IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: C283/99

In the matter between:

First Applicant

COLIN ABRAHAMS & OTHERS Second and Further Applicants

and

Respondent

ng: Thursday, 30 March 2000
ment: Friday 31 March 2000
on: For the Applicants, Mr A Steenkamp of Cheadle Thompson & Haysom
For the Respondent, Ms J Myburgh of Jan S De Villiers & Son

JUDGMENT

ARENDSE AJ:

1. This dispute was referred to this Court in terms of section 9(4) of the Labour Relations Act, 66 of 1995, as amended ("the Act"), the CCMA having attempted unsuccessfully to resolve the dispute through

conciliation as required by section 9(3) of the Act.

2.The dispute concerns the payment by the respondent of a R200,00 Pick-'n-Pay voucher to those of its employees in its operations division who did not participate in the strike which took place from 3 December to 15 December 1998. The applicants contend that such a payment contravenes section 5(1) and/or 5(3) of the Act.

Section 5(1) and (3) provide as follows:

"*(1) No person may discriminate against an employee for exercising any right conferred by this Act ...*

(3) No person may advantage, or promise to advantage, an employee or a person seeking employment for that person not exercising any right conferred by this Act for not participating in any proceedings in terms of this Act. However, nothing in this section precludes the parties to a dispute from concluding an agreement to settle that dispute".

3.Section 9(1) of the Act provides that if there is a dispute about the interpretation or application of any provision of Chapter II (which deals with freedom of association and general protections), any party to the dispute may refer the dispute in writing to (in this case) the CCMA.

4.Section 10 of the Act provides that in any proceedings in this Court – (a) any party who alleges that a right or protection conferred by Chapter II has been infringed must prove the facts of the conduct; and (b) the party who engaged in that conduct must then prove that the conduct did not infringe any provision of Chapter II.

5.The parties did not lead any oral evidence but handed up a statement of agreed facts. The salient facts are the following:

5.1 The respondent employs approximately 200 employees, 142 of whom are employed in the respondent's operations (production) department.

5.2 From 3 December to 15 December 1998 (nine working days in all), approximately 60 employees in the operations division of the respondent, all members of the first applicant, participated in a protected strike.

5.3 The strike ended when the first applicant and respondent agreed, in proceedings held under the auspices of the CCMA on 15 December 1998, that all of first applicant's members in job grades 1A – 2B would be granted a wage increase of 7.5% with effect from 1 October 1998. The increase was applied by respondent also to non-members in the bargaining unit.

5.4 The 82 non-striking employees in the operations division maintained production at a level sufficient to enable the respondent to commence its annual shut down on 16 December 1998 with the customary level of product in stock.

5.5 Towards the middle of February 1999, those employees in the operations division who had not participated in the strike, received a R200,00 Pick-'n-Pay voucher.

5.6 The respondent's reason for giving the vouchers to the non-striking employees was to reward them for their hard work ("*going the extra mile*") during the strike in December 1998.

5.7 The first applicant challenged the respondent's allocation of the vouchers stating that such allocation infringed the Labour Relations Act 66 of 1995, as the vouchers served as a reward for not participating in the strike and/or as an incentive not to strike in future.

5.8 The respondent denied that the allocation of the vouchers was intended or had the effect of discriminating unfairly against strikers or disregarding the right of first applicant's members to strike.

5.9 At meetings held between the first applicant and respondent on 17 and 18 February 1999, the parties could not reach agreement and the dispute was referred to the CCMA.

5.10 Conciliation was unsuccessful and a certificate reflecting the failure to resolve the dispute was issued on 7 May 1999.

In addition, and before commencing to hear argument, there was agreement in regard to the following aspects:

i) There is a recognition agreement formalising the collective bargaining relationship between the first applicant and the respondent.

ii) The first applicant is the sole collective bargaining agent for its members in the category 1A – 2B in the operations department.

iii) There were trade union members (at least one) who were not on strike in December 1998 and who received the Pick-'n-Pay voucher.

iv) Production resumed on the 4th January 1999.

v) 82 of the respondent's employees worked overtime and at weekends during the strike and they were paid. The overtime work was in excess of overtime work for the corresponding period in the previous year.

vi) The voucher payment to the 82 workers amounted to R16 400,00 whereas the wages lost due to the strike amounted to R69 000,00. The overtime payments to the 82 workers amounted to R46 000,00.

vii) The collective bargaining relationship between the first applicant and the respondent can be described as *"sound"*.

viii) The strike was the first strike at the respondent's plant.

ix) The payment of the vouchers created tension between management and the first applicant. Trade union membership has grown from 60 to 80. (I was however specifically requested not to read anything into this increase in membership as the parties were unable to agree what caused the increase in membership).

x) The *"exercising of any right"* referred to in section 5(1) of the Act is a reference to the exercise of the right to strike.

6. Mr Steenkamp, who appeared for the applicants, contended that the respondent contravened section 5(1) and/or (3) of the Act by virtue of the fact that the respondent had paid to the non-strikers the R200,00 Pick-'n-Pay voucher and that in this way the respondent *"discriminated"* against the strikers (all of whom were members of the first applicant)

for exercising their right to strike conferred by the Act. In the same way, he argued, the respondent had advantaged the non-strikers in exchange for them not exercising their right to strike conferred by the Act. The mere fact that the respondent differentiated between strikers and non-strikers in this way, constitutes discrimination as contemplated by section 5(1) of the Act and is sufficient for this Court to find that the respondent contravened section 5(1) and (3) of the Act. The effect of the payment of the R200,00 voucher, Mr Steenkamp submitted, was that those who did not strike were rewarded for doing so, and those who did strike, were penalised for doing so. This, he contended, had the effect that the strikers were deterred from striking in future; conversely those who did not strike, were encouraged not to go on strike in future. Indeed, he argued, the respondent's conduct was the more reprehensible in that the strike was a successful one and the benefits of the salary increase demanded by the first applicant, was conferred also upon the non-strikers. The strike was therefore self-evidently functional to collective bargaining and the fact that the respondent was now seeking to influence the outcome of that collective bargaining process by rewarding non-strikers, is an act of discrimination prohibited by section 5(1) and (3) of the Act.

7. Ms Myburgh, who appeared for the respondent, argued that the payment of the R200,00 voucher was simply a payment to those who did not strike; who had worked during the strike; and who had *"gone the extra mile"*. This payment was for the *"extra hard work"* done by the non-strikers. They had ensured the continued viability of the operations department by keeping production going and had ensured that the respondent could commence its annual shut down on 16 December 1998 with the customary level of product in stock. The respondent had no ulterior motive in

making the R200,00 payment over to the non-strikers. There was no intention on the respondent's part to secure an unfair advantage over the union or for that matter for it to undermine the first applicant or its role as the collective bargaining agent on behalf of its members employed in the operations department. She submitted that the respondent proved that its conduct did not infringe either section 5(1) or (3) of the Act in that the respondent's reason for giving the vouchers to the non-striking employees was to reward them for their hard work during the strike in December 1998 – nothing more, nothing less. The respondent, she submitted, was justified in rewarding the non-strikers for their hard work based purely on business and commercial considerations. She submitted that there was nothing unfair or discriminatory about the respondent's conduct.

8.Both Ms Myburgh and Mr Steenkamp accepted that the act of discrimination contemplated by section 5(1) must involve some degree of *"unfairness"*. They differed in regard to what this *"unfairness"* entailed. Mr Steenkamp submitted that section 5(1) should be strictly construed, i.e. the mere fact that the respondent's conduct differentiated between strikers and non-strikers is sufficient for the prohibition to come into play. Ms Myburgh submitted that something more or additional was required to be shown by the applicants. In other words, evidence must be adduced by the applicants to show that the employer's conduct did not only discriminate (as in differentiate) between strikers and non-strikers, but that it also was unfair, unjustified and was done for an ulterior purpose.

9.In regard to section 5(3), Mr Steenkamp argued that the respondent, by giving the non-strikers a voucher of R200,00, gave them an *"advantage"*

(meaning a *"benefit, bonus or an added extra"*) and that this *"advantage"* was given to each of the non-strikers in exchange for them not exercising their right to strike contained in section 64 of the Act. This, he contends, is supported by the fact that the respondent allocated vouchers to non-strikers and not to employees who participated in the strike, including the individual applicants.

Ms Myburgh, by contrast, argued that it is not the advantaging of other employees *per se* which is proscribed, but the advantaging *"in exchange for"* those employees not striking. What is required therefore, is legal causation. She submitted that whilst the applicants may be able to show factual causation, legal causation is absent where (as in this case), the agreed proximate cause was the beneficiaries' hard work. Put another way, the *quid pro quo* (or *"advantage"*) was the payment by the respondent of a voucher of R200,00 in return for hard work performed by the non-strikers. She submitted further that the words *"advantage or promise to advantage"* clearly imply that there should be a lasting advantage or favour. In this instance, the only *"advantage"* was of an ephemeral nature.

10. In applying the Act, this Court is enjoined to interpret its provisions (a) to give effect to its primary objects; (b) in compliance with the Constitution; and (c) in compliance with the public international law obligations of the Republic (section 3(a)(b) and (c) of the Act). Section 1 provides that the purpose of the Act is, *inter alia*, to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the Act which are, *inter alia*, to provide a framework within which employees and their trade unions, employers and employers' organisations

can collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest, and also to promote orderly collective bargaining and the effective resolution of labour disputes (section 1 of the Act).

11. It is well-established in our labour law (confirmed in many cases) that collective bargaining is the preferred method of dispute resolution involving employees and employers. Indeed, the right to engage in collective bargaining is now entrenched in our Constitution (section 23(5) of the Constitution). The Act regulates collective bargaining. Our Constitution also entrenches the right to strike (section 23(2)(c) of the Constitution). In this regard too, it is well-established in our law (and it is also internationally-accepted and recognised by ILO conventions and recommendations) that the right to strike is a necessary (and important) corollary of collective bargaining. In fact, that proposition or principle is no better illustrated than by the facts of this case.

The first applicant and the respondent were locked in a wage dispute. They deadlocked and the first applicant called upon their members employed in the operations department to go out on strike (which was in compliance with the Act). The first applicant's members heeded the call to strike (except for at least one of its members employed in the operations department) and the strike lasted for nine days resulting in the respondent agreeing to grant a wage increase to all those employed in job grades 1A – 2B who work in the operations division of the respondent. Albeit that the wage agreement was apparently brokered by the CCMA, it seems that the strike served its purpose, i.e. as a corollary to collective bargaining which had failed to produce an

agreement in the first place. Indeed, the wage increase was extended also to those employees who are not members of the first applicant, the so-called "*free-riders*".

12. In interpreting and applying section 5(1) and (3) of the Act, it is trite that one must have regard to the context in which it is alleged the violations occurred. It is not in dispute that the act of discrimination took place in the context of a protected strike. Similarly, the advantage allegedly given by the respondent was done in the context of a protected strike. In other words, for not striking (legally), the respondent paid to the non-strikers a sum of money. The *sine qua non* for the payment of the R200,00 voucher was not so much the hard work performed by the non-strikers, but the fact that the non-strikers did not go on strike and therefore maintained production at a level sufficient to enable the respondent to commence its annual shut down on 16 December 1998 with the customary level of product in stock. This must be the case since the non-strikers were otherwise remunerated for overtime work and working weekends - in the sum of R46 000,00. Put another way, the non-strikers did nothing extraordinary to warrant additional or extra payment other than that provided for in their service contracts. Indeed, there was otherwise no other rational or objective basis on which the additional R200,00 was paid to the non-strikers other than what was described by the respondent as thanking the non-strikers for their "*hard work, above the call of duty, during our industrial unrest in December last year*". Moreover, in answer to a question by the Court, Ms Myburgh confirmed that there is no practice whereby the respondent rewards its employees for hard work done other than by payment of the ordinary remuneration, including overtime payments from time to time.

13. The words *"discriminate against"* is described in the Concise Oxford Dictionary (10th Ed) to mean *"make an unjust distinction in the treatment of different categories of people, especially on the grounds of race, sex or age"*. Within the constitutional context *"discrimination"* denotes a decision that *"has the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner"*: **Harksen v Lane NO & Others 1998 (1) SA 300 (CC) 322 (para 47).** In that case discrimination under section 8 of the interim Constitution (the equality clause) was held to be actionable only if it is unfair. **Brassey** in his book **Employment and Labour Law Vol 3: Commentary on the Labour Relations Act (Juta) at page A2:8** writes that it is enough that the discrimination should be based on the exercise of rights conferred by the Act but it is must nevertheless be unfair.

Indeed, in argument before me, both Mr Steenkamp and Ms Myburgh agreed that the act of discrimination must be *"unfair"* to constitute a contravention of section 5(1) of the Act. They were also *ad idem* that the exercise of the right referred to in section 5(1) refers to the right to strike conferred by section 64 of the Act.

14. **Brassey** writes in his book at **page A2:9** that a contravention of section 5(1) of the Act comprises two elements: discriminatory conduct that is actuated by an elicit reason. For example, he says, an employer commits no breach of the section by dismissing a union member; the breach exists only if the dismissal was actuated by his membership of the union. Indeed, he writes, cases of mixed motive present considerable problems.

He refers for example to the victimisation provisions of the previous Acts where the courts sought the effective cause of the act and thus gave effect to the dominant motive of the employer as was the case in **Wilson v R 1948 (1) PH K.9.** (This was a dismissal case where the Court held that the proper test is whether the belief or suspicion that the employee has made a complaint about wages or conditions of employment, in the mind of the employer was the effective cause of the dismissal. **Brassey** then suggests that *"it seems likely that the approach to this provision [section 5(1)] will be the same"*.

Regrettably, I disagree with the learned author. **Firstly**, the **Wilson v R** case (**supra**) was a dismissal case which concerned the test to be applied in deciding whether an employer has contravened section 66(1)(a) of the Industrial Conciliation Act No.36/1947 and whether the belief or suspicion in the mind of the employer was the effective cause of the dismissal of the employee. Section 66 under that Act and subsequently (and more recently) under the Labour Relations Act of 1956 was a penal provision which required a restrictive interpretation. By contrast, the express purpose of the (current) Act is to decriminalise conduct in contravention of the Act. **Secondly**, the omnibus unfair labour practice remedy of the previous Act is no more. That universal regulator of collective relations, from recognition to the nuances of good faith bargaining, has been replaced under the (new) Act by a set of provisions both more explicit and economical. They begin with organisational rights, move through collective agreements, bargaining councils and workplace forums, and end with new rules on the exercise of economic power, including provision for protection for legal strikes. Importantly, the Act does not impose a duty to bargain upon employers

but does put in place (very firmly) the support structures for union recognition by providing a set of organisational rights for qualifying organisations. Moreover, the Act in section 64, provides for the right to strike. In essence, the Act now codifies the fundamental philosophy of the old Act that collective bargaining is the means preferred by the legislature for the maintenance of good labour relations and for the resolution of labour disputes and moreover that the strike weapon is an essential and integral element of collective bargaining. (See **NUM v Ergo (1991) 12 ILJ 1221 (A) at 1236J-1237F**).

Thirdly, and very importantly, it is now self evident that the provisions of the Act should be read in a constitutional context. Its provisions in this regard are clear (**cf sections 1(a) and 3(b)**; See **Johnson & Johnson (Pty) Ltd v Chemical Workers Industrial Union (1999) 20 ILJ 89 (LAC) at para 22**). Thus, in applying the Act, this Court must interpret its provisions not only to give effect to its primary objects, in compliance with the Constitution, but also it must comply with the public international law obligations of the Republic (section 3(a), (b) and (c) of the Act). One of the primary objects of the Act is to give effect to the obligations incurred by the Republic as a member state of the international labour organisation (section 1(b)) of the Act). In this regard also, one must point out that whereas under the unfair labour practice regime, the courts had to interpret and give effect to the intention of the law-giver by (often) convoluted and complex routes, by, for example, reference to ILO conventions and recommendations, the situation currently is that the Act expressly incorporates such instruments by reference. It can now be taken for granted that the conduct of employers and their organisations and employees and their

trade unions, will be judged according to the Constitution and according to ILO standards.

15. I revert to an analysis of section 5(1) of the Act. In determining whether differentiation amounts to unfair discrimination under section 8(2) of the interim Constitution, the Constitutional Court held that this requires a two stage analysis. Section 8(2) of the interim Constitution provided as follows:

"No person shall be unfairly discriminated against, directly or indirectly, and, without derogating from the generality of this provision, on one or more of the following grounds in particular: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language ...".

(The equality clause in the current Constitution is now found in section 9 thereof). In **Harksen v Lane NO & Others 1998 (1) SA 300 (CC) at para 46**, the Constitutional Court stated that the first enquiry was whether the differentiation amounts to *"discrimination"* and, if it does, whether, secondly, it amounts to *"unfair discrimination"*. At **para 48** of that case, the Constitutional Court said that the question whether there has been differentiation on a specified ground (such as race or gender) or an unspecified ground, must be answered objectively. If the answer is in the affirmative, then it is necessary to proceed to the second stage of the analysis to determine whether the discrimination is *"unfair"*. In the case of discrimination on a specified ground, the unfairness of the discrimination is presumed, but the contrary may still

be established. In the case of discrimination on an unspecified ground, the unfairness must still be established before it can be found that a breach of the equality clause has occurred. At **para 50** of the **Harksen** case (***supra***), the Constitutional Court said that what the specified grounds (such as race or gender) have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes or characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity. There is often a complex relationship between these grounds. In some cases they relate to immutable biological attributes or characteristics, in some to the associational life of humans, in some to the intellectual, expressive and religious dimensions of humanity and in some cases to a combination of one or more of these features. The temptation to force them into neatly self-contained categories should be resisted. The Court went on to say that section 8(2) of the interim Constitution (now section 9(3) and (4) of the Constitution) seeks to prevent the unequal treatment of people based on such criteria which may, amongst other things, result in the construction of patterns of disadvantage such as has occurred only too visibly in our history. I mention this because it is important when having regard to the history of the development of labour law in this country. Our labour law is relatively young. For many decades the labour laws blatantly discriminated on the grounds of race. Recognition of (black) trade unions was a battle only recently won. In the process, this battle or struggle took its toll; the lives of many workers and trade union officials were lost. The courts resisted progress for many decades. Even after the 1956 Act was amended, the courts found reason to deny black workers and their unions rights we now take for granted.

The rights found in our Constitution and in the Act are hard-earned and well-deserved. The right to organise, the right to engage in collective bargaining, and the right to strike are priceless.

My observations are well-documented elsewhere and I need cite no authority for it.

16. This Court has no hesitation in embracing, and concurring with, the remarks made by **Justice Goldstone** in the **Harksen** case (***supra***). Equally, his remarks at **para 51** where he states that dignity is referred to as an underlying consideration in the determination of unfairness:

"The prohibition of unfair discrimination in the Constitution provides a bulwark against invasions which impair human dignity or which affect people adversely in a comparably serious manner ...

...In the final analysis, it is the impact of the discrimination on the complainant that is the determining factor regarding the unfairness of the discrimination...".

17. In order to determine whether the discriminatory factor has impacted on complainants unfairly, various factors must be considered said **Justice Goldstone**. These would include **firstly**, the position of the complainants in society and whether they have suffered in the past from patterns of disadvantage, and whether the discrimination in the case under consideration is on a specified ground (such as race or gender) or not; **secondly**, the nature of the provision or power and the purpose sought to be achieved by it; **and thirdly**, with due regard to (a) and (b) above, any other relevant factors, the extent to which the discrimination has affected the rights or interests of complainants and

whether it has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature (**Harksen**, ***supra* at para 52**). If the discrimination is held to be unfair then the equality provision would be violated and then one will proceed upon the final leg of the enquiry as to whether the provision can be justified under the limitations clause (section 36).

18. In my view, there is much to be said in attempting to analyse section 5(1) and (3) of the Act along the same lines as that followed in the **Harksen** case, ***supra***, and in **Prinsloo v Van der Linde & Another 1997 (3) SA 1012 (CC) at para 20**.

19. One is however assisted somewhat by the provisions of section 10 of the Act which provides in sub-section (a) that in proceedings before this Court a party who alleges that a right or protection conferred by Chapter II has been infringed must prove the facts of the conduct; and (b), the party engaged in that conduct must then prove that the conduct did not infringe any provision of this Chapter. In this matter, the facts have been agreed and it is indeed common cause that following a lawful strike in December 1998, the respondent employer paid to the non-strikers (including at least one union member) the sum of R200,00. The applicants allege that the employees' right to strike conferred by section 64 of the Act has been infringed thereby. Section 10(b) of the Act then provides that the party engaged in that conduct, i.e. the respondent in this case, must then prove that the conduct did not infringe any provision of Chapter II.

20. In my view, where a person (such as the respondent employer in this case)

discriminates against employees (such as the individual applicants) for exercising their right to strike which is conferred by this Act, then the unfairness of that discrimination is presumed although the contrary may still be established. In this regard it is analogous to discrimination on one of the grounds specified in the Constitution, the unfairness of which is presumed until the contrary is established (**Harksen *supra* at para 48**). In my view therefore it is not necessary at the section 10(a) stage of the proceedings in this Court, for the party alleging the infringement to prove, for example, that the discriminatory conduct was or is actuated by an illicit reason or by an ulterior motive on the part of the respondent employer. This approach, with due respect to **Brassey**, avoids the cases of so-called mixed motive which he refers to in his book **at page A2:9**. This approach also, with due respect to Mr Steenkamp's argument, avoids me having to get into a debate about whether section 5(1) (and (3) for that matter) should be restrictively applied or interpreted. In other words, in my view, once it is established that there was discrimination against an employee for exercising any right conferred by this Act, then it must be presumed that such discrimination was unfair, until the contrary is established.

21. The respondent avers that the R200,00 voucher was paid to the non-strikers purely for the hard work they performed during the strike and for *"going the extra mile"*. I am not persuaded that by doing so, the respondent did not infringe either section 5(1) or (3) of the Act. **Brassey** suggests that section 10(a) and (b) mean that it is for the applicant to prove the objective, or external facts on which the cause of action is based, and if the applicant does so, then the respondent must demonstrate that there was no such mental intent to bring the respondent

within the ambit of the section. This entails an enquiry into the conduct constituting discrimination and the motivation behind it. On the first aspect the aggrieved employee would bear the onus of proof, on the second it would rest on the employer (see **Brassey at page A2:17**). In this regard, I have already indicated that the objective or external facts on which the cause of action is based is indeed common cause and that it remains for the respondent to prove that it did not infringe section 5(1) or (3).

22.The reasons why I say that the respondent did not prove that its conduct did not infringe either section 5(1) or (3) of the Act are:

21.1 The strikers embarked on a legal and legitimate strike sanctioned by the Act which had as its purpose to compel the respondent to accept its wage demands.

21.2 The strike had the effect that the pressure applied by the union and its striking members compelled the respondent to comply with its wage demands.

21.3 There was a clear correlation between the strike and the failure by the parties to agree on a wage increase during normal collective bargaining negotiations.

21.4 The respondent attempted (apparently successfully) to counter the strike by requesting the non-strikers to work overtime and over weekends and for doing so, the non-strikers were paid overtime at time and a third, time and a half or double time, whichever was applicable. This cost the

respondent R46 000,00. Compare this with the R69 000,00 which was lost by the strikers in the form of wages.

21.5 There is neither a term or condition of employment prevailing at the respondent company nor is there a practice that employees are remunerated for work done (or well done for that matter) over and above the normal contractual entitlements. In the context of this case, the respondent deviated from its normal practice by paying the additional R200,00 to the non-strikers. The payment of the R200,00 voucher will create some doubt (at the very least) in the minds of both strikers and non-strikers in regard to their future participation in a strike. So much, Ms Myburgh was constrained to concede during her argument. Some strikers may say that to strike is pointless because the benefit of it is conferred also upon non-strikers, and moreover the non-strikers get something *"extra"* in any event if they work during the strike. The non-strikers may say that their decision not to strike was vindicated because **firstly**, they got what the strikers wanted in any event, i.e. a higher wage, **secondly**, they received additional remuneration in the form of overtime payment, and **thirdly**, they were rewarded for working during the strike in the form of the R200,00 voucher. There can (at the very least) be little doubt that the payment of the R200,00 would affect or influence a union member's decision whether or not to strike in future. In my view, the infringement must be regarded in a very serious right given the fundamental nature of the right infringed. If employers, in a protected strike context, are allowed to pay incentives, rewards or bonuses to non-strikers albeit that they are dressed up as *"innocent"* rewards for *"hard work"* then there is a very real danger that that Holy Cow called collective bargaining, may be undermined or compromised in

the process. Indeed, in my view, in the context of a legal strike, payment of any reward, incentive, or bonus should be strictly prohibited. Such payment is unnecessarily provocative and fuels an adversarial approach to collective bargaining.

17.6 The first applicant and the respondent have a *'stable"* collective bargaining relationship. It is common cause between the parties that the payment of the R200,00 voucher caused *"tensions"* in the relationship. The purpose of the Act is to advance, *inter alia*, labour peace and the democratisation of the workplace by fulfilling one of the primary objects of the Act which is to promote, *inter alia*, orderly collective bargaining. The respondent's conduct in paying the R200,00 voucher clearly (at the very least) threatened labour peace. In my view the effect was to influence both strikers and non-strikers' in the exercise of their right to decide for themselves (in future) whether to strike or not to strike in support of the first applicant's demands. Indeed, the payment of the R200,00 was a highly adversarial move on the part of the respondent. It is apparent from the minutes of the meetings held in February 1999 (prior to the referral by the first applicant of the dispute to the CCMA on 23 February 1999) that tensions ran high and that there was a threat to the labour peace prevailing at the workplace. Fortunately, the dispute resolution provisions in the Act triumphed when the matter was defused by it being referred to the CCMA initially, and now to this Court.

23.I conclude therefore that the respondent discriminated against the strikers (members of the first applicant) for exercising their right to strike conferred by this Act and that by doing so, the respondent infringed section 5(1) of the Act.

24.Although I do not have to do so, I nevertheless find that for the same reasons which I set out above, that section 5(3) of the Act was also infringed by the respondent paying to the non-strikers the sum of R200,00 in February 1999. The right to strike is a right that cannot be waived unless of course there is an agreement between a trade union party and an employer party which regulates the issue. In the context of this case however, there can be no justification for giving rewards to non-strikers because they refrained from exercising their statutory right to strike. **SACCAWU v OK Bazaars (1929) Ltd (1995) 16 ILJ 1031 (A)** which was decided under the 1956 Act, provides a classic example of such a case, concerned as it was with the non-payment of a customary, but discretionary, annual bonus to employees who had taken part in a legal strike during the year in question. In this regard, I agree with **Brassey** (at **page A2:1**) that today, it seems, such a decision would contravene the present section since section 64 confers on employees the right to strike. In this matter, the facts speak for themselves, and that is that the non-strikers were paid a benefit or a reward of R200,00 *"in exchange"* for them not having exercised their right to strike conferred by the Act.

25.As to the relief sought, the applicants request compensation for each individual applicant, equivalent to the voucher given to the non-strikers, together with costs of suit. In regard to the costs of this matter, it was agreed between Ms Myburgh and Mr Steenkamp that each party should pay its own costs having regard to the nature of the dispute, the relative novelty of the point argued before this Court, and moreover, having regard to the sound collective bargaining relationship which exists between the first applicant and the respondent. I agree that this is a sound approach to the issue of costs and accordingly, I

make no order as to costs.

26. In regard to the substantive relief sought however, there are difficulties. It seems to me that were I to grant the applicants' request, then I would, in effect, compound or condone the illegitimate conduct of the respondent. Quite simply, two wrongs do not make a right. Having said that, however, the respondent also needs to be censured for infringing section 5(1) and (3) of the Act. This Court's powers are set out in section 158(1) of the Act. In this regard, Ms Myburgh proposes that should I find the respondent's conduct to have amounted to an infringement of section 5(1) and (3) of the Act, then this is not a case where substantive relief would be appropriate and that rather a declaratory order coupled with an order prohibiting repetition, would be sufficient. I am inclined to agree with this proposal and accordingly, I make the following order:

(i) It is declared that the respondent engaged in conduct that infringed section 5(1) and (3) of Chapter II of the Act;

(ii) The respondent is prohibited from engaging in such conduct with effect from the date of this order;

(iii) There is no order as to costs.

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ARENDSE AJ

31 MARCH 2000