REPORTABLE (27)

Judgment No. SC 26/06
Civil Appeal No. 337/05

TEL-ONE (PRIVATE) LIMITED v

COMMUNICATIONS AND ALLIED SERVICES WORKERS' UNION

SUPREME COURT OF ZIMBABWE
CHIDYAUSIKU CJ, CHEDA JA & ZIYAMBI JA
HARARE, JUNE 19 & SEPTEMBER 12, 2006

S V Hwacha, for the appellant

T Biti, for the respondent

CHIDYAUSIKU CJ: This is an appeal against a judgment of the High Court (MAKARAU J (as she then was)). The facts of the matter are, to a very large extent, common cause. They are as follows –

On 6 October 2004 some employees of the appellant embarked on a collective job action. The collective job action was in the form of the employees absenting themselves from work. On 19 October 2004 the Minister of Public Service, Labour and Social Welfare ("the Minister") issued a show cause order against the employees on strike. On 9 November 2004 the show cause order was set aside on technical grounds by the Labour Court. As a result of the Labour Court's ruling, no disposal proceedings were held under the provisions of Part XIII of the Labour Relations Act [*Cap. 28:01*] (hereinafter referred to as "the Act").

Meanwhile, on 15 October 2004 the appellant suspended the employees who were on strike without pay and other benefits and proceeded to charge them under its Code of Conduct ("the Code") with absence from work, disobedience to a lawful order, and disregarding standing procedures. In December 2004 the appellant conducted disciplinary hearings for each employee charged, culminating in the dismissal of the employees. The dismissal proceedings were held under, and in terms of, the Code.

The respondent, the Communications and Allied Services Workers' Union ("the Union"), then filed an application in the High Court for a review of the disciplinary proceedings in its own name, and as the only applicant in the review. The court *a quo* determined on the facts that the Union had *locus standi* to file the review in its own name, that the High Court had jurisdiction to review the disciplinary proceedings despite the employee's failure to exhaust domestic remedies before approaching the High Court, and that it was irregular for the appellant to conduct disciplinary proceedings in terms of the Code in respect of misconduct arising from the collective job action.

The appellant was dissatisfied with that judgment and appealed to this Court. The notice of appeal reveals essentially three grounds of appeal, firstly, that the respondent, who was not a party to the disciplinary proceedings, had no *locus standi* to bring this matter in its own name; secondly, that the High Court erred in assuming jurisdiction in this matter when the employees had not exhausted the domestic remedies available to them; and, thirdly, that the court *a quo* erred in holding that the appellant was

legally bound to follow procedures laid down in Part XIII of the Act and was barred from using its disciplinary Code in disciplining the employees.

Thus, this Court needs to determine whether the court *a quo* was correct in holding as it did that - (1) the respondent had *locus standi* in this matter; (2) the High Court had jurisdiction to determine this matter; and (3) the appellant was barred from using its Code to discipline its employees in the circumstances of this case.

Before dealing with the above three issues, I wish to make the following observations on the issue of the lawfulness or otherwise of the collective job action in this case. The parties are in disagreement on the issue.

Mr *Hwacha*, for the appellant, contends that the collective job action was unlawful because members of the respondent who are employees of the appellant are prohibited from engaging in collective job action by Statutory Instrument 137 of 2003 ("the Statutory Instrument"), as read with s 102 of the Act. The Statutory Instrument declares the appellant an essential service. It provides in the relevant section, s 2(f)(i), as follows:

> "2. The following services are hereby declared to be essential services in terms of section 102 of the Act –
>
> (a) – (e) …
>
> (f) transport and communication services provided by –
>
> (i) telecommunication technicians, drivers and mechanics in the industry; …".

It is common cause that collective job action in essential services is prohibited in terms of the Act.

Mr *Biti*, for the respondent, on the other hand, contends that it is not every employee of an essential service, such as the appellant, who is prohibited from engaging in collective job action. He argues that it is only those employees employed in certain categories in an essential service that are prohibited from engaging in collective job action.

There is no doubt that some of the appellant's employees who participated in the collective job action were prohibited from doing so by s 2(f)(i) of the Statutory Instrument, as read with s 102 of the Act. There may be some doubt in respect of others. Consequently, those of the appellant's employees who participated in the strike action and who are prohibited from collective job action by the Statutory Instrument did so unlawfully. It is not possible to determine on the record which of the appellant's employees went on strike unlawfully.

The learned judge in the court *a quo* assumed that the collective job action was lawful and determined the matter on that basis. It is not entirely clear on what basis the court *a quo* assumed that the collective job action was lawful. It would appear that the learned Judge's assumption was based on the Labour Court's ruling that set aside the show cause order issued by the Minister. The Minister's show cause order purported to

terminate the collective job action. It would appear that the learned Judge's attention was not drawn to s 2 of the Statutory Instrument, as read with s 102 of the Act, which prohibits employees of the appellant from collective job action. I am sure if her attention had been drawn to the above provisions she might have refrained from assuming that the strike action was lawful.

Be that as it may, I agree with Mr *Hwacha's* submission that the issues that fall for determination in this appeal can be determined without the need to determine the issue of whether the collective job action was lawful or not.

I will now turn to deal with the three issues.

(1) DOES THE RESPONDENT HAVE *LOCUS STANDI*?

The disciplinary proceedings which resulted in the dismissals of the appellant's employees were brought against each employee personally and each employee was notified of the proceedings personally. The outcome of the proceedings was notified to each employee personally. In some instances each employee appealed against the ruling of the disciplinary body in terms of the Code.

Mr *Hwacha's* contention in this regard is succinctly captured in para 6 of his heads of argument, wherein he makes the following submission:

> "Despite it having been clear who the parties to the initial hearings were, the court *a quo* considered and determined that it was legally competent that an omnibus review of those earlier proceedings was brought by a body which was clearly not

> a party in the first place. It is the appellant's submission that the court *a quo* erred in this regard." (my emphasis)

Put differently, Mr *Hwacha's* contention is that a party that was not privy to the original proceedings cannot apply for the review of such proceedings. I recognise the cogency of this submission. The proposition that only parties to the proceedings can challenge on review or appeal the outcome of such proceedings admits of little doubt.

The court *a quo*, however, reached the conclusion that, although the respondent was not a party to the disciplinary proceedings, it had *locus standi* to challenge on review the outcome of the disciplinary proceedings. In coming to this conclusion, the court *a quo* relied on the provisions of the Act, in particular s 29(4)(d). In this regard the learned Judge reasoned and concluded thus at p 3 of the cyclostyled judgment:

> "10. Dealing with the first issue, I note that s 29(2) of the Act clothes trade unions with corporate status and specifically provides that trade unions shall be capable of doing all such acts that are authorised by its constitution. The section proceeds in subs (4)(d) to grant a trade union the right to make representations before any determining authority or the Labour Court.
>
> 11. In my view, the fact that the Act entitles (vests?) a registered trade union with the right to make representations before any determining authority or the Labour Court does not limit it to that role only, as suggested by Mr *Hwacha*. It appears to me that if its constitution authorises it to sue and be sued on behalf of its membership, a trade union can bring or defend representative actions on behalf of its members. In my further view, s 29(4)(d) is expressly providing for a trade union to have a voice in labour disputes that are before determining authorities and the Labour Court, which voice may have been denied at common law and on the narrow construction of the general rule governing rules of procedure as to who may address a determining authority or court in formal hearings.

12. It is my further view that in addition to having a voice before a determining authority and the Labour Court, a trade union may be a party before this court as long as its constitution allows it to sue in the subject matter and as long as it can establish a standing before this court."

In concluding thus, the learned Judge also placed reliance on *Zimbabwe Teachers' Association v Minister of Education* 1990 (2) ZLR 48 (HC) and *Law Society of Zimbabwe and Ors v Minister of Finance* 1999 (2) ZLR 231 (SC).

Sections 29(2) and 29(4)(d) of the Act provide as follows in relevant part:

"**29 Registration and certification of trade unions and employers organisations and privileges thereof**

(1) …

(2) Every trade union, employers' organisation or federation shall, upon registration, become a body corporate and shall in its corporate name be capable of suing and being sued, of purchasing or otherwise acquiring, holding or alienating property, movable or immovable, and of doing any other act or thing which its constitution requires or permits it to do, or which a body corporate may, by law, do.

(3) …

(4) Subject to this Act, a registered or certified trade union or federation of such unions shall be entitled –

(a) - (c) …

(d) to make representations to a determining authority or the Labour Court; and …".

It is quite clear that s 29 of the Act, which the learned Judge relied on, confers on the respondent the *locus standi* to sue and to be sued in its own name in matters such as *in casu*. Section 29 of the Act, however, does not make a trade union such as the respondent a party to proceedings which the trade union has not commenced

or in respect of which the trade union has not been cited or joined as a party. Section 29 of the Act merely confers on a trade union the right to sue or to be sued or to be joined as a party to proceedings. In my view, s 29 of the Act does not make the respondent, by virtue of its being a trade union, a party to the present proceedings.

However, there are facts peculiar to this case that militate against refusing the respondent *locus standi*. The record reveals that the respondent gave notice to the appellant that the appellant's employees who were members of the respondent intended to embark on collective job action. Following this, the appellant applied to the Minister for a show cause order. The Minister issued the show cause order, which prohibited the collective job action. The respondent successfully appealed to the Labour Court against the Minister's show cause order. The parties in those proceedings were the respondent as the appellant, and the present appellant and the Minister were the respondents. Following the Labour Court's determination setting aside the show cause order, the appellant instituted disciplinary proceedings against its employees. Correspondence between the parties clearly shows that the disciplinary proceedings were part and parcel of the ongoing dispute between the appellant on the one hand and the employees and their representative union, the respondent, on the other hand. In my view, to insist in the light of these facts that the respondent was not a party to the disciplinary proceedings, which were part of the ongoing dispute between the appellant and the respondent, is pedantic and too technical. Apart from this, the employees are members of the respondent and they authorised the respondent to institute the proceedings in terms of a document on p 74 of the record, which reads in part:

> "We, the undersigned, hereby authorise the Union to institute High Court proceedings on our behalf, against Tel-One (Pvt) Ltd, for unfairly dismissing us following a collective job action.
>
> At the time of the collective job action, which we believe was engaged upon in compliance with the Labour Act, (we) were fully paid up members of the Union."

Thereunder the signatures of the various employees of the appellant who were members of the respondent are attached.

Thus, while I agree with Mr *Hwacha* that a party that was not privy to the original proceedings cannot appeal against or take on review a decision of a court *a quo*, the facts of this case are somewhat peculiar. They clearly show that the present case was an ongoing process of litigation between the respondent and the appellant, in which at one stage the respondent was not joined as a party. In these circumstances, it would be a travesty of justice to deny the respondent *locus standi*.

I accordingly come to the conclusion, though for reasons different from those of the court *a quo*, that the court *a quo* was correct in concluding that the respondent had *locus standi* to bring the application.

This ground of appeal therefore fails.

(2) DID THE HIGH COURT HAVE JURISDICTION TO ENTERTAIN THE REVIEW PROCEEDINGS?

Mr *Hwacha*, in his heads of argument, accepts that the High Court enjoys a discretion to hear a matter where other domestic remedies have not yet been exhausted. It therefore follows that the High Court had a discretion to hear this matter and it decided to hear it. That being the case, the issues that then fall for determination are whether there was a misdirection in the exercise of the discretion and whether the court *a quo* was grossly unreasonable in exercising the discretion in favour of hearing the matter.

No misdirection has been alleged.

I see nothing in the heads of argument of counsel for the appellant that suggests that the exercise of the discretion was grossly unreasonable. At best, Mr *Hwacha* advances reasons why it would have been better for the court *a quo* to have declined to exercise its discretion. So, even if this Court were to agree with him, this would not assist his case, as this does not amount to gross unreasonableness in the exercise of a discretion.

Accordingly, this ground of appeal fails as well.

(3) DOES PART XIII OF THE ACT BAR AN EMPLOYER FROM TAKING DISCIPLINARY ACTION IN TERMS OF ITS CODE AGAINST EMPLOYEES WHO PARTICIPATE IN COLLECTIVE JOB ACTION?

The appellant's contention in the court *a quo,* and indeed in this Court, was that there was no law which barred the appellant from relying on its Code of Conduct

in taking disciplinary action against those of its employees that had taken part in the unlawful collective job action. The appellant argued that ss 106-107 of the Act do not impose a mandatory procedure to be followed whenever there is collective job action.

In essence, the appellant's stance is that, although Part XIII of the Act provides for the resolution of a collective job action, it does not bar an employer from resorting to a Code of Conduct to discipline employees who will have participated in such collective job action.

Mr *Biti*, on the other hand, submitted that collective job action or strike action is *sui generis*. Strike action, he argued, is a collective game of power between an employer and an employee and that an employee who participates in this game of power cannot be disciplined for narrow breaches of his contract of employment arising from engagement in that game of power. Put simply, whenever there is collective job action the issue is no longer one of the narrow breach of the contract of employment, and the Code of Conduct is ousted and has no application. For this proposition he relied on *SACTWU and Ors v Novel Spinners (Pty) Ltd* 1999 (11) BLLR 1157 and *Combrinck in Black Allied Workers' Union and Ors v Prestige Hotels CC t/a Blue Waters Hotel* (1993) (14) ILJ 963 at 972 (a)-(c), where the following was stated:

> "The right to strike is important and necessary to a system of collective bargaining. It underpins the system – it obliges the parties to engage thoughtfully and seriously with each other. It helps to focus their minds on the issues at stake and to weigh up carefully the costs of failure to reach agreement.
>
> If an employer facing a strike could merely dismiss the strikers from employment by terminating their employment contracts then the strike would have little or no

> purpose. It would merely jeopardise the rights of employment of the strikers. The strike would cease to be functional to collective bargaining and instead it would be an opportunity for the employer to take punitive action against the employees concerned."

I agree with the above in as far as it relates to a lawful collective job action. I do not understand the above remarks to apply to an unlawful collective job action. I have no doubt that an employee cannot be dismissed from employment for participating in a lawful collective job action, even if such participation contravenes a Code of Conduct, such as absence from work in excess of five days contrary to the provisions of the Code of Conduct.

Mr *Biti* further submitted that it is precisely because of the *sui generis* nature of the strike action that any misconduct arising therefrom is not punished by way of Part IV of the Act but rather by way of Part XIII of the Act. He submitted that the only qualification is that where participating in an unlawful collective job action has been specifically proscribed in a Code of Conduct, then the Code of Conduct may be used. For this submission, he relied on *Zimbabwe Iron and Steel Co Ltd v Dube and Ors* 1997 (2) ZLR 172 (SC). In particular, he relied on what GUBBAY CJ had to say at pp 176B-177A of the judgment:

> "The real point to decide, so it seems to me, is whether it was the legislative intention that employees who have taken part in unlawful collective job action are only dismissable under the direction of a disposal order – such conduct not being subject to a code of conduct. Put differently, that ss 104 to 108 in Part XIII of the Act are specifically designed to deal with all forms of collective job action.
>
> This was the main and most weighty argument that Mr *Nherere* advanced on behalf of the respondents. Acknowledging that the bringing of disciplinary

proceedings under a code of conduct would be permissible where the charges resulted from the taking of collective job action, as for instance theft or wilful destruction of the employer's property, counsel submitted that such conduct was not dependent on the unlawfulness or otherwise of collective job action.

It is true, as was emphasised, that Part XII of the Act is concerned with the determination of disputes and unfair labour practices; Part XIII with collective job action. But these Parts are not mutually exclusive. Section 107(5)(a) details the powers conferred upon an appropriate authority in the making of a disposal order in the case of unlawful job action. Although the power to dismiss specified employees or categories of employees engaged in the unlawful collective job action is provided for in para (iv), its exercise is discretionary. The appropriate authority need not have recourse to it. Instead, the appropriate authority may decide merely to suspend the employer's liability to pay part of wages due to specified employees in respect of part of the duration of the unlawful collective job action (see para (i)); or suspend, with pay, specified employees for a defined period (see para (ii)); or take no disciplinary measures against the employees. *In casu* the disposal order of 26 March 1995 only directed that the unlawful job action be terminated. It was not directed to the liability of the respondents involved in the unlawful strike for disciplinary proceedings.

Accordingly, it is my view that a disposal order made pursuant to s 107(5)(a) of the Act, in which the dismissal of specified employees had not been ordered by the appropriate authority, does not bar the employer, under a code of conduct which categorised 'illegal industrial action' as a dismissal offence, from subsequently charging that offence and applying the prescribed penalty to those employees found guilty. Plainly, there is no provision, either express or implied, in Part XIII of the Act to the effect that a disposal order grants immunity from the unlawful collective job action referred to in it."

Mr *Biti* also contended that the learned Judge in the court *a quo* was correct in her reasoning and in concluding that:

"28. Section 102 of the Labour Act provides that, subject to the provisions of the Act, all employees, workers' committees and trade unions shall have the right to resort to collective job action to resolve disputes of interest. The Act proceeds under s 107 to provide for the issuance of disposal orders disposing of illegal collective action. In s 108(3) the Act affords protection to employees engaged in lawful collective job action. Such employees are not liable for breach of contract and their employment shall not be terminated on the ground that they engaged in a lawful collective job action.

29. In my view, it is these clear provisions of the law that provide the short answer to Mr Hwacha's submission and bar the respondent from resorting to its Code of Conduct to discipline employees that engaged in the collective job action.

30. For the respondent to proceed to charge the employees who engaged in collective job action under its Code was grossly irregular and flies in the face of the express letter of the law. It is not permissible. It seeks in vain to make the Code superior to the provisions of the Act under which the Code is registered. A Code is not part of the *corpus juris* of this country. It is essentially part of the terms of the contract of employment between employer and employee. It cannot override the law of the country."

I agree with the learned Judge to the extent that her remarks relate to lawful collective job action. I have some doubt that her remarks, as Mr *Biti* seems to imply, include unlawful collective job action.

While Mr *Biti's* submission that once the employees are engaged in collective job action the Code of Conduct is ousted and the action becomes a power game between an employer and the employees has some merit as a labour relations management principle, this has not been incorporated in the Act.

There is nothing in the language of the Act, either express or implied, that codifies the proposition advanced by Mr *Biti*. If anything, certain sections of Part XIII of the Act suggest the contrary. Thus, sections 108 and 109 of the Act provide for immunity for participating in a lawful collective job action and criminalises participation in an unlawful collective job action.

The issue here is one of interpretation. In particular, what meaning is to be ascribed to Part XIII of the Act. Part XIII of the Act consists of sections 102 to 112. Section 102 is a definition section, which defines what constitutes a disposal order, a lawful collective job action, a lock-out and a show cause order. Section 103 provides for appeals against a declaration of an occupation or service as an essential service by the Minister. Sections 104 and 105 create the right to resort to collective job action and sets out the procedures to be followed on embarking on a lawful collective job action or lock-out. Sections 106 and 107 provide the modalities for the management of collective job actions through the use of show cause orders and disposal orders. I see nothing in the language of these two sections which prohibits or proscribes the use of a Code of Conduct by employers to discipline employees who will have participated in an unlawful collective job action or absented themselves from work by reason of participating in an unlawful collective job action. As I have said, ss 108 and 109 deal with the immunity of participants in a lawful collective job action and criminalise participation in an unlawful collective job action. Section 110 provides for appeals against a show cause order, while s 111 provides for the cessation of collective job action. Section 112 deals with offences and mitigating factors. None of the above sections bar an employer from disciplining employees engaged in an unlawful collective job action in terms of a Code of Conduct.

The issue of the proper construction or interpretation of Part XIII of the Act in relation to Codes of Conduct is not new. This Court has had occasion to consider and determine this issue in a number of cases –

(a) *Cargo Carriers (Pvt) Ltd v Zambezi and Ors* 1996 (1) ZLR 613 (S)

In the *Cargo Carriers* case *supra* the employer sought to dismiss some three hundred and forty employees through the use of its Code of Conduct. Notice of disciplinary proceedings to the three hundred and forty employees was pinned on the entrance to the employer's premises. Very little time was given to the workers in this notice. The employer thereafter instituted disciplinary hearings *en masse*. The employer found the employees guilty *en masse* and punished them *en masse*. The Code of Conduct provided that disciplinary action against an employee be conducted on an individual basis. The disciplinary proceedings were set aside as irregular on the basis that the events of the collective job action simply dwarfed the Code of Conduct and that in a situation like that it was appropriate to deal with such industrial action in terms of ss 105-107 of the Act. The *Cargo Carriers* case *supra* is authority for the proposition that where the collective job action is massive it would be inappropriate to deal with it in terms of a Code of Conduct. Part XIII of the Act, as opposed to a Code of Conduct, provides the correct procedure to follow in such circumstances.

The *Cargo Carriers* case *supra* is no authority for the proposition that it would be irregular to discipline employees in terms of a Code of Conduct in every case where there has been a collective job action. It certainly is authority for the proposition that where the particular facts of the case dwarf the Code of Conduct it would be inappropriate to use a Code of Conduct.

(b) *Zimbabwe Iron and Steel Co v Dube and Ors* 1997 (2) SA 172 (ZS)

In the *Zimbabwe Iron and Steel Co* case *supra* the employees participated in an industrial action which was unlawful. The Code of Conduct specifically provided that engaging in an unlawful collective job action constituted misconduct. The employer instituted disciplinary proceedings in terms of the Code of Conduct and dismissed the employees. The Court held that disciplinary proceedings in terms of the Code of Conduct for participating in the unlawful collective job action were competent and confirmed the dismissal of the employees.

I do not accept Mr *Biti's* contention that it is only in those instances where participating in an unlawful collective job action is expressly prohibited in terms of the Code of Conduct that disciplinary action can be taken against the employees in terms of the Code of Conduct. I see nothing in the Act that limits the employer to taking disciplinary action against employees to situations where there is specific prescription of unlawful collective job action in the Code of Conduct.

(c) *Net*One Cellular (Pvt) Ltd v Communications and Allied Services Workers Union* SC-89-05

In the *Net*One* case *supra* I made the following observation at p 19 of the cyclostyled judgment:

> "By parity of reasoning, there is nothing in Part XIII of the Act which bars the appellant (the employer) from taking disciplinary action against employees for absenting themselves from work for a period in excess of five consecutive days in terms of … the Code, which is precisely what the appellant did in this case …".

There is nothing that I have heard in the instant case which would cause me to reconsider what I said in the *Tel**One case *supra*. I hold the view that Part XIII of

the Act does not bar an employer from conducting disciplinary proceedings against employees for absenting themselves from work for a period in excess of five days if such is prohibited in terms of a Code of Conduct. It is up to the employee to raise as his defence that he was absent from work for the period in question by reason of participating in a lawful industrial action. Participation in a lawful industrial action is a sufficient defence to such a charge – see s 108 of the Act. However, participation in an unlawful collective job action does not provide a defence to such a charge.

The respondent and those employees who were dismissed in the present case did not raise the defence of participation in a lawful collective job action. Accordingly, there is no basis for holding that their dismissals were unlawful. It was lawful for the employer to charge the employees with absence from work in contravention of the Code of Conduct. It was open to the employees to plead participation in a lawful collective job action. They did not. Because the employees are employed in an essential service, I doubt if the employees could have successfully raised that defence.

On that basis the appeal succeeds and the order of the High Court is altered to read:

"The application for review is dismissed with costs".

The appellant has been substantially successful and is entitled to its costs. Accordingly, the respondent is ordered to pay the appellant's costs.

CHEDA JA: I agree.

ZIYAMBI JA: I agree.

Dube, Manikai & Hwacha, appellant's legal practitioners

Honey & Blanckenberg, respondent's legal practitioners