a draft ruling by a labour office or designated agent “with or without amendment.” The section is not directly linked to the powers of the court under s 89, which is unsatisfactory. However, the power is broadly couched suggesting that the Labour Court retains broad power to make an appropriate order as it has for an appeal under s 89(2)(a). The issue remains to be tested.

A similar situation obtains in relation to labour officers/designated agents when making a draft ruling in relation to a dispute of right or unfair labour practice under the new s93(5)(c) of the Act. If the dispute or unfair labour practice is a dispute of right, the labour officer, may, upon a finding on a balance of probabilities, make a ruling that -

- (i) The employer or other person is guilty of an unfair labour practice; or
- (ii) The dispute of right or unfair labour practice must be resolved against any employer or other person in a specific manner by an order -
  - A. directing the employer or other party concerned to cease or rectify the infringement or threatened infringement, as the case may be, including payment of moneys, where appropriate;
  - B. for damages for any loss...

As with the powers of the Labour Court in relation to confirmation or variation of a draft ruling, the above powers of the labour officer are loosely and inelegantly drafted. They are bound to create confusion.

The powers though are couched widely, in a manner that gives the labour officer broad powers in relation to the draft ruling. Following on precedent, this seems to confer on the labour officer the power to order reinstatement after consideration of the pertinent factors of whether the employment relationship is no longer tenable. The same was upheld in *Mtewa v Business Equipment Corporation*<sup>72</sup> where the appeals committee made a straight order for reinstatement without an alternative or damages. This was upheld by the court which held that the employee could not subsequently opt for damages. This is in a similar manner to that of a determining authority under s 111 of the Labour Relations Act, 1985.<sup>73</sup> Section 111(1) though was much better worded on the powers of the labour officer, whilst s 111(2) gave explicit examples of how the general power under s 111(1) could be exercised, including an order for reinstatement. The provisions read:

- (1) After due inquiry into, and consideration of any matter that has been referred to it in terms of paragraph (d) of subsection one hundred and nine, a determining authority may-
  - (a) make such order as it thinks appropriate for determining the dispute or rectifying the unfair labour practice concerned; or
  - (b) ...
- (2) Without derogation from the generality of subsection (1), an order made in terms of that subsection may provide for or direct, as the case may be -
  - (a) back pay from the time of the dispute or unfair labour practice concerned; ...or
  - (b) ....or
  - (c) reinstatement in a job; or
  - (d) insertion into a seniority list at an appropriate point; or
  - (e) promotion or, if no promotion post exists, pay at a higher rate pending promotion; or
  - (f) employment in a job; or
  - (g) payment of legal fees and costs; or
  - (h) cessation of the unfair labour practice; oras may be appropriate

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<sup>72</sup> S-25-04. *Business Equipment Corporation v Mtewa* S-14-07 affirmed the correctness of the earlier decision.

<sup>73</sup> *Art Corporation v Moyana*, *supra*.

The above formulation of the powers of a determining authority under the old Labour Relations Act, 1985 were clear and concise, and could be used as a basis to amend the new s 93(5)(c) to remove the current confusion.

#### **REINSTATEMENT UNDER S 89(2)(C) LABOUR ACT**

The third circumstance when reinstatement applies under statutes is in terms of s 89(2)(c)(iii) of the Labour Act. Reinstatement or employment in a job is provided as a specified remedy under s 89(2)(c)(iii) of the Act. The section reads:

- (2) In the exercise of its functions, the Labour Court may, ...
  - (c) in the case of an application made in terms of subparagraph (i) of subsection (7) of section ninety-three, make an order for any of the following or any other appropriate order -
    - (iii) reinstatement or employment in a job:  
Provided that -
      - (i) any such determination shall specify an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement or employment;
      - (ii) in deciding whether to award damages or reinstatement or employment, onus is on the employer to prove that the employment relationship is no longer tenable, taking into account the size of the employer, the preferences of the employee, the situation in the labour market and any other relevant factors;
      - (iii) should damages be awarded instead of reinstatement or employment as a result of an untenable working relationship arising from unlawful or wrongful dismissal by the employer, punitive damages may be imposed.

There is considerable controversy over the interpretation of the section. Firstly whether it solely applies to s 93(7) applications or is of broader effect. Under s 93(7)(ii) of the Act when a conciliatory authority has issued a certificate of no settlement but it is not possible for any reason to refer the dispute to compulsory arbitration or the labour officer for any reason refuses to issue a certificate of no settlement after the prescribed period allowed for conciliation, any

party to the dispute may apply to the Labour Court, in case of a dispute of right, for an order in terms of s 89(2)(c) of the Act. Another issue is what is the effect of proviso (i) to s 89(2)(c)(iii) compelling an alternative order for damages when reinstatement or employment is awarded and who has the right of choice to effect the alternative, the employee or the employer. Related to the above is whether the previous *locus classicus* in this area, *Hama v National Railways*,<sup>74</sup> still applies, given the amendments effected by s 29 of the Labour Amendment Act, No. 5 of 2005.

### ***History of Section***

The controversies arise from the wording and history of the section. The original formulation of the precursor to the section, namely s 107 of the Labour Relations Act, 1985, was broadly worded, and without the qualification of the damages alternative. The same applied to determining authorities under s 111(1)LRA 1985. Section 112(2) LRA 1985 gave specific examples of how the power could be exercised, including making an order for reinstatement. The courts held that in terms of the above the Tribunal and determining authorities could, in appropriate circumstances, award a pure order of reinstatement without an alternative of damages.<sup>75</sup>

The first qualification arose with s 96(1) (c) of the Labour Relations Amendment Act No. 12 of 1992. It provided:

Without derogation from the generality of sections ninety-three and ninety five, a determination made in terms of those sections may provide for -

- (a) back pay from the time when the dispute or unfair labour practice arose;
- (b) ...
- (c) Reinstatement or employment in a job 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.

In *Hama v National Railways of Zimbabwe, supra*, the court held that by virtue of s 96(1) (c)LRA 1992 an order for reinstatement must be

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<sup>74</sup> 1996 (1) ZLR 664 (S).

<sup>75</sup> *Art Corporation v Moyana* 1989 (1) ZLR 304 (S); *Ruturi v Heritage Clothing (Pvt) Ltd* 1994 (2) ZLR 374 (S).

accompanied with an alternative order for the payment of damages in lieu of reinstatement. The case became the *locus classicus*.<sup>76</sup>

The proviso to s 96(1)(c)LRA 2002 did not specify who had the right to make the choice between reinstatement and damages, between the employee and the employer. *Hama* was silent on the matter but in *BHP Minerals Zimbabwe (Pvt) Ltd v Takawira*<sup>77</sup> the court held that although the matter had not been dealt with directly the courts seemed to assume the choice lay with the employer. The court ruled that logically it made sense to interpret the proviso as for the benefit of the employer. "The employer is given the opportunity to, as it were buy his way out of his obligation. It makes no sense to allow the employee to claim money in place of reinstatement."

The effect of the above was to effectively neutralize the remedy of reinstatement under the Labour Act. It gave the employer a veto over its application hardly any different from the old classical common law position that had proscribed reinstatement as a matter of law. The courts did not explain how this could be so under a statute one of whose purposes was to protect employees from arbitrary dismissal.

The provision was subsequently retained but in a modified manner as s 89(2)(c)(iii) of the Labour Act, inserted by s 29 of the Labour Relations Amendment Act, No. 17 of 2002. It read:

- (2) In the exercise of its functions, the Labour Court may -
  - (a) ...
  - (b) ...
  - (c) in the case of a application made in terms of subparagraph (i) of subsection (7) of section ninety-three, make an order for any of the following or any other appropriate order -
    - (i) back pay ...
    - (ii) ...
    - (iii) reinstatement or employment tin a job:  
Provided that any such determination shall specify

<sup>76</sup> Followed in numerous cases including, *ZESA v Bopoto* 1997 (1) ZLR 126(S); *Mhowa v Beverly Building Society* 1998 (1) ZLR 546(S); *Olivine Industries (Pvt) Ltd v Gwekwerere & Ors* 2005 (2) ZLR 421 (S) at 428F; and *Net\*One Cellular (PVT) Ltd v Communications and Allied Services Workers Union of Zimbabwe and 56 Employees* S-89-05.

<sup>77</sup> 1999 (2) ZLR 77 (S).

an amount of damages to be awarded to the employee concerned as an alternative to his reinstatement or employment;

(iv) ...

Although the formulation of the reinstatement/damages proviso was exactly the same with that in the Labour Relations Amendment Act (No. 12 of 1992) there was a change in the scope of application of the provisions. Whereas s 96(1)(c)LRA 1992 applied generally to determining authorities including the Labour Relations Tribunal, s 89(2)(c)(iii)LA 2002 expressly stated that it applied to applications made in terms of s 93(7)(ii) of the Labour Act. It did not expressly apply to s 89(2)(a) when the court dealt with appeals. *Prima facie* there was therefore a narrowing of the scope of application.

Despite the apparent change in the scope of application of the provision, the courts mainly continued to apply the provision in the same way as under s 96(1)(c)LRA 1992.<sup>78</sup> They did not explain why the rationale of the *Hama* decision should continue to apply generally, when its basis, that is the wide scope under s 96(1)(c), had now been restricted to the special s 93 (7) application. They did not explain why it was necessary to depart from the plain and express wording of s 89(2)(3)(c) that expressly stated that it applied to the special s 93(7) applications, including whether any absurdity would arise for instance in comparison to the powers of the court in an appeal under s 89(2)(a) of the Act. Perhaps if they did, they might have come to a different conclusion as indeed the court did in obiter in *Zimnat Life Assurance Ltd v Dikinya*.<sup>79</sup>

A further material amendment was introduced by s 29 of the Labour Amendment Act No. 7 of 2005 amending s 89(2)(c)(iii). The amendment introduced two further provisos to proviso (i), which potentially impacted on the reinstatement/damages issue, as discussed below.

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<sup>78</sup> *Mandiringa & Ors v National Social Security Authority* 2005(2)ZLR 329(H) at 333F; *Olivine Industries (Pvt) Ltd v Gwekwerere & Ors* 2005 (2) ZLR 421 (S) at 428F; *Net\*One Cellular (PVT) Ltd v Communications and Allied Services Workers Union of Zimbabwe and 56 Employees S-89-05*; *Chitambo v ZESA Holdings (Pvt) Ltd & Anor* LC/H/331/2013.

<sup>79</sup> S-30-2010.

### ***Present Law on Reinstatement under S 89(2)(C)Labour Act***

In *Mvududu v ARDA*<sup>80</sup> PATEL J specifically left the question of the full import of s 89(2)(c)(iii)LA 2005 open, although *in obiter* the judge seemed to accept that the Labour Court has the discretion to order reinstatement.

It is my respectful submission that s 89(2)(c)(iii) of the Labour Act does no more than substantially incorporate, with modifications, the position already provided for under the general appeal power of the Labour Court under s 89(2)(a)LA 2005 and under modern common law. That is the Labour Court can grant the remedy of reinstatement to an unlawfully or wrongfully dismissed employee who claims it, but subject to the discretion of the court to decline the remedy where the employer discharges the onus that the employment relationship is no longer tenable. A further modification being that unlike under s 89(2)(a)LA 2005, a reinstatement order under s 89(2)(c)(iii) must be accompanied with an alternative order for the payment of damages by virtue of proviso (i) to s 89(2)(c)(iii). The proviso is for the benefit and exercise by the employee. The proviso though is not in material conflict with s 89(2)(a) of the Labour Act as the court exercising its general equity powers can also include the same. It is also consistent with trends in common law and is designed to facilitate the just, effective and expeditious resolution of labour disputes.

There are several grounds for the above approach. The starting point is the amendment to s 89(2)(c)(iii) LA 2002 by s 29 of Act No. 7 of 2005. This was highly significant. The amendment changed the formulation that had been used in both s 96(1)(c) of the Labour Relations Act and under Act No. 17 of 2002. Whilst retaining the proviso on the damages alternatives, it added two critical provisos, provisos (ii) and (iii). These provide the "coloured context" through which proviso (i) must be understood. The provisos show the clear legislative intention to retain reinstatement as the primary remedy for wrongful dismissal as well as the essential principles of common law.

The first point is that despite the wording of proviso (i) the subsequent provisos vest the Labour Court with the power to decide whether to grant reinstatement or damages. Proviso (ii) expressly states that "in deciding whether to award damages or reinstatement or

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<sup>80</sup> SC - 446-14.

employment...” Then can be no question of “deciding” if the employer is allowed to subsequently unilaterally opt out of reinstating and paying damages. Proviso (ii) makes clear that the onus “to prove that the employment relationship is no longer tenable” is with the employer. If the employer fails to discharge such onus, it follows that reinstatement must be ordered. There would be no point in placing such onus on the employer, if the employer is allowed to subsequently unilaterally decide whether to reinstate or pay damages, as was previously held.<sup>81</sup> But the opposite applies. Reinstatement may no longer be practicable or because of changed circumstances making the employee now prefer damages instead of reinstatement as originally claimed.<sup>82</sup>

Proviso (iii) reiterates the position, providing that “should damages be awarded instead of reinstatement as a result of an untenable working relationship arising from unlawful or wrongful dismissal by the employer, punitive damages may be imposed.” The wording is clear that the award may be damages or reinstatement, and that in case of the former punitive damages may be awarded. If proviso (i) precluded discretion on the Labour Court then the wording of proviso (iii) as with proviso (ii) would not make sense.

Under the three provisos the deciding agent is clearly the court, as under common law and as acknowledged by labour scholars.<sup>83</sup> Drawing from common law, proviso (ii) does not provide the court with an unfettered discretion but subjects it to the overall requirement of whether the “employment relationship is no longer tenable,” by reference to a non-exhaustive list of factors. Again drawing from common law, the onus to establish why reinstatement should not apply lies with the employer. alternative for damages were the employer has proven that the relationship is no longer “tenable.”

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<sup>81</sup> *BHP Minerals Zimbabwe (Pvt) Ltd v Takawira* 1999 (2) ZLR 77 (S); *Gauntlet Security Services (Pvt) Ltd. v Leonard* 1997 (1) ZLR 583 (S).

<sup>82</sup> As was tried, but unsuccessfully by the employee in *BHP Minerals Zimbabwe (Pvt) Ltd v Takawira*, supra; and in *Mtewa v Business Equipment Corporation* S-25-04; and further affirmed in *Business Equipment Corporation v Mtewa* S-14-07.

<sup>83</sup> 83G Makings states that after Act No. 7 of 2005, the “*decision as to whether to order reinstatement or damages now lies with the dispute resolution authority*”, in G Makings, *Useful Labour Cases*, 4th ed ( Aquamor, Harare, 2011) 44. See also C Mucheche (2014), supra at 48-49.

The second point is that s 89(2) must be read holistically and purposively. In *Sagitarian (PVT) Ltd t/a ABC Auctions v The Workers Committee of Sagitarian (PVT) Ltd*,<sup>84</sup> GWAUNZA JA, cited authority to the effect that a “section, of whatever length, must have a unity of purpose... Separate subsections must all have some relevance to the central theme which characterises the section.” That general words may be “coloured” by their context.

The powers of the Labour Court under s 89(2) generally must be read in line with the purpose of the Act under s 2A(1)(f) of the Act to secure the just, effective and expeditious resolution of disputes. Employees also have a right to protection from unfair dismissal under s 12B(1) of the Act. It is now well-established that the normal or primary remedy for unfair dismissal is reinstatement. A construction that makes the position of the “protected” employee under the Act worse than that of the ordinary employee under the common law, by virtually giving the employer a veto power over reinstatement or to “buy out” such remedy cannot be consistent with the objectives of the section or the Act in general. Section 2A(2) requires that the Act be construed in a manner that best ensures the attainment of its objectives.

The above interpretation also removes any unnecessary conflict that may be read between the powers of the Labour Court when hearing a s 93(7) application and when exercising its general appeals powers under s 89(2)(c) of the Labour Act. Under its broad power in terms of the later section the court may, but is not obliged to issue an accompanying alternative order of damages as recognised in the *Dikinya* case, *supra*. It generally should, for the convenience and expeditious resolution of the dispute, if reinstatement subsequently prove impracticable after the judgment. This was the situation historically with a determining authority under its broad powers in terms of 111(1)LRA 1985 and the more specific powers under s 112LRA 1985. There was no necessary conflict.

### ***Who Has the Right of Choice, Employee or Employer?***

The wording of proviso (i) to s 89(2)(c) LA 2005 is clear that an order for reinstatement must be accompanied by an alternative order of damages. In *Net\*One Cellular (PVT) Ltd v Communications and Allied*

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<sup>84</sup> 2006 (1) ZLR 115 (S) at 118E -119C-E.

*Services Workers Union of Zimbabwe and 56 Employees*,<sup>85</sup> CHIDYAUSIKU CJ stated;

It is quite clear from the above section (s 89 (2) (c) (iii)) that the Labour Court is enjoined to make an award of damages as an alternative to reinstatement.

The question though is who has the right of choice- does it remain the employer per the *Takawira* decision or has this to change in light of the amendments to s 89(2)(c) under Act No. 7 of 2005? In the *Hama* case the matter was not dealt with. Subsequently though the courts, starting with the *Takawira* decision, ruled that it was the employer.<sup>86</sup> There was no justification for this. The wording of s 96 (1)(c) did not necessarily mean that choice was with the employer. The court acknowledged as much in the *Takawira* case, but went on to ascribe the right to the employer.

However, a holistic consideration of s 89(2) (c) shows that such interpretation is inconsistent with the section and the purpose of the Act. It also runs afoul of well established principles of common law on remedies. It is respectfully submitted that it is time for the courts to reconsider the issue, in view of the fact that *Takawira* was made before Amendment No. 7 of 2005.

Only an interpretation that gives the choice to the employee avoids the above pitfalls. Provisos (ii) and (iii) give the deciding power to award reinstatement or damages to the court, but provided it is the employee who has exercised their right to choose that as the primary relief. If not, the question does not arise. The court can only grant reinstatement if the employer has failed to discharge the onus to show that relationship is no longer tenable. A reading that reposes the employer with the power to unilaterally choose whether to reinstate or pay damages after the judgment, defeats the purpose of the provisos of vesting that power with the court, in pursuance of a claim by the employee. It is illogical and runs counter to the very purpose of provisos (ii) and (iii) to provide reinstatement as the first remedy unless the employer has failed to discharge the onus.

Contrary to the argument in *Takawira* the reverse applies well. Whereas the employer may fail to discharge the onus on it under proviso (ii)

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<sup>85</sup> S-89-05.

<sup>86</sup> *Gauntlet Security Services (Pvt) Ltd. v Leonard* 1997 (1) ZLR 583 (S); *ZESA v Bopoto* 1997 (1) ZLR 126(S).

and hence reinstatement is ordered. But in practice the employer has before it every tool to make such reinstatement impracticable for the worker. Mucheche puts it well, comparing such an enforced reinstatement to building “a permanent structure on sinking sand”:<sup>87</sup>

No matter how strongly an arbitrator or judge of the Labour Court may feel about reinstatement, it will be ridiculous to force an employee into a cage of reinstatement which is nothing short of a circle of despair. Such an employee’s woes may be compounded by the fact that the belligerent employer may choose not to give him/her work to do and render him/her a white elephant.

Besides the above, many workers become scared of again facing employers or managers that they fought over in court, and understandably prefer to move on even if they have won reinstatement. This is especially true of small to medium employers and those without a trade-union protected environment.<sup>88</sup> The employment relationship is inherently a personal one, in which these dynamics are inevitable. This explains the series of cases that came before the courts where workers who had successfully won reinstatement made a u-turn to seek damages. In *Shabani v ZIMPLATS*<sup>89</sup> the court approved the Appellant’s request for damages as opposed to reinstatement on the grounds that he was now employed elsewhere and “that the atmosphere at the Respondent institution is no longer conducive for him to work under.”

Proviso (i) of s 89(2)(c)(iii) can therefore be read to be designed to allow the flexibility necessary in the application of specific performance in the context of the employment relationship. Whereas under the common law where a party is awarded specific performance but the defendant fails to comply, the plaintiff has to bring a new action for cancellation and damages, with the first order remaining extant and the second order standing independent.<sup>90</sup> The above is clearly a long and cumbersome process.

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<sup>87</sup> C Mucheche (2014) 50.

<sup>88</sup> Deakin and Morris (2005) 522.

<sup>89</sup> LC/H/48/2009 [*Makamure P*].

<sup>90</sup> R Christie (2006), *supra* at 350 citing various authorities including, *Schein and Sliom v Joubert* 1903 TS 428; *Evans v Hart* 1949 4 SA 30 (C), and *Papenfus v Luiken* 1950 2 SA 508 (O). Also, but perhaps more narrowly see, *Olivine Industries (Pvt) Ltd v Gwekwerere* 2005 (2)ZLR 421(S) at 428F; *Girjac Services (Pvt) Ltd v Mudzingwa* 1999(1) ZLR 243 (S) at 250C-D.

Christie states though that a plaintiff who sues for specific performance may include an alternative claim for cancellation and damages and this may be awarded. Alternatively, that even when not included in the summons as an alternative claim, "cancellation and damages may be awarded on a clause asking for general or other relief... or in the absence of such a clause and without amendment of the declaration."<sup>91</sup>

The trend under common law as outlined by Christie is one towards removing the obstacles to an effective remedy to a party who has been awarded specific performance but the defendant fails to comply. It is in that light that Proviso (i) to s 89(2)(c)(iii) should be taken. It codifies the above trend by making it easier for the employee to get the alternative remedy of damages where the one of reinstatement has become impracticable or unobtainable for whatever reason. The employee does not have to institute fresh proceedings to get relief, but the Act places the obligation on the court to make the alternative order of damages to the one of reinstatement. Should there in fact be no problems, then that's the end of the matter as the employee gets her or his primary remedy. But equally so, should reinstatement prove to be sinking sand, the employee gets the monetary compensation. Such a construction well accords with the purpose of the Act of expeditiously and justly resolving disputes. It is particularly suited for a court which is not governed by the strict formalities and technicalities of the civil courts.

The above interpretation of s 89(2)(c) is in accordance with common law, unlike the one that virtually overturns the now established principle that reinstatement is a competent remedy for wrongful dismissal. After all it's the *Hama* decision itself that reiterated the principle that courts must not easily infer the ouster of common law unless this is by express provision or by necessary implication.

Such an interpretation is also jurisprudentially sound and accords with the legislative intention of protecting employees from unfair dismissal and promoting fair labour standards. Where the employer has failed to discharge the onus on it to show that the relationship is no longer tenable, there is no reason why reinstatement should not be granted. Under fair dismissal legislation reinstatement is recognised as the primary remedy for unfair dismissal. In some instances it may be the only effective remedy as in cases of unfair discrimination against trade

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<sup>91</sup> R Christie, *ibid.*

unionists,<sup>92</sup> or cases where the moral blameworthiness of the employer is particularly high as in cases of gender or racial discrimination or victimisation of employees.<sup>93</sup> The deadly side effect of the contrary interpretation being that it encourages employers to unfairly dismiss union and workers committee activists, or discriminate against women including sexual harassment or violate other fundamental rights of employees knowing fully well that the courts will allow them to buy out the victim.

This was exactly the Achilles heel of the old position, which rewarded the guilty party by giving him, the “the opportunity to, as it were buy his way out of his obligation”, as admitted in the *Takawira* case, *supra*. This is contrary to the well-established principle of common law that the choice of remedy lies with the wronged party, subject to the discretion of the court, including specific performance.<sup>94</sup> It is unfair for the wrong-doer to have such choice as was done in the cases that gave the employer such choice. Giving the employer the choice offends the *nemo ex proprio dolo consequitur actionem* maxim, “no one maintains an action arising out of his own wrong”.<sup>95</sup>

The opposite applies where the worker is the one reposed with the right of choice. A purposive reading of s 89(2) avoids any unnecessary conflict in interpretation of the powers of the Labour Court under s 89(2)(a) and under s 89(2)(c) of the Act. A literal reading of s 89(2)(c) of the old Labour Act shows that the s 89(2)(c) jurisdiction of the Labour Court would, unlike the old s 96(1)LRA not apply generally, but only to a s 93(7) application. However, there is no need to look at it this way, as I previously argued.<sup>96</sup>

Following the approach in *Sagitarian (PVT) Ltd t/a ABC Auctions v The Workers Committee of Sagitarian (PVT) Ltd*, *supra*, the section

<sup>92</sup> *National Union of Textile Workers and Ors v Stag Packings (Pty) Ltd & Ors* 1982 (4) SA 151 (T); *Jiah & Ors v PSC & Anor* 1999 (1) ZLR 17 (S); *Chitambo v ZESA Holdings (Pvt) Ltd & Anor* LC/H/331/2013.

<sup>93</sup> *Commercial Careers College (1980) (Pvt) Ltd v Jarvis*, *supra*

<sup>94</sup> *Farmers' Co-op Society (Reg) v Berry* 1912 AD 343, held at 350, ‘it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it.’ The election is rather with injured party, subject to the discretion of the Court. Ó

<sup>95</sup> *Mutasa v Masvingo Brick Tile* LC/MS/13/05; *Standard Chartered Bank Ltd v Matsika* 1997 (2) ZLR 389 (S) and *Mushaya v Glens Corporation* 1992 (1) ZLR 162.

<sup>96</sup> M Gwisai (2006) 127, and also applied in *Chitungwiza Municipality v Mvududu* LC/H/71/2009 p 3.

must be read with unity of purpose around its central theme. The two subsections can be read together in a non-conflictual manner. Under its general power in terms of s 89(2)(c) the court can apply the specific powers provided under s 89(2)(c)(iii), including making an order with an alternative of damages. But it is not compelled to and may go beyond this, given the broad wording of the subsection. The above has always been the situation historically. The powers specified under the present s 89(2)(c) of the Labour Act were similar to those of a determining authority under s 111(2) of the Labour Relations Act, 1985. But the same authority also enjoyed broad unqualified powers under s 111(1) LRA 1985, which are similar to the powers of the Labour Court in terms of s 89(2)(c) of the Labour Act. This interpretation is consistent with s 2A(2) of the Labour Act and best facilitates the Labour Court in implementing its broad equity jurisdiction.

Finally the above interpretation avoids possible glaring absurd results. For instance an interpretation that compels a mandatory damages alternative order in which the employer has the choice to reinstate or pay, could lead to palpable injustice in cases of unfair dismissal by constructive dismissal under s 12B(3)(a) of the Labour Act. Section 89(2)(c) does not provide for an independent standing relief of damages, but only as an alternative to an order for reinstatement. In one case an arbitrator, following the above rigid approach, made an order of reinstatement or damages. But in constructive dismissal cases reinstatement clearly does not apply, the intolerable relationship being the reason the employee resigned. Only a flexible interpretation of the powers of the court that gives it authority to decide on what is the applicable remedy, subject to the employee's initial choice of what relief to seek, is the correct approach.

### ***Recommendations***

To capture the above characters of the remedy of reinstatement the courts and the legislature need to reformulate its current wording, to avoid confusion or subversion of the legislative intention. For instance even within the current framework of both s 89(2)(c)(iii) and s 89(2)(a) of the Labour Act, courts, arbitrators, labour officers and designated agents can formulate their orders appropriately to show clearly that the option of taking damages lies with the employee. An order could be worded as follows:

The appellant is to be reinstated into her former position without loss of salary and benefits from the date of dismissal to the date

of reinstatement less mitigation and should the appellant find that reinstatement is no longer practicable or preferable, the appellant is to be paid damages as an alternative to reinstatement as may be agreed upon the parties or that failing, as may be determined upon application by this court.

Similarly there is need to amend s 89(2) (a) (b) and (c) of the Labour Act to achieve greater clarity. It would remove the reference to the s 93(7) applications but provide for a general provision dealing with orders by the Labour Court and other determining authorities under the Labour Act encompassing all applications, references or appeals to the court and /or other determining authorities like a labour officer, designated agent, arbitrator or determining authority under an employment code or national model code. A useful reference to model the amendment of s 89(2) (b) (c) is the old s 111(1) and s 112 LRA 1985 as read with s 107.

Finally the reinstatement/damages proviso should be re-worded to clearly spell out the right of choice lies with the employee where reinstatement is no longer practicable or preferable after the court has found in favour of the employee. For instance Proviso (i) could then read:

Reinstatement or employment in a job;

Provided that-

- (i) any such determination shall specify an amount of damages to be awarded to the employee concerned as an alternative to his or her reinstatement or employment if the employee finds that reinstatement or employment is no longer practicable or preferable.

#### **REINSTATEMENT IN CASES OF PROCEDURAL IRREGULARITIES AND REVIEW**

The third circumstance of reinstatement under statutes is where the Labour Court or the appropriate determining authority makes a finding that the dismissal is affected by a material procedural irregularity or the proceedings are set aside on review.

Irregularities may arise at various stages of proceedings under the Labour Act. This may be in hearings under an employment code or under the national model code. It may be in hearings by arbitrators, labour officers or designated agents. The issue may be pertinent in appeals before the Labour Court or when the court exercises its general review jurisdiction or in applications.

The effect of procedural irregularities was well summarised in *Maposa v CMED (Pvt)*,<sup>97</sup> where MATANDA-MOYO P (as she then was) held:

The law is very clear on the question of the effect of procedural irregularities. Procedural irregularities can render the entire proceedings void, and if an act is void, then it is a nullity.

In *Tamanikwa & Ors v Zimbabwe Manpower Development Fund*,<sup>98</sup> respondent failed to comply with the provisions of s 12B of the Labour Act but dismissed its employees using an alternative set of regulations, it was held:

Any disciplinary procedures which have been effected outside the peremptory provisions of s 12B are clearly unlawful. The dismissal of the appellant was therefore null and void.

These decisions follow a longstanding line of cases dealing with precursors to the Labour Act, notably *Standard Chartered Bank of Zimbabwe Ltd v Matsika*,<sup>99</sup> dealing with statutory regulations or employment codes.<sup>100</sup> In other instances the courts have ruled that the effect of the procedural irregularities is to render the proceedings at the very least voidable at the instance of the employee.<sup>101</sup> The above must be read though in the context of the settled law that an irregularity which does not cause prejudice does not by itself vitiate proceedings. In *Nyahuma v Barclays Bank (Pvt) Ltd*<sup>102</sup> it was held that; “..it is not all procedural irregularities which vitiate proceedings. In order to succeed in having proceedings set aside on the basis of procedural irregularity, it must be shown that the party concerned was prejudiced by the irregularity.” Or put differently a party “should not escape the consequences of his misdeeds simply because of a failure to conduct proceedings properly”,<sup>103</sup> or because of technicalities.<sup>104</sup>

<sup>97</sup> LC/H/81/2007. Cited, *McFoy v United Africa Co. Ltd* (1961) 3 All ER 1169 at 1167; *Jacks Club of South Africa & Ors v Feldman* 1942 AD 340 at 359.

<sup>98</sup> 2013(2)ZLR 46(S) at 61.

<sup>99</sup> *Standard Chartered Bank of Zimbabwe Ltd v Matsika* 1996 (1) ZLR 123 (S); *Mugwebie v Seed Co. Ltd & Anor* 2000 (1) ZLR 93(S).

<sup>100</sup> *Madoda v Tanganda Tea Co. Ltd* 1999 (1) ZLR 374 (S); *Standard Chartered Bank Zimbabwe Ltd v Chikomwe & Ors* S-77-00; *Kukura Kurerwa Bus Co v Mandina* LC/H/72/2008.

<sup>101</sup> *Minerals Marketing Corporation of Zimbabwe v Mazvimavi* 1995(2) ZLR 353(S).

<sup>102</sup> 2005 (2) ZLR 435 (S) 438E-F. Cited *Jacks Club of South Africa & Ors v Feldman* 1942 AD 340 at 359.

<sup>103</sup> *Air Zimbabwe v Mensa* S-89-04.

<sup>104</sup> *Dalny Mine v Banda* 1999 (1) ZLR 220 (S); *Air Zimbabwe Corporation v Mlambo* 1997 (1) ZLR 220 (S).

The effect of holding the dismissal null and void, is effectively to reinstate the employee in their former job, as the dismissal is taken as never having occurred. This is what was done in the *Tamanikwa* and *Matsika* decisions. The reinstatement though may be temporary. The employer is entitled to reinstitute fresh proceedings on the same facts, but in a procedurally correct manner. This is what distinguishes reinstatement in cases of procedural irregularities from that of reinstatement on the merits.

The Labour Court, on appeal may exercise its powers in terms of s 89(2)(a)LA, to conduct a re-hearing to cure the irregularities, or if this is not possible, remit the matter. When this happens, the employment relationship is deemed to continue. In the case of a re-hearing the court is starting afresh on a clean page and the effective date of termination is from "the date on which the irregularity is cured."<sup>105</sup> The finding of irregularity "means that the employee was never lawfully dismissed. He must therefore continue to be treated as an employee pending the outcome of the hearing on remittal."<sup>106</sup>

The same situation obtains on review. Where proceedings are set aside on review, the status *qua ante* is restored, and in the case of dismissal the employee is effectively reinstated in their former position. Reinstatement is automatic. There is no issue of discretion of awarding damages, as would be the case on appeal.<sup>107</sup> In *ZFC Ltd v Geza*,<sup>108</sup> the court held:

The relief available on review is that proceedings or the decision may be 'set aside or corrected' ...Miss Geza asked for a great deal more than that. She wanted an order that ZFC Ltd reinstate her or pay damages. That is the kind of relief one seeks on appeal, not on review.

Where proceedings are set aside on review and the employee reinstated, as with the case of procedural irregularities in general, this may be only for a temporary period, as the employer is entitled to re-institute proceedings on the same charges but in a procedurally correct manner. This is why in cases of procedural unfairness it is

<sup>105</sup> *Dalny Mine v Banda* 1999 (1) ZLR 220 (S).

<sup>106</sup> *Air Zimbabwe Corporation v Mlambo* 1997 (1) ZLR (S) at 223.

<sup>107</sup> *Muringi v Air Zimbabwe Corporation & Anor* 1997 (2) ZLR 488 (S). Generally see, *Bailey v Healthy Professions Council of Zimbabwe* 1993 (2) ZLR 17 (S); *Health Professions Council v McGown* 1994 (2) ZLR 329 (S) at 373C.

<sup>108</sup> 1998 (1) ZLR 137(S) at 139.

preferable to institute proceedings by way of an appeal rather than an application in terms of s 89(1)(d1)LA when the court exercises its general review jurisdiction similar to that of the High Court. As discussed above, an “appeal” under the Labour Act, is an appeal in the wide sense and encompasses grounds of appeal based on procedural irregularities or review, where appropriate, but on a narrower scale than the general review jurisdiction of the Labour Court under s 89(1)(d1) of the Act.<sup>109</sup>

#### REINSTATEMENT UNDER S 6 (2) OF THE NATIONAL EMPLOYMENT CODE

The final framework under which the issue of reinstatement may arise under the Labour Act is in terms of s 6 (2) of the Labour (National Employment Code of Conduct), Regulations, 2006, the model code.

An employer who has good cause to believe that an employee has committed misconduct may suspend such employee and conduct a hearing into the alleged misconduct and within fourteen days hand down a determination.<sup>110</sup> In terms of s 6 (2) the employer -

... may, according to the circumstances of the case-

- a) serve a notice, in writing, on the employee concerned terminating his or her contract of employment, if the grounds for his or her suspension are proved to his or her satisfaction; or
- b) serve a notice, in writing, on the employee concerned removing the suspension and reinstating such employee if the grounds for suspension are not proved.

A question that arises is whether if the employee is not found guilty, reinstatement is automatic or the employer has discretion not to impose reinstatement if the relationship has broken down?

The precursor to s 6(2) was s 3 (2) S.I. 371 of 1985,<sup>111</sup> which was similarly worded but with the difference being that the determining authority was not the employer but a labour relations officer. The courts initially ruled that the determining authority had no discretion, but had to order reinstatement if his or her finding was that the

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<sup>109</sup> See also, DE van Loggerenberg, *Superior Court Practice*, 2<sup>nd</sup> ed. (Lose-leaf, Juta) A1-32.

<sup>110</sup> Section 6 (1) Model Code.

<sup>111</sup> Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations, 1985.

employee was not guilty, and vice versa - *United Bottlers (Pvt) Ltd v Murwisi* 1995 (1) ZLR 246 (S).<sup>112</sup> This position was overruled in *Hama v National Railways of Zimbabwe*<sup>113</sup> where the court ruled that the common law position of discretion was retained under the Regulations *moreso* because under the amended s 96(1)(c)LRA it was mandatory that an order for reinstatement be accompanied by an alternative order of damages. It is submitted that the situation under s 6(2) of the model code is now different and that where the employer does not find the employee guilty of the alleged offence the suspension must be removed and the employee reinstated. Reinstatement is automatic.

This is logical, because the reinstatement/damages proviso is no longer applicable under s 6 (2) of the model code. The provisions of s 6 (2) are clear and admit of no ambiguity, providing for "removing the suspension and reinstating such employee if the grounds for suspension are not proved." The provisions are peremptory as per *Tamanikwa & Ors v Zimbabwe Manpower Development Fund*.<sup>114</sup> In any case under the model code we are dealing with a suspended employee rather than a dismissed employee.

Interpreting s 6 (2) of the model code in a discretionary manner, as may be suggested because of the phrase in s 6 (2) that the employer, "may, according to the circumstances of the case", defies common sense and leads to glaring absurdities. "May" in those circumstances really signifies the peremptory. The changed structure and nature of s 6 (2) of the model code clearly make the *Murwisi* case the more applicable precedent rather than the *Hama* decision.

Whereas under S.I. 371 of 1985, the determining authority was an independent third party, the labour relations officer, who could accordingly carry out an objective exercise of discretion on whether to grant reinstatement, and if not, assess damages. The same applies to the Labour Court or an arbitrator under s 89(2) of the Labour Act. But this cannot be so under the model code. Under the code, it is the same employer who charged the employee, conducted the hearing and found the employee not guilty, who should decide whether

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<sup>112</sup> Initially declared in obiter by MCNALLY JA in *Masiyiwa v T M Supermarket* 1990 (1) ZLR 166, holding, "To put it another way, he has a choice, but that choice is governed, not by his discretion, but by his finding Ó

<sup>113</sup> 1996 (1) ZLR 664 (S).

<sup>114</sup> 2013(2)ZLR 46(S) at 61.

reinstatement should apply or not, and if not, assess damages. This clearly flies in the face of the “basic tenets of natural justice” and the employee’s right to protection from unfair dismissal under s 12B(1).

If after a internal process that it completely runs and dominates the employer has found the employee not guilty, then the logical thing is that the employee be reinstated as provided in s 6 (2) (b), as argued by Madhuku.<sup>115</sup> Of course this raises problems where the relationship has broken down or the employee no longer wants reinstatement, a situation normally catered for by the alternative of damages. But this is the fundamental problem of S.I. 15 of 2006 as a dispute resolution system. It attempts to square a circle by impermissibly superimposing a pluralist based system on a unitarist based one. This contradiction cannot be resolved other than by either creating a semi-autonomous determining authority at the workplace made up of representatives of both the employer and employee as is normally done under employment codes, or alternatively outsourcing this to an entirely different third party, like the labour relations officer, as was done under S.I. 371 of 1975.

There is urgent need to address this anomaly. In the absence of this, an employee who no longer wants reinstatement can only resign after the reinstatement, unless she or he can sue for constructive dismissal where appropriate.

## CONCLUSION

The above survey of the law, legislative and common law, shows that the remedy of reinstatement has come a long way, evolving from the position of complete non-recognition under classical common law to one of general acceptance as a competent remedy and finally its recognition as the primary remedy for unfair dismissal. This can only be so under an Act whose declared purpose is *inter alia*, the attainment of social justice and under a new constitutional dispensation that enshrines labour rights including the right to fair labour practices and standards.

With such clear and established legislative and constitutional foundations one can only hope that the judiciary will follow suit to fully recognise the remedy of reinstatement, for such is the only way to ensure that the employee’s right to protection from unfair dismissal and to fair labour practices and standards is fully and finally realised.

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<sup>115</sup> L Madhuku (2015) 125-27.