

LABOUR LAW DISPUTE RESOLUTION IN ZIMBABWE AND THE LAW: THE CONCEPT OF FAIRNESS IN ADJUDICATION OF LABOUR DISPUTES IN ZIMBABWE

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INTRODUCTION

Dispute resolution is a system of resolving disputes which covers both formal and informal methods. The law mainly regulates formal dispute resolution systems. According to the Oxford Dictionary, fairness is the impartial and just treatment or behaviour without favoritism or discrimination. The principle of fairness may be described as the thread that runs through labour law in general and labour dispute resolution system in particular. Fairness constitutes the heart and soul of justice. One of the chief characteristics of good law is fairness. In labour matters, fairness is anchored on a hybrid of procedural and substantive fairness. Procedural fairness is the barometer or yardstick to measure proper and lawful compliance with a procedure to arrive at a decision. Substantive fairness deals with the legal correctness of a decision based on the facts and merits of a given case. This paper² deals with a critical legal analysis of the application of the principle of fairness to labour cases in Zimbabwe. In labour matters, from the side of employees, fairness is rooted in equity and social justice as the foundation and chief cornerstone of labour law anchored on **section 2A** of the **Labour Act**.

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LABOUR DISPUTE RESOLUTION SYSTEMS BY LABOUR OFFICERS, MAGISTRATES COURT, LABOUR COURT, HIGH COURT, SUPREME COURT AND CONSTITUTIONAL COURT : EXCLUSIVE FIRST INSTANCE JURISDICTION OF LABOUR OFFICERS AND LABOUR COURT LABOUR MATTERS AS CONFIRMED AND ENDORSED BY THE SUPREME COURT OF ZIMBABWE

The Supreme Court of Zimbabwe, as the final appellate court for all matters other than constitutional matters where the Constitutional Court has the final say, authoritatively solved once and for all the old age tug of war, perennial confusion and several previous conflicting judgments³ about first instance/first bite jurisdiction in labour matters pitting various players like labour officers, Labour Court and High Court. There are legal situations where other dispute resolution systems like Magistrates Court, Labour Court and High Court also exercise secondary jurisdiction in labour matters with regard to confirmation of draft rulings as well as registration of draft rulings. Access to justice for resolution of any general or universal civil dispute like a labour dispute via a court or tribunal established by law is at the heart and soul of **section 69 of the Constitution of Zimbabwe; Right to a fair hearing** provisions and more particularly **subsection (2)** which elaborately provides as follows: *“in the determination of civil rights and obligations, every person has a right to a fair, speedy and public hearing within a reasonable time before an independent and impartial court, tribunal or other forum established by law.”*

The pinnacle floodgate of access to justice is **section 69(3) of the Constitution of Zimbabwe**, *“Every person has the right of access to the courts, or to some other tribunal or forum established by law for the resolution of any dispute.”*

³ See *Darlington Gutu v Netone Cellular (Pvt) Ltd* HH 420/21, *Kudakwashe Nyashanu v Netone Cellular (Private) Limited* HH 119/19, *Loveness Govera and Anor v Netone Cellular (Pvt) Ltd* HH 720/20 and *Lazarus Muchenje v Susan Mutangadura and Ors* HH 21/21, *Zimtrade v Makaya* 2005 (1) ZLR 427 (H), *DHL International (Pvt) Ltd v Madzikanda* 2010 (1) ZLR 201 (H) at pp204-5, *Chiweshe & Ors v Air Zimbabwe Holdings (Pvt) Ltd* 2014 (2) ZLR 837 (H), *Confederation of Zimbabwe Industries v Mbatha* HH 126/15, *Stanley Machote v Zimbabwe Manpower Development Fund* HH 813/15, *Nyanzara v Mbada Diamonds (Private) Limited* 2016 (1) ZLR 195 (H), *Traingle Limited & Three Others v Zimbabwe Sugar Milling Industry Workers Union and Others* HH 74/16, *Guva & Anor v Willoughby's Investments (Pvt) Ltd* 2009 (1) ZLR 368 (S)

It is now clear like tropical sunlight that under the prevailing or current labour legislative framework in Zimbabwe, labour officers enjoy sole primary or first instance jurisdiction in the bulk of categorized labour matters and such jurisdiction cannot be ousted or taken away by the High Court or any other court of law or tribunal. Also there are some labour matters where first instance jurisdiction is reposed in the Labour Court by the legislature and not labour officers, especially exercise of review powers in labour matters.⁴ This position was explicitly and instructively enunciated and underscored by the Supreme Court in the case of *Stanley Nhari v Robert Gabriel Mugabe and Others* SC 161/20 at pages 1, 2 and 20 as follows:

“This is an appeal against the judgment of the High Court upholding the special plea by the respondents that the High Court did not have jurisdiction to determine issues of employment and labour law. At the centre of the dispute between the parties, both in the court a quo and before this Court, is the question whether the High Court, which now enjoys original jurisdiction over all civil and criminal matters throughout Zimbabwe pursuant to s 171 of the 2013 Constitution, has jurisdiction to determine all matters including issues of labour and employment. Having carefully considered all the constitutional provisions that have a bearing on this matter, as well as case law authority, I am in no doubt that the powers of the High Court are not unbounded and that in the sphere of labour and employment law, the court does not have jurisdiction to determine such matters in the first instance.

[46] Whether the High Court has jurisdiction in all matters including matters of labour and employment has been a subject of conflicting decisions of the High Court. Until such time as this Court were to make a definitive pronouncement on the matter, parties to litigation were at liberty to cite cases on both sides of the divide that supported their respective positions on the matter. It seems to me that, the circumstances, each party should bear its own costs, both in the court a quo and this Court.

⁴ See sections 89(d1) and 92EE of the Labour Act [Chapter 28:01]

[47] On a careful interpretation of the Constitution, it is clear that the High Court does not, in fact, have jurisdiction over all civil and criminal cases in Zimbabwe. The general jurisdiction of the High Court is restricted by the very Constitution itself which has created specialized courts to handle specific areas of the law. The High Court has no jurisdiction to determine unfair labour practices which, in terms of the Labour Act, should more properly be handled by labour officers appointed in terms of that Act.” see also *Chingombe & Anor v City of Harare and Ors* SC 177/20.

DUTY OF A LABOUR OFFICER TO CORRECTLY RECORD FACTS OF A LABOUR DISPUTE, DO PROPER DIAGNOSIS OR PROGNOSIS AND APPLY THE CORRECT LEGAL PRESCRIPTION

Labour officers deal with both factual and legal issues in relation to disputes of interest and disputes of right referred to them in terms of **section 93** of the **Labour Act**. It is important for a labour officer dealing with a dispute to get the facts right and record them correctly. Also it is equally important for a labour officer to apply the correct law to the facts of a dispute. Thus, there is need for a labour officer to do a correct diagnosis or prognosis of the labour dispute and thereafter give a correct legal prescription or solution befitting the problem at hand. A labour officer doing adjudication or preparing a draft ruling is a trier of fact and applies law to the given facts as well. At the end of the day, each case will depend its own facts and merits.

SOME BIBLICAL DIMENSIONS TO THE CONCEPT OF FAIRNESS IN THE ADJUDICATION OF LABOUR DISPUTES

The bible provides an illuminating and scintillating view about the concept of fairness in the adjudication of labour disputes through various scriptures from the holy book. One of the notable scriptures is **James 5 verse 4** “ *Indeed the wages of the labourers who mowed your fields, which you kept back by fraud, cry out; and the cries of the reapers have reached the ears of the Lord of Sabaoth.*” In the same vein an old testament prophet and proponent of social justice by the name Amos sounds a stern warning for the need to adhere to social justice in **Amos 4 verse 1-2** “ *Hear this word, you cows of Bashan, who are on the mountain of Samaria, Who*

oppress the poor, Who crush the needy, Who say to your husbands, "Bring wine, let us drink. The Lord has sworn by His holiness, Behold the days shall come upon you when he will take you with fishhooks and your posterity with fishhooks." Similarly Colossians 4 verse 1 espouse fairness and a warning for a moment of reckoning before God in the following words, "*Masters, give your employees what is just and fair, knowing also that you have a Master in heaven.*" Also 2 Chronicles 19 verse 7 says, "*Judge carefully, for with the Lord our God there is no injustice or partiality. He is impartial and never takes bribes.*"

LEGAL RECOGNITION, ENTRENCHMENT AND JUSTICIABILITY OF THE PRINCIPLE OF FAIRNESS IN LABOUR MATTERS IN TERMS OF THE CONSTITUTION OF ZIMBABWE

Probably for the first time in the legal history of Zimbabwe, the full bench of the Constitutional Court, in a unanimous judgment written by **Malaba CJ**, has explicitly clarified the legal scope and general applicability of the constitutional principle of fairness in labour matters in the *locus classicus* case of **Greatermans Stores (1979) (Private) Limited t/a Thomas Meikles Stores and Another vs The Minister of Public Service, Labour and Social Welfare and Another CCZ 2/18**. The principle of fairness enjoys a ubiquitous constitutional status under the Constitution of Zimbabwe. Section 65 (1) of the Constitution⁵ provides that,

*"Every person has the right to **fair** and safe labour practices and standards and to be paid a **fair** and reasonable wage".*

This constitutional right is a three in one, *viz*, (a) right to fair labour practices and standards, (b) right to safe practices and standards, (c) right to be paid a fair and reasonable wage. The right to fair labour and safe labour practices and standards in terms of section 65(1) of the Constitution equally applies to and protects both an employer and an employee because of the use of the generic phrase therein, "every person". However, it must be pinpointed out that much as the labour rights in terms of section 65(1) of the Constitution are of a wider application to encompass both a natural and artificial/juristic person, that right is inapplicable to any other relationship that is not a labour or employment relationship. It is noteworthy that

5 Amendment No 20, Act 2013.

section 65(1) of the Constitution affords blanket legal protection to every person meaning that it equally applies with full legal force and effect to both public sector and private sector employers and employees thereby removing the “Berlin Wall” that creates a legal distinction of the labour laws that regulate public sector and private sector employers and employees. In Zimbabwe, private sector employees are legally governed by the Labour Act and regulations made under it whilst public sector employees or civil servants are excluded from the legal purview of the Labour Act⁶ as they are regulated by the Public Service Act and regulations made thereunder. The labour legal right jealously guarded in terms of section 65(1) of the Constitution is *sui generis* in that, apart from applying to all employers and employees without any distinction, it also fully applies to a special category of workers who are normally insulated from the application of labour laws that apply to the generality of the working class e.g. State security employees like members of the defence forces, police, prisons, state security. Fairness in labour law must not be applied in a lopsided manner but it must be evenly applied by seeking to strike a fair balance between the competing interests of an employer and an employee.

This article will analyse the applicability of the principle of fairness to labour cases in this country in relation to (a) the right to fair labour practices and standards and (b) the right to fair and reasonable wage, the basis being the Constitution which is the supreme law of the land. It has to be noted that despite the constitutional drive towards fairness in labour relations, the legislature tried to create an even playing ground by informalising proceedings in all labour hearings.

THE RIGHT TO FAIR LABOUR PRACTICES AND STANDARDS

Section 65 (1) does not define the meaning of fair labour practices and standards. The principle of fair labour practice is foreign to common law. It is rather an

6 See section 3 of the Labour Act [Chapter 28:01]. Suffice to mention that the Labour Amendment Act No. 17 of 2002 previously harmonised labour law in Zimbabwe by providing for the application of the Labour Act to both private sector and public sector employers and employees under one legal roof but that harmonisation was short-lived as it was reversed by the Labour Amendment Act No. 7 of 2005 which reversed that harmonisation and restored the status quo ante of disharmonised labour laws.

invention of the International Labour Organisation (ILO).⁷ There are several ILO Conventions that set out various labour standards and minimum practices that are acceptable under the ILO family.⁸ International labour standards are legal instruments drawn up by the ILO's constituents, setting out basic principles and rights at work.⁹ The international labour standards are therefore either conventions, which are legally binding international treaties that may be ratified by member states, or recommendations that are non-binding agreements. What is apparent from this definition is that standards are a creation of ILO.¹⁰ Hence the referral to standards under municipal law should derive its definition from the ILO definitions.

Zimbabwe employs the transformation doctrine as a way of domesticating international instruments. In section 327 (2) of the Constitution of Zimbabwe, an international instrument needs to be signed and ratified first for it to be binding. In addition, after the ratification, parliament should then by an Act of parliament incorporate the convention or treaty into municipal law (domestication). Hence, in this instance, the definition of what is a standard or practice can be adopted from the ILO literature since Zimbabwe has already ratified and signed several international labour standards as will be discussed. Section 326 (1) of the Constitution of Zimbabwe provides reference to the international customary law in interpreting treaties and conventions and provides that customary international law is part of the Zimbabwean law unless it is inconsistent with the Constitution and Acts of parliament. However, when interpreting a statute or the Constitution of Zimbabwe the rule is that the Constitution or statute must be interpreted in such a manner that is consistent with international customary law or convention or treaty.¹¹

7 Xavier Beaudonnet (ed) *International Labour Law and Domestic Law*, ILO, Switzerland, 2010

8 ILO, *Freedom of Association, Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, 2006.

9 ILO, *Rules of the Game, A brief introduction to International Labour Standards*, ILO, Revised Edition, Switzerland, 2009, p14.

10 ILO, *Constitution of the International Labour Organisation*, ILO Switzerland, Geneva, 2009.

11 Sections 326 and 327 of the Constitution of Zimbabwe.

The answer to what constitutes a fair labour standard and practice is thus found under international law. As already pointed out, a number of these fair labour standards and practices exist, including:

- a. the right to fair dismissal,
- b. the right to maternity leave,
- c. the right to vacation leave,
- d. the right to fair conditions and terms of employment
- e. the right to organize.
- f. the right to join trade union of choice.¹²

The Zimbabwean Labour Act [Chapter 28:01] does set several fair practices and standards. Section 6, 7, 8, 9 and 10 of the Labour Act (28:01) lists unfair labour practices and standards. It lists that which cannot be regarded as fair in labour relations.

As a way of an example, section 12B(1) of the Labour Act expressly provides that an employee has a right not to be unfairly¹³ dismissed. It is submitted that this provision is a fair labour practice and standard. Thus, when interpreting the provisions of section 65 (1) of the Constitution of Zimbabwe, there should be inclusion of the right to fair dismissal. In dealing with cases of fair labour standards as set in the Labour Act the courts will essentially be dealing with matters raising constitutional issues. ILO Convention 158 embeds the principle of fairness by laying down the caveat that the termination of a worker's employment must only happen for a just cause related to the employee's conduct or operational requirements of the employer. The concept of a just cause preceding any termination of an employee's contract of employment whether via dismissal or otherwise, epitomizes fairness. In making reference to the principle of fairness under ILO Convention 158, in the **Greatermans Stores Constitutional Court** judgment (supra), **Malaba CJ** had this to say at pages 41 and 42 thereof:

See ILO, *Rules of the Game, A brief introduction to International Labour Standards*, ILO, Revised Edition, Switzerland, 2009, in general.

¹³ *What constitutes unfair dismissal is generally and not exhaustively defined in terms of section 12B(2) & (3) of the Labour Act which encompass both procedural and substantive fairness as a legal combo.*

“Section 12C (2) of the Act is consistent with international best practices. The International Labour Organisation (“ILO”) Convention 158 (“the Convention”) contains principles which have been accepted at international level on how employees whose contracts of employment have been terminated on notice at the initiative of employers must be treated under national law. Section 12C(2) of the Act gives effect to the purpose of Article 12(1) of the Convention of ensuring that workers whose employment has been terminated on notice at the initiative of the employer are afforded some form of income protection to mitigate the adverse effects of termination. It is a recognised principle of labour relations reflective of social justice that when employment is terminated for reasons other than misconduct, compensation for long service rendered is paid. Payment of a severance package based on length of service to an employee whose contract of employment was terminated for a reason other than misconduct has always been viewed as a means of ensuring that the employee has a soft landing after losing employment.”

The Supreme Court of Zimbabwe’s (SCZ) approach in dealing with matters of unfair dismissal is clearly common law as opposed to ILO jurisprudence yet the common law does not define what unfair dismissal constitutes. The approach by the Zimbabwean Supreme Court seems to be conservative as it is based on the concept of lawfulness and not fairness. To appreciate this observation, a brief foray into the South African jurisdiction will be done.

There is a difference between the two concepts of fairness and lawfulness. A termination maybe within the parameters of the law but not fair. Lawfulness is confined to what the rules of law say yet fairness referred to in section 12B of the Labour Act (28.01) extends beyond what the rules of law enunciate. Fairness also includes the aspect of equity and morality to some extent unlike law that may be law despite its moral content. Hence, the correct interpretation of the provisions of sections 65(1) of the Constitution of Zimbabwe as read with section 12B of the Labour Act [Chapter 28.01] requires dismissal not only to be lawful but fair. Hence the penalty to terminate ought not only to be lawful but fair.

In the South African case of *NEHAWU v University of Cape Town (NEHAWU)* the court ruled that because the Labour Relations Act 66 of 1995 gave content to the rights in respect of labour relations in section 23 of the constitution, its interpretation application “in application compliance with the constitution” are constitutional issues.

The court in NEHAWU further held that the right to fair labour standards and practices in section 23(1) of the Labour Relations Act 66 of 1995 is fairly applicable to both the workers and employers. Rautenbach argues that the focus of section 23 (1) of South African Labour Relations Act is to ensure that the relationship between the worker and the employer is fair to both.¹⁴ He says the right not to be unfairly dismissed is essential to the right to fair labour practices.¹⁵

In the case of *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 12 BLLR 1097 (*Sidumo*), the South African Supreme Court ruled that in deciding dismissal disputes in terms of the compulsory arbitration provisions of the Labour Relations Act 66 of 1995 (LRA), Commissioners should approach a dismissal with ‘a measure of deference’ because the commissioner ought to be persuaded that dismissal is the only fair sanction. The Supreme Court held that once the employer establishes that dismissal is the only fair sanction, the end of the inquiry as the discretion to dismiss lies with the employer. This approach is the same as the one adopted in the judgments of *Toyota v Posi* SC -55-2007; *Tragers Plastics (Pvt) Ltd v Woodreck Sibanda and Anor* SC-22-2012; and *Innscor Africa Limited v Letron Chimoto* SC264-2010 where the Supreme Court clearly concretised the sanctity and supremacy of the employer’s decision to dismiss in cases where there is belief that the misconduct goes to the root of the contract. See also *ZB Bank v Maria Sithole* SC 48/16, *Zimplats v Godide* SC 2/16, *Circle Cement v Nyawasha* SC 560/03.

14 I M Rautenbach, *Overview of Constitutional Court Decisions on the Bill of Rights-2002*, TSAR 2003 p182.

15 Ibid.

The issue of fairness in termination of an employee's contract of employment via dismissal was a focal point in the case of **Pioneer Transport v Douglas Mafikeni SC 45/2017** where the Supreme Court ruled that it is absurd and repugnant to justice for an employer to appeal against a decision made in favour of an employee by the employer's constituted disciplinary committee or disciplinary authority at the workplace. The law must put on a human face or rather employers may also need to exercise empathy in situations of a vulnerable employee like in one case of **Zesa Enterprises (Private) Limited v Aloyce Roy Stevawo SC 29/2017**, where an employer dismissed an employee who was sick and had exceeded sick leave maximum period provided for in the Labour Act. The concerned employee was dismissed without afforded a fair hearing after the employer did not give him time to engage a lawyer to defend him resulting in him defaulting the hearing and the Labour Court as a court of equity rightly and justly set aside the dismissal of that vulnerable sick employee but unfortunately the progressive Labour Court judgment was overturned on appeal to the Supreme Court at the instance of the employer. Also one of the progressive Supreme Court judgments inculcating and engendering fairness in termination of employment is the leading case of **Tongoona Mutasa and Others v Tobacco Processors (Pvt) Ltd SC 12/21**, a case in which both the Labour Court and Supreme Court came to the same conclusion that the termination of affected employees' fixed term contracts of employment who kept reporting for duty after expiry of their fixed term contracts of employment was wrongful, unlawful and amounted to unfair dismissal on the basis of tacit relocation and statutory protection afforded to fixed term contract employees in terms of **section 12 (3a)** of the Labour Act.

CLARION CALL FOR THE COURTS TO INDEPENDENTLY DO LEGAL INTEROGATION OF AN EMPLOYER'S DISRECTION TO IMPOSE A PENALTY OF DISMISSAL ON AN EMPLOYEE IN RELATION TO MISCONDUCT

With due respect, applying the principle of fairness, it is legally difficult to

sustain the general notion that once an employer takes a serious view that an employee must be dismissed from employment for an act of misconduct which the concerned employer perceives to be going to the root of the contract of employment, then dismissal is entirely at the discretion of the employer. It is necessary for the courts to give a serious legal interrogation to an employer's serious view to impose a dismissal penalty on an employee by considering the principle of fairness and independently assessing whether the employee's misconduct really strikes at the root of the contract of employment such as to erode a relationship of trust and confidence. An obvious non exhaustive example of acts of misconduct that go to the root of the contract of employment to destroy trust and confidence thereby giving an employer a firm legal justification to mete out a penalty of dismissal are such forms of misconduct that border on dishonesty e.g. theft, fraud, bribery, corruption conflict of interest etc. Other acts of misconduct that warrant a dismissal penalty are habitual acts of misconduct where a corrective penalty was previously imposed, serious acts of misconduct and gross acts of misconduct which erode a relationship of trust and confidence between an employer and employee. Where an employee is properly found guilty of an act of misconduct going to the root of the employment contract, that employee is treated as having committed a material breach or fundamental breach of the contract of employment which impairs the employer-employee relationship so much such that it amounts to a repudiation of the concerned employment relationship. In the spirit of fairness, in any case dealing with an allegation of unfair dismissal where an employee is guilty of such misconduct, a court of law must thoroughly, objectively and judiciously examine whether such misconduct goes to the root of the contract of employment such as to warrant the employer to exercise a discretion to apply a dismissal penalty. An employer is a generally primary decision maker in cases dealing with any act of misconduct and the legal test is that an appeal court must not interfere with the decision of a primary decision maker or lower tribunal merely because it disagrees with such a decision but there is need to demonstrate that such an impugned decision is grossly unreasonable or irrational before interfering with it. The law frowns upon employers who

use dismissal indiscriminately for virtually any act of misconduct without first putting in place a legal filter to differentiate between cases that deserve a penalty no less severe than dismissal such as acts of misconduct going to the root of the contract of employment and other acts of misconduct that do not deserve a punitive but corrective penalty e.g. trivial acts of misconduct which do not entail a cognisable prejudice to the employer. The legislature has enacted the model code to guide employers and employees that dismissal is a sanction of the last resort which must be sparingly applied depending on the severity or gravity of the act of misconduct in issue and where possible, depending on the facts and merits of given case, a non-punitive and corrective penalty may be applied¹⁶. One of the leading cases in which the Supreme Court played a very crucial role of applying the principle of fairness to interfere with an employer's discretion to impose a dismissal penalty on an employee is **Celsys Limited v Nobert Ndeleziwa SC 49/15** wherein **Gwaunza JA** (as then she was) upheld a Labour Court judgment that had set aside an employer's dismissal of an employee for an act of misconduct where the concerned employer did not prove or demonstrate prejudice suffered as a result of the employee's misconduct such as to justify the imposition of a drastic and punitive penalty of dismissal. This line of jurisprudence to interfere with an employer's discretion to impose a dismissal penalty upon an employee for trivial acts of misconduct had its firm foundation laid down by the Supreme Court in the celebrated case of **Tobacco Sales Floors Ltd v Chimwala 1987 (2) ZLR 210 (S)** in the following salutary terms:

“misconduct (which), though technically inconsistent with the fulfilment of the conditions of his contract, was so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted.”

Inspired by the need to do fairness in the employment relationship, courts have always been prepared to step in and correct excesses where an employer unjustifiably and unfairly imposes an underserved dismissal

¹⁶ See section 7 of the Labour (National Employment Code of Conduct) Regulations, 2006 SI 15 of 2006.

penalty for an act of misconduct that warrants a corrective and non-punitive penalty. Thus, in the trailblazing case of **COH COH Enterprises (Pvt) Ltd v Mativenga 2001(1) ZLR 151 (S)** the Supreme Court enunciated the fairness principle that where an employment code of conduct states that certain conduct warrants a dismissal penalty, it does not mean that where the conduct is proved, dismissal must inevitably follow. In a proper case a lesser penalty may be imposed because codes of conduct being often drafted by laymen should not be over strictly interpreted. The High Court adopted a similar approach to temper justice with mercy and fairness in dealing with a dismissal penalty for an act of misconduct in the case of **Dzikiti v United Bottlers 1998 (1) ZLR 389 (H)** wherein it was held that where in an employment code of conduct a penalty is specified for an offence, the prescribed penalty is generally the maximum penalty that can be imposed and the disciplinary tribunal dealing with the matter in terms of an employment code may decide to impose the maximum penalty or a lesser penalty. A court of law, as an independent citadel of justice, must closely assess whether an employer's decision to dismiss an employee from employment is fair and compliant with a reasonable decision maker test and if not, set it aside. A decision to dismiss an employee from employment which is grossly unreasonable or irrational must not stand in the eyes of the law. The court retains the jurisdiction to decide whether or not an employer's decision to dismiss an employee from employment is fair.

The South African Constitutional Court ruled that the *Sidumo* case raised constitutional issues especially in view of the fact that the Labour Relations Act was enacted to give effect to the rights contained in sections 23 and 33 of the South African Constitution.¹⁷ Further, the court noted that the issues pertaining to the determination of the powers and functions of the Labour Court canvassed in the *Sidumo* case are essentially constitutional issues.¹⁸

The South African Constitutional Court (SCC) in disposing the *Sidumo* case

17 See p 50 of the *Sidumo* judgment.

18 See para 51 *ibid*.

ruled that, although section 23 (1) of the South African Constitution affords fair labour practices to both the employer and the employee alike, to the employees it affords security of employment.¹⁹ The Court held that a primary purpose of the LRA is to give effect to the fundamental rights conferred by section 23 of the South African Constitution. The provisions of s1 of LRA are like the provisions of s2A of the Labour Act [Chapter 28:01]. Hence the application and interpretation of the provisions is the same. The SCC further ruled that section 185 of the LRA provides that every employee has the right not to be unfairly dismissed and subjected to unfair labour practices.²⁰ The SCC ruled further that the Commissioner first examines whether the decision to dismiss was fair or reasonable and that such a decision should be made in light of the rule breached. The SCC ruled that the Commissioner was an independent adjudicator who considers the competing interests of the employer and the employee. The court noted that when interpreting s145 of LRA they ought to do so in a manner that is compatible with the values of reasonableness and fair dealing that an open and democratic society demands.²¹

It ruled that the onus is on the employer to prove that the dismissal is fair.²² The reasoning in the Zimbabwean *Zuva* case, however, is contrary to the SCC reasoning in the *Sidumo* case.

FAIRNESS OR OTHERWISE OF THE RIGHT TO TERMINATE ON NOTICE UNDER SECTION 65 (1) OF THE CONSTITUTION OF ZIMBABWE.

The Supreme Court of Zimbabwe's endorsement of termination in the *Zuva* case resulted in mixed feelings between the employees and employers. The workers described it as a resurrection of the Master and Servant Ordinance of 1905, while the employers celebrated it as a case that enhances labour flexibility and an entrance to a free market economy.

19 See para 55 ibid.

20 See para 58 ibid.

21 See para 158 of the *Sidumo judgment*

22 See para 58 ibid.

The Supreme Court of Zimbabwe clearly exalted the common law right of termination on notice over a constitutional right. The author believes this was incorrectly. The case ignored the new legal and fairness terrain set by the Constitution of Zimbabwe 2013. It also failed to take heed from a rooted legal precedence created by the previous Supreme Court judgment in **Art Corporation v Moyana 1989(1) ZLR 304 (S)** underscoring the legal principle that an employer did not enjoy any legal right to terminate an employee's contract on notice. What is clear is that the discretion of the employer to dismiss in terms of section 65 of the Constitution of Zimbabwe is subjected to the test of fairness. The Supreme Court of Zimbabwe seems to have deviated from jurisprudence that clearly originates from ILO conventions on the principle of fairness in labour relations.

The employees in question were terminated on notice after the following sequence of events: the employer initiated a retrenchment process and the employees in question were then selected for retrenchment. The employer then offered a retrenchment package to the employees, which the employees rejected. The employer opted to refer the matter to Retrenchment Board for quantification of the retrenchment package. The employer later revised its position and then terminated the employees on three months' notice on a no-fault basis. The Supreme Court then ruled that both the employer and the employee had a common law right to terminate an employment relationship on notice. The court further held that the common law right in respect of both the employer and the employee could only be limited, abolished or regulated by an Act of Parliament or a statutory Instrument Act which is, clearly, *intra vires* an Act of Parliament.

The Supreme Court further ruled that it is also a well-established principle of statutory interpretation that a statute cannot affect an alteration of the common law without saying so explicitly. The court did find that in section 12B of the Labour Act [Chapter 28:01] there expressly or impliedly was no abolition of the employer's common law right to terminate an employment relationship by way of notices. The court ruled that section 12B deals with

dismissal and the procedures to be followed in those instances where an employment relationship is to be terminated by way of dismissal following misconduct proceedings. The court made a finding that termination on notice is another method of dismissal like other methods like retrenchment etc.

It is argued that the termination on notice is contrary to the provisions of section 65 (1) of the Constitution of Zimbabwe through exalting the common law right over a constitutional right. This is so if termination on notice is looked in the context of ILO jurisprudence, or as a component of the right to fair labour practice and standards.

TERMINATION ON NOTICE IS DISMISSAL: A DISTINCTION WITHOUT A DIFFERENCE

Zimbabwean labour law unfairly and primitively creates a superficial and artificial distinction between termination of employment and dismissal and yet both processes lead to a job loss on the part of an employee. It is respectfully submitted that the purported differentiation between termination of employment on notice by the employer and dismissal is a legal fantasy that creates a distinction without a difference as the destination is the same i.e. loss of a job by the affected employee. John Grogan argues that there is a significant development on the law of dismissal²³ which, as Grogan puts it, has gone outside the framework of the statute to the constitutional framework.²⁴ Grogan argues that section 23 of the South African Constitution affords everyone the right to fair labour standards.²⁵ In addition, Grogan argues that in the case of *Old Mutual Life Assurance Company SA Ltd v Gumbi 2007 28 ILJ 1499* the Supreme Court of Appeal recognized, as an implied term of every contract of employment, a right to be terminated fairly. The afore-cited case also underscores the principle that trust and confidence are key pillars in an

23 John Grogan, Dismissal, Juta (2010) p9

24 John Grogan, ibid p10

25 ibid p10

employment relationship. Grogan defines dismissal anchored on section 186(1) of the LRA.²⁶

In terms of section 186 (1) of the LRA, dismissal means that:

- a. An employer has terminated a contract of employment with or without notice.
- b. An employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms and then the employer offers to renew it on less favourable terms or did not renew it.
- c. An employer refuses to allow an employee to resume work after she took maternity leave in terms of any law or collective agreement governing her contract of employment.
- d. An employer who dismisses a number of employees for the same or similar reasons and then offers to re-employ one or more of them but refuses to re-employ another or;
- e. An employee terminates a contract of employment with or without notice because the employer made employment intolerable for the employee.
- f. An employee terminated a contract of employment without notice because the new employer, after a transfer of the business, lowered the conditions and terms of employment.

The provisions of section 186 (1) LRA buttress the argument that dismissal includes terminating on notice or without notice. In other words, dismissal is not confined to misconduct hearings as the Supreme Court implied. The term dismissal is not a common law principle. Grogan argues that the word

26 *ibid* p10

dismissal does not occur in the language of the common law. Hence section 12B (1) of the Labour Act that provides the right not to be unfairly dismissed is not to be interpreted from a common law position. There are two key aspects in section 12B (1) of the Labour Act, namely, the concept of fairness and lawfulness.

The Supreme Court therefore was incorrect to rule that termination on notice is outside the armpit of dismissal. The South African LRA clearly puts termination on notice in the armpit of dismissal. If one does not want to follow the above reasoning, termination on notice still will be found to be violating section 65(1) of the Constitution of Zimbabwe. The violation occurs in respect to two aspects.

First, the right to terminate on notice without compensation does not pass the test of fairness under ILO Convention (C150).²⁷ Convention 158 governs termination and the concept of fair termination is enshrined in this convention. Even though Zimbabwe has not signed and ratified the Convention, Convention 158 has great persuasive value and the courts can rely on it based on section 326 of the Constitution of Zimbabwe. In other words, the Supreme Court should have followed the decisions of the courts of other jurisdictions where the definition of fairness in termination has been pronounced. Hence the employees in the *Zuva* case terminated on notice without compensation were terminated unfairly.²⁸

The second aspect was for the Supreme Court to inquire whether terminating on notice without compensation is a fair labour practice or standard. In other words, the court ought to have proceeded to measure the termination on notice against set standards or practices on termination particularly as the countries that follow ILO jurisprudence are member states, like Zimbabwe. What is clear and apparent is that there is no standard or

27 Termination of Employment Convention, 1982

28 Michelle Olivier, Interpretation of the Constitutional provisions relating to international law, paper based on doctoral thesis '*International Law in South African Municipal Law: human rights procedure, policy and practice*'.

practice that classifies termination on notice without compensation as a fair standard.²⁹

RIGHT TO BE PAID A FAIR AND REASONABLE WAGE.

A fundamental change introduced under section 65 (1) of the new Constitution of Zimbabwe³⁰ is the enshrinement of the right of employees to be paid a fair and reasonable wage. It reads:

65 Labour rights.

- (1) *Every person has the right to fair and safe labour practices and standards and to be paid a **fair and reasonable wage.***

This provision marks a milestone in the labour law regime of Zimbabwe in that it emphasises the principle of fairness in issues of even the price of the employees' bargain. It brings Zimbabwean law in closer conformity with relevant regional and international instruments. Although the philosophical basis of the Labour Act³¹ is pluralist, with the Act providing that its "purpose is to advance social justice and democracy in the workplace,"³² the regime covering wages has been decidedly unitarist. Hitherto neither statutes nor common law had prescribed the quantum of fair wages payable to employees. This, despite perhaps one of the most rallying demands of labour in the last two decades being the demand for a Poverty Datum Line-linked living wage. This is understandable, when one considers that by 2011; nearly 93 per cent of formal sector employees were earning wages less than the Total Consumption Poverty Line (TCPL), the generally accepted measurement of poverty.³³ Thus, for most workers, a living wage remains a figment. They are mired in dire and debilitating poverty.

29 See also Munyaradzi Gwisai, *Labour and Employment Law in Zimbabwe*, Harare, UZ & Zim Labour Centre, 2006.

30 Introduced by Constitution of Zimbabwe Amendment (No. 20) Act 2013 (1/2013)

31 [Chapter 28:01].

32 Section 2A (1) of the Act.

33 ZimStat 2011 *Labour Force Survey* (2012) 53.

The conflicts over a fair living wage became particularly intense in the post-dollarisation era after March 2009. On the one hand, labour felt it deserved a dividend for the immense sacrifices it made in the preceding period of economic collapse and hyper-inflation running into billions, which virtually wiped out wages. Employers on the other hand argue for wage restraints to ensure sustainable economic recovery. Unreasonable wage increments will kill the goose that lays the golden eggs, so they argued.

This conflict spilled into the courts where differing positions emerged. One line of cases, starting from the premises of the interests of the business, took the approach that increments above the prevailing inflation rate, were grossly unreasonable and against public policy as in the *Tel-One (Pvt) Ltd v Communications & Allied Services Workers Union of Zimbabwe* decision.³⁴ The other line, started off from the premises of the workers' right to a living wage, and rejected the approach that saw such increments as unreasonable per se, as in *City of Harare v Harare Municipal Workers Union*.³⁵

The new Constitution radically changed the situation by, for the first time in Zimbabwean constitutional history, explicitly providing for the right to “a fair and reasonable wage.” In this essay we dissect the implications of this new constitutional right on the law of remuneration, in the context of international human rights and labour law and contrasting philosophical and jurisprudential worldviews.

THE LEGAL FRAMEWORK BEFORE ACT NO. 20 OF 2013

Prior to the new constitutional dispensation, the principal methods for the determination of wages were under common law and relevant labour statutes. Under the common law, the amount of wages to be paid is in terms of the agreement made by the parties under the contract of employment.³⁶ What the employer pays for is the availability of the employee's services and not the value of

34 2007 (2) ZLR 262 (H); and *Chamber of Mines v Associated Mineworkers Union of Zimbabwe* LC/H/250/2012.

35 2006 (1) ZLR 491 (H).

36 *National Railways of Zimbabwe v National Railways Contributory Fund* 1985 (1) ZLR 16 (S); *Gladstone v Thornton's Garage* 1929 TPD 116; A Rycroft and B Jordaan *A Guide to South African Labour Law* 2nd ed (1992) 67.

the product of the actual work done by the employee.³⁷ Increments are at the discretion of the employer.³⁸ Considerations of equity, fairness or reasonableness do not enter into the picture *per se*. Renowned author RH Christie puts it thus:³⁹

The starting point of the common law is that the courts will not interfere with a contract on the ground that it is unreasonable. In the Burger v Central African Railways 1903 TS 571 Innes CJ said that:

‘Our law does not recognize the right of a court to release a contracting party from the consequences of an agreement duly entered into him merely because that agreement appears to be unreasonable.’

What is paramount is what the parties themselves see as fair and reasonable as reflected in the terms of their contract of employment. The main responsibility of the courts is to enforce this contractual will of the parties and not seek to second-guess adult free persons.⁴⁰ The emphasis is on the market as the principal and most fair manner of determining a reasonable wage. Hepple B captures it well:

*The freedom of the employer and worker from the interference of the state in the labour market, the freedom of the contracting parties and the freedom of private will to determine the content of the contract.*⁴¹

37 *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344; *Belmore v Minister of Finance* 1948 (2) SA 852 (SR)

38 *Chiremba (duly authorized Chairman of Workers Committee) and Ors v RBZ* 2000 (2) ZLR 370 (S); *Chubb Union Zimbabwe (Pvt) Ltd v Chubb Union Workers Committee* S 01/01. Also: *Nare v National Foods Ltd* LRT/MT/38/02.

39 R H Christie *The Law of Contract in South Africa* 5th ed (2009) 14.

40 As put by INNES CJ in *Wells v South African Alumenite Company* 1927 AD 69 at 73: “No doubt the condition is hard and onerous; but if people sign conditions they must, in the absence of fraud, be held to them. Public policy so demands. ‘If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore, you have this paramount public policy to consider – that you are not lightly to interfere with this freedom of contract.’ (per JESSEL M.R. in *Printing and Numerical Registering Co. v Sampson* [1875]LR 19 Eq. 462 at 465).” See also: R Epstein, “In defence of the contract at will” 51 *Chi. L. Rev.* (1984) 947; A Rycroft and B Jordaan *op cite* 10 – 17.

41 B Hepple (ed) *The making of labour law in Europe* (1986).

The legal philosophy underpinning common law is clearly utilitarian and reflected in the theory of labour relations of unitarism. The individual parties, meeting in the free market, are the ones who know what is best and fair for themselves. Allowing such individual parties maximum contractual freedom will derive not only maximum benefit for the parties but society at large.⁴² Unitarism is a theory that places a premium on the unity of interests and goals between labour and capital in the employment relationship, but within a framework in which capital enjoys undoubted superior status.⁴³ Conflict is unnatural and dysfunctional.

This free market-based conception underlies the decision in *Tel-One (Pvt) Ltd v Communications & Allied Services Workers Union of Zimbabwe, supra*. In such case, the arbitrator had awarded a 266% wage increment across the board. The employer made an application to the High Court to set aside the award on the ground that it was in violation of Zimbabwe's public policy.⁴⁴ It argued that it was grossly unreasonable as it would result in over 130% of its overall income going to wages. In setting aside, the award, HUNGWE J, at 266A-C, ruled:

*There is no doubt in my mind that the spirit of collective bargaining between employer and employee is to arrive by consensus or, if that fails, by arbitration, at what a **fair** wage is. The idea is to preserve the employer-employee relationship. The employee makes his labour available for a **fair** fee. The employer engages the employee on acceptable terms and conditions. The employer employs his resources to ensure that the goose that lays the eggs for their mutual benefit continues to do so. Society expects these mutually beneficial outcomes. The economy thrives and so does the community generally and its members in particular. An award that plunges the apple-cart over the cliff in my view could not be said to be in the best interest of the general good of Zimbabwe...*

The court proceeded to place at the pinnacle of considerations to be made when determining whether a wage increment was fair and reasonable, the ability of the employer to pay:

In all work situations salaries and wages are limited by an employer's ability to pay. The courts and indeed all tribunals delegated with decisions of a financial nature

42 J S Mill, "On Liberty" in *John Stuart Mill: A Selection of His Works* J M Robson (ed) (1966) 13 - 19.

43 M Finnemore *Introduction to Labour Relations in South Africa* 10th (ed) (2009).

44 Under art 34 (2) (b) (ii) of the Arbitration Act [Chapter 7:15].

would be failing in their duty if they were to will-nilly give awards whose effect would be to drive corporations into insolvency thereby destroying the economic fabric of the nation. Such awards would defeat the very purpose they are meant to serve. As such they are liable to be set aside as being in conflict with the public policy of Zimbabwe...

The Labour Court per Matanda-Moyo J (as then she was) went further in *Chamber of Mines v Associated Mineworkers Union of Zimbabwe*.⁴⁵ In that case the trade union had made a demand of 55% wage increment whilst the employer offered 5%, roughly the prevailing inflation rate. The Labour Court set aside the 20% increment by the arbitrator, as being outrageous. The court observed:

“Thus, it is high time the labour advocacy institutions migrate from the hang-over of the hyper-inflationary environment to the current multi-currency stable environment. This will ensure sustainability of the workers’ welfare and also ensure economic development... The inflation level obtaining in the country is at about 5% which should provide an essential guide for salary negotiations...

*Whilst workers should be remunerated **fairly**, I do not believe it is reasonable to do so at the expense of the sustainability of the companies which pay them...I am satisfied that the Chamber has justified the setting aside of the arbitral award. Whilst it is necessary to raise the workers’ salaries, the raise should be in tandem with the inflationary levels, production levels, and other costs. I am satisfied that a blanket raise by 20% is outrageous. A 5 % raise meets the justice of the case.”*

In neither of the above cases did the court seek to balance or place in context the economic factor of the employer’s business interest with the other factors that are accepted under appropriate international labour standards.⁴⁶ These factors include economic – social factors such as productivity, standards of living in the country and

45 LC/H/ 250/2012.

46 Zimbabwe has ratified important ILO conventions dealing with wages including: ILO 026 Convention: Minimum Wage Fixing Machinery (Manufacturing, Commerce, Domestic Sectors) (1928); ILO 099 Convention: Minimum Wage Fixing Machinery (Agriculture) (1951). There are also other relevant ILO instruments, which Zimbabwe has not ratified such as: ILO 131 Convention: Minimum Wage-Fixing (1970); ILO 135 Recommendation: Minimum Wage Fixing Recommendation (1970)

the average wages in the country as well as the needs of the worker and their family and the specified purposes of the Labour Act.

Given that Zimbabwe has ratified some of the important ILO instruments on wage-fixing, these should have been of high persuasive authority to the courts in determining what a grossly unreasonable wage increment was.⁴⁷ It would have required a contextual and balanced approach, weighing the factors based on the interests of the business such as ability to pay and profitability and those in favour of the needs of the worker and their family such as the bread basket and PDL. In doing so the courts would have been guided by the fact that the specified objective of the Labour Act is to advance social justice in the workplace and that Zimbabwe has ratified regional and international instruments that provide for the employee's right to "just and favourable remuneration."⁴⁸ In any case the courts should have been bound by the principle that the grounds on which an arbitral award can be set aside for contravention of public policy in particular unreasonableness, are of a very limited nature.⁴⁹ The courts were clearly guided by a unitarist approach to labour relations yet one which is inconsistent with the specified objectives of the Act. This was obviously in tandem with the dominant ideological thrust during the Government of National Unity, which tended to emphasize free-market values.

This was aptly captured in the 2010 Budget Statement of the then Minister of Finance, *T Biti*, wherein he stated:⁵⁰

47 The Long Title of the Labour Act stipulates that one of the objectives of the Act is "to give effect to the international obligations of the Republic of Zimbabwe as a member state of the international Labour Organisation..." The Labour Court has in other instances, correctly in our view, used relevant ILO conventions to help interpret provisions of the Labour Act as was done in: *Mavisa v Clan Transport* LC/H/199/2009 applying ILO 135 Convention: Workers Representatives Convention (1971); ILO 087 Convention: Freedom of Association and Protection of the Right to Organise (1948) to help interpret the provisions of s 14B(C) and s 29 (4a) of the Act; and *Chamwaita v Charhons (Pvt) Ltd* LC/H/215/2009 applying provisions of the Termination of Employment Convention, 1982 (C 158). Generally, on the appropriateness of using principles under relevant international treaties – see section 15B of the Interpretation Act [Chapter 1:01] and *Kachingwe, Chibebe and ZLHR v Minister of Home Affairs and Commissioner of Police* 2005 (2) ZLR 12 (S) and *S v Moyo & Ors* 2008 (2) ZLR 338 (H) at 341E-F

48 Article 23 (3) Universal Declaration of Rights; art. 14 (b) Charter of Fundamental Social Rights in SADC.

49 Discussed in detail, *infra* 7.

50 Cited in: 25 *Labour Relations Information Service* 3 (June – August 2012) 2. The Finance Minister

The review of the role of arbitrators in awarding wage adjustments that bear no relationship to the competitiveness of most industries and indeed the entire economy, is unavoidable. Failure to nip in the bud unsustainable wage awards will be swiftly punished in the global village as our products price themselves out of the market, both locally and in the export markets.

REGULATION OF WAGES UNDER THE LABOUR ACT AND THE PUBLIC SERVICE ACT

The regulation of wages under statutes had not gone too far beyond the common law. In the public sector wages and related benefits were set by the Public Service Commission with the concurrence of the minister responsible for finance.⁵¹ The Commission was required to consult the recognized public sector associations and organizations before setting the terms and conditions including remuneration, but failure to consult or to reach agreement with the associations did not invalidate any wage regulations so made.⁵² The Public Service Act does not provide for the right of employees to “a fair and reasonable wage” but only provides public sector employees to an enforceable right to remuneration.⁵³ The only major modification to common law is the requirement that salaries be fixed to by reference to, “academic, professional or technical qualifications or the attributes necessary for the efficient and effective execution of the tasks attached to the post.”⁵⁴

The above provision is important in so far as it limits the arbitrary discretion of the employer to differentiate between wages of employees in different grades as would otherwise be allowed under the common law. Nonetheless, it does not advance the employee’s cause for a fair and reasonable wage. The employment relationship in the private sector is generally covered by the provisions of the Labour Act [*Chapter*

repeated the same sentiments in the November 2011 Budget Statement stating: “Stakeholder submissions by industry as well as the labour movement acknowledge rising incidences of wage demands divorced from productivity by workers unions and arbitration awards that fail to take into account affordability at company levels.”

51 Section 19 (1) as read with s 8 (1) of the Public Service Act [*Chapter 16:01*].

52 See section 20 (1) and (2) of the Public Service Act as read with s 73 (2) Constitution of Zimbabwe 1979 (SI 1979/1600 of the United Kingdom) .

53 Section 22, Public Service Act.

⁵⁴ Section 20 (2) Public Service Regulation 2000 (SI 1/2000)

28:01]. The situation was only marginally different from that under common law. The Act does not specifically provide for a right to “a fair and reasonable wage,” whether as a fundamental right, a specified fair labour practice or under its mandatory minimum wages regime.

Under Part 2, the Act provides for various fundamental rights of employees, including the right to fair labour standards. Section 6 (1) creates a fundamental duty of the employer to pay the prescribed remuneration, but the section does not expressly provide for a fair labour standard of fair and reasonable wages. It merely compels the employer not to pay a wage which is lower than that specified by law or agreement:

“No employer shall pay any employee a wage which is lower than that which is fair labour standard specified for such employee by law or by agreement.”

Mandatory minimum wages may be set in terms of sections 17 and 20 of the Act. Under section 17 (3) as read with section 17 (1) the Minister of Labour may, after consultation with the Wages Advisory Council, make regulations providing for, *inter alia*:the rights of employees, including minimum wages, benefits, social security, retirement, and superannuation benefits and other benefits of employment;

Section 20 further provides, *inter alia*, that:

20(1) The Minister may, by statutory instrument –

- (a) In respect of any class of employees in any undertaking or industry –*
 - (i) specify the minimum wage and benefits in respect of such grade of employees;*
 - (ii) require employers to grant or negotiate increments on annual income of such minimum amount or percentage as he may specify;**and prohibit the payment of less than such specified minimum wage and benefits or increments to such class of employees;*
- (b) ...*
- (c) ...*

- (d) *give such other directions or make such other provision as he may deem necessary or desirable to ensure the payment of a minimum wage or benefits to any class of employees;*
- (e) *provide for exemptions from paragraphs (a), (b), (c) and (d)."*

Where a minimum wage notice is issued in terms of these provisions every contract of employment or collective bargaining agreement has to be modified or adapted to the extent necessary to bring it into conformity with the minimum wages regulations.⁵⁵ However, it is again noted that there are no specific minimum standards by which the Minister sets the minimum wages, including that the minimum wages be “fair and reasonable wage” or guarantee the employees “a decent standard of living.”

Another platform for regulation of wages under the Labour Act relates to statutory collective bargaining agreements made in terms of Part VIII and Part V of the Act. These may be industry-wide agreements made under a National Employment Council or a workplace agreement made under a Works Council. However, as with the ministerial wage regulations, there are also no prescribed minimum standards by which the agreements must adhere.⁵⁶ Thus the parties are free to negotiate what they deem fit as a fair or reasonable wage. The parties though, do not have absolute freedom. Firstly, reflecting the state corporatist origins of the Act, the Minister of Labour has residual power to direct the renegotiation of an agreement which the Minister feels has become:

- (a) *inconsistent with this Act or any other enactment or,*
- (b) *unreasonable or unfair, having regard to the respective rights of the parties.*⁵⁷

The Act does not define the phrase “unreasonable or unfair.” The discretion is left with the Minister. It may be argued though that the Minister may generally be

55 Section 17 (3) of the Act.

56 See the bargaining agenda set in s 74 (3) of the Act which includes: “...rates of remuneration and minimum wages for different grades and types of occupation;”

57 Section 81 (1)

guided by the objects of the Act specified in section 2A (1). The later though, can only take the argument so far, because neither s 2A (1) nor the Act in general provides for an explicit fair labour standard of a right to a fair and reasonable wage.

Secondly, a party aggrieved by an award made under compulsory arbitration can appeal to the Labour Court on a question of law,⁵⁸ or if made through voluntary arbitration, make an application to the High Court to set it aside as being, *inter alia*, in contravention of the public policy of Zimbabwe.⁵⁹ It has been held that an appropriate ground on which an award may be held to be in contravention of the public policy of Zimbabwe, is where the award is deemed grossly unreasonable.⁶⁰ But the courts have generally held that the ground of “unreasonableness” is of very limited use in such applications or appeals and the party who seeks to establish this bears “a formidable onus”⁶¹ to show that the award made is “so outrageous in defiance of common sense and logic.”⁶² This is why the bar set in *Chamber of Mines v Associated Mineworkers Union of Zimbabwe*, *supra*, of using only the inflation rate as the basis of judging reasonability or otherwise of an award without regard to the specified objectives of the Labour Act and considering all other relevant factors such as the needs of the worker, was too low and inconsistent with case authority.

From the above it becomes clear that the Labour Act does not compel the employer to pay “a fair and reasonable wage,” let alone a living wage. At most s 2A(1), may be used as an interpretation tool to determine what is a fair and reasonable wage in relation to minimum wages notices decreed by the Minister, or directions by the Minister for renegotiations of collective bargaining agreements or in relation to wage awards made by arbitrators.⁶³ However, the absence of an explicit inclusion in the Act of the employees’ right to a fair and reasonable wage whether as a

58 Section 98 (10). See *Chamber of Mines v Associated Mineworkers Union of Zimbabwe*, *supra*

59 Article 34 (2) (b) (ii), Arbitration Act [Chapter 7:15]. *Tel-One (Pvt) Ltd v Communications & Allied Services Workers Union of Zimbabwe* 2007 (2) ZLR 262 (H)

60 *Tel-One (Pvt) Ltd v Communications & Allied Services Workers Union of Zimbabwe* *ibid*; and *Chamber of Mines v Associated Mineworkers Union of Zimbabwe*, *op cite*.

61 *Cargo Carriers (Pvt) Ltd v Zambezi & Ors* 1996 (1) ZLR 613 (S)

62 *Chinyange v Jagers Wholesalers* SC 24/03; *Beazley NO v Kabel & Anor* SC/22/03; *ZESA v Maposa* 1999 (2) ZLR 452 (S)

63 By reliance on s 2A (2) of the Act providing that the Act “... shall be construed in such manner as best ensures the attainment of its purpose referred to in subsection (1).”

fundamental right of employees or as a fair labour standard, makes the potential use of s 2A (1) as a basis for such right tenuous and unlikely. This is moreso in view of the already declared skepticism of the Supreme Court on the generalized use of this section.⁶⁴

RIGHT TO FAIR AND REASONABLE WAGE AND APPROPRIATE INTERPRETATION MODEL

The preceding survey of the legal framework prevailing prior to Act No. 20/2013 shows that Zimbabwean law did not provide for a fair and reasonable wage or a living wage. It shows that fairness is just a figment when it comes to wages. Not surprisingly the demand for the right to a fair and reasonable wage or a living wage was one of the primary demands of workers and trade unions in relation not only to labour law reform but constitutional reform as well.

This was aptly captured in the National Constitution Assembly Draft Constitution.⁶⁵ This demand is manifest in s 65 (1) of the new Constitution. Although this section is clearly inspired by s 28 (1) of the NCA Draft Constitution but not going as far as the later in providing for a living wage consistent with the poverty datum line, the enshrinement of the right to a fair and reasonable is still of profound significance. It has provided what has so far been the critical missing link in the legal framework, and which allowed the common law and unitarist based approach to reign with impunity.

For the first time in Zimbabwean labour history, statute law now provides for the regulation of wages based on normative values of fairness and reasonableness, something which is alien to common law and was omitted in the statutory framework. This is even done at the highest possible level, namely as an enshrined fundamental right under the Declaration of Rights. What had been missing as a

64 In *United Bottlers v Kaduya* 2006 (2) ZLR 150 (S) at 155B-C, *CHIDYAUSIKU CJ* observed in relation to s 2A –

“The section is not a wholesale amendment of the common law. The common law can only be ousted by an explicit provision of the Labour Act.”

65 Section 28 (1), NCA Draft Constitution (2001), s 28 (1) providing: “Every worker has the right to fair and safe labour practices and standards and to be paid at least a living wage consistent with the poverty datum line.” See generally, M Gwisai *The Zimbabwe COPAC Draft Constitution and what it means for Working People and Democracy* (2012) 54

directly specified fair labour standard in the purposes of the Labour Act under s 2A (1) is now provided for, but now as a constitutional right though the translation of such into the practical equivalent remains illusionary.

THE TEST FOR “A FAIR AND REASONABLE WAGE” UNDER INTERNATIONAL LAW

Although the Constitution does not directly define the phrase “a fair and reasonable wage,” it provides clear guidelines to be used in interpreting the phrase. In the first instance in interpreting the Declaration of Rights, one is required to give full effect to rights provided in the Constitution and to promote the values that underlie a democratic society based on inter alia justice and human dignity.⁶⁶ This is strengthened by s 46 (2) of the Constitution which requires that when any court or tribunal is interpreting an enactment and when developing the common law, it must promote and be guided by the spirit and objectives of the Declaration of Rights.⁶⁷

Critically further, the courts and tribunals are required to “take into account international law and all treaties and conventions to which Zimbabwe is a party.”⁶⁸ Of further importance are the provisions of s 327 (6) of the Constitution. This provides:

When interpreting legislation, every court and tribunal must adopt any reasonable interpretation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement.

The phrase “a fair and reasonable wage” is in fact derived from international law instruments, most of which Zimbabwe has ratified. These must provide guidance on how it is interpreted by virtue of section 46 and section 327 (6) of the Constitution.

66 Section 46 (1) (a) (b) of the Constitution

67 Which is also reinforced in s 176 of the Constitution

68 Section 46 (1) (c) of the Constitution

Firstly art. 14 (b) of the Charter of Fundamental Social Rights in SADC 2003, provides:

- a. *Workers are (to be) provided with fair opportunities to receive wages, which provide for a decent standard of living; ...*

Zimbabwe is also party to the Universal Declaration of Human Rights 1948, whose art.23 (3) provides:

Everyone who works has the right to just and favourable remuneration ensuring for himself and herself existence worthy of human dignity...

Zimbabwe has also ratified the International Covenant of Economic, Social and Cultural Rights 1966 whose article 11 (1) provides:

Everyone has a right to a standard of living adequate for the health and well-being of himself or herself and his or her family including food, clothing, housing, medical care and necessary social services...

The International Labour Organisation has several instruments dealing with minimum-wage fixing.⁶⁹ Perhaps the most relevant are ILO 131 Convention: Minimum Wage-Fixing (1970) and ILO 135 Recommendation: Minimum Wage-Fixing (1970). In terms of article 1 of ILO R135, one of the key factors to be considered in wage fixing is the need to “... to overcome poverty and to ensure the satisfaction of the needs of all workers and their families...”

In terms of the specific elements to be considered when determining an appropriate minimum wage that realizes the above purposes, article 3 of ILO C131 states these as, subject to national practice and conditions:⁷⁰

69 See for instance: ILO 026 Convention: Minimum Wage-Fixing Machinery; ILO 030 Recommendation: Minimum Wage - Fixing Machinery; ILO 099 Convention: Minimum Wage-Fixing Machinery (Agriculture) (1951)

70 ZimStat, “Appendix: Summary of International Labour Organisation (ILO) position on Poverty Datum Line in relation to wages and salaries” (2013)

- (a) *The needs of workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits, and the relative living standards of other social groups;*
- (b) *Economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.*

Therefore, under ILO instruments the deciding factor in the fixing of minimum wages is the “human factor”, that is, the needs of the worker and their family to live a poverty-free life, but this is done within prevailing “national practice and conditions” including economic and social considerations, which in reality makes the right to fair wages a pipe dream.

The influence on the above ILO conventions is a pluralist conception, at the centre of which is poverty reduction and collective bargaining as key factors. The instruments provide for two broad considerations to be made, encompassing both worker friendly and employer friendly factors, but with the specified fundamental purpose being poverty reduction and ensuring the satisfaction of the needs of the worker and their family. This frame-work allows flexibility in the determination of what is fair and reasonable wage, taking into account the concrete realities in each given country, with effective collective bargaining providing the yard-stick of what is appropriate national practice. The underlying theoretical basis is pluralism, especially the adversarial version. This has been defined as a theory of labour relations in which employers accept the inevitability and need for collective regulation of the employment relationship, in particular through collective bargaining.⁷¹

Following on the above international instruments, the concept of a just or fair remuneration has had major influence in recent constitutional reform on the continent and globally including, Kenya,⁷² Malawi⁷³ and Mozambique.⁷⁴ Perhaps

71 M Finnemore *op cite* 144-145

72 The Constitution of Kenya, 2010 provides in s 41 (2) (a):
“(1) Every person has the right to fair labour practices.
(2) Every worker has the right – (a) to fair remuneration....”

73 See s 31 (1), Constitution of Malawi, providing: “31 (1) Every person shall have the right to fair and

the fullest expression is to be found in article 91 of the Constitution of Venezuela, which provides:

Every worker has the right to a salary sufficient to enable him or her to live with dignity and cover basic material, social and intellectual needs for himself or herself and his or her family. The payment for equal salary for equal work is guaranteed, and the share of the profits of a business enterprise to which workers are entitled shall be determined... The State guarantees workers in both the public and private sector a vital minimum salary which shall be adjusted each year, taking as one of the references the cost of a basic market.

The Australian case of *Ex Parte H.V. McKay* 1907 provides perhaps the most elaborate statement of the test for a “fair and reasonable wage.” In that case the court had to determine what was meant by the phrase “fair and reasonable wages” in an enactment which provided duty exemption for Australian manufacturers paying such wages. The court held:

The provision for fair and reasonable remuneration is obviously designed for the benefit of the employees in the industry; and it must be meant to secure to them something which they cannot get by the ordinary system of individual bargaining with employers. The standard of ‘fair and reasonable’ must, therefore, be something else; and I cannot think of any other standard appropriate than the normal needs of the average employee, regarded as a human being living in a civilized community.

The court went on to state that whilst there is need to balance the different factors, the “first and dominant factor” in ascertaining a “fair and reasonable” wage for an unskilled employee are the “normal needs of the average employee, regarded as a human being living in a civilized community.” And that a wage cannot be regarded as fair and reasonable, “if it does not carry a wage sufficient to insure the workman food,

74 safe labour practices and to fair remuneration.”
Article 89 (1) of the Constitution of Mozambique provides: “Labour shall be protected and dignified... the State shall promote the just distribution of the proceeds of labour.”

shelter, clothing, frugal comfort, provision for evil days, etc. as well as reward for the special skill of an artisan if he is one.” This position does not apply in this country.

The Court stated that the standard is an objective one, which is not dependent on the profitability of the business, but rather the needs of the employee:

... the remuneration of the employee is not made to depend on the profits of the employer. If the profits are nil, the fair and reasonable remuneration must be paid; and if the profits are 100 per cent, it must be paid. There is far more ground for the view that, under this section, the fair and reasonable remuneration has to be paid before profits are ascertained – that it stands on the same level as the cost of the raw material of the manufacture.

The concept of “a fair and reasonable wage” therefore encapsulates the concept of the bread-basket or a living wage that ensures a dignified or decent standard of living, as the starting and primary point. The most scientific method of measuring standards of living is the Poverty Datum Line (PDL). The PDL is a general measurement of standards of living and poverty. It represents “the cost of a given standard of living that must be attained if a person is deemed not to be poor.”⁷⁵

To measure standards of living, two measures are generally used, namely the Food Poverty Line (FPL) and the Total Consumption Poverty Line (TCPL). The FPL “represents the minimum consumption expenditure necessary to ensure that each individual can, (if all expenditures were devoted to food), consume a minimum food basket representing 2 100 kilo calories.” An individual whose total consumption expenditure does not exceed the food poverty line is deemed to be very poor.

On the other hand, the TCPL is derived “by computing the non-food consumption expenditure of poor households whose consumption expenditure is just equal to the FPL. This amount is added to the FPL.”⁷⁶ An individual whose total consumption expenditure does not exceed the total consumption poverty line is deemed to be poor.

75 ZimStat (2012) 53

76 *ibid.*

Therefore, the human factor, the need to prevent poverty is the key determinant of a ‘fair and reasonable wage.’ This generally would be PDL-Linked. This is the ‘first and dominant factor.’ Employers who seek to pay less than this wage, therefore have the onus to establish compelling reasons why this should be so, by for instance reference to the other factors such as economic and financial. But the burden is onerous and heavy because of the primacy of the human factor. Where incapacity is raised, there must be full financial disclosure by the employer. In **Ex Parte H.V. McKay**, *supra*, it was held that there is no general obligation on an employer to give full financial disclosure on its finances, but only if the employer is paying a fair and reasonable wage, otherwise it would have such duty.

The above conception of a “fair wage” is also aptly captured in the Marxist theory of labour relations as expressed by F. Engels. According to him a fair wage is one consistent with what he terms the Law of Wages, namely:⁷⁷

Now what does political economy call a fair day’s wages and a fair day’s work? Simply the rate of wages and the length and intensity of a day’s work which are determined by competition of employer and employed in the open market. And what are they, when thus determined? A fair day’s wages, under normal conditions, is the sum required to procure to the labourer the means of existence necessary, according to the standard of life in his station and country, to keep him in working order and to propagate his race. The actual rate of wages, with the fluctuations of trade, may be sometimes below this rate; but, under fair conditions that rate ought to be the average of all oscillations.

IMPLICATIONS OF INTERNATIONAL LAW ON ZIMBABWEAN LAW

The thrust of the above on the position in Zimbabwean law is profound. By virtue of sections 46 and 327 (6) of the Constitution, the phrase “fair and reasonable wage” in s 65 (1) must therefore be interpreted consistent with the above international law

77 F Engels, “A Fair Day’s Wages for a Fair Day’s Work,” *The Labour Standard* 7 May 1881 in *Inqaba ya Basebenzi* 2 (Aug-Oct 1983) 7

instruments which Zimbabwe has ratified and which give primacy to the human factor.

In other words, by enshrinement of the right to a fair and reasonable wage in the Declaration of Rights there is a nod towards minimum wages being at least those that provide adequate food, clothing, shelter, healthcare, education of children, frugal comfort and social security taking into account the general standard of living and cost of living in the country by reference to the PDL.

The above means the approach followed in the *Chamber of Mines* case, *supra*, is decidedly no longer good or binding authority under the new constitutional dispensation. Such decision, which was based on the sole consideration of the inflation rate and interests of the business, cannot clearly stand in view of s 65 (1) of the new Constitution. In terms of the later, considerations of fairness require balancing both the business factors and the human factor but with first priority being given to the human factor.

ONUS AND EVIDENTIARY BURDEN

The above interpretation means that s 65 (1) of the Constitution has now set a general standard of remuneration by which all employees should be paid, but like all general rules, exceptions are applicable in appropriate circumstances. The onus though, lying on the party seeking to resile from the general rule to show compelling reasons why it should not.

This means in effect that the Constitution shifts the onus to the party who says it cannot comply with such standard to provide adequate reasons why it cannot. This means that where an employer seeks to pay less than a PDL-linked wage, the employer has the onus to prove compelling reasons why this should be so. If the employer pleads financial incapacity to pay fair wages, then it follows that the onus shifts to the employer to establish this and generally the burden is high because this is a justiciable right provided in the Declaration of Rights.

The employer has a duty of full disclosure. This may pertain to areas such as the overall pay-roll, in particular the distribution of salaries between the highest paid categories and the lowest paid ones, as was held required in the case of *City of Harare v Harare Municipal Workers Union*.⁷⁸ Additional details of this duty are provided in Sections 75 and 76 of the Labour Act. Section 75 establishes a duty to negotiate in good faith whereby all parties to the negotiation of a collective bargaining agreement are required to disclose “all information relevant to the negotiation including information contained in records, papers, books and other documents.” Section 76 establishes a duty of full financial disclosure where financial incapacity is alleged. It reads:

When any party to the negotiation of a collective bargaining agreement alleges financial incapacity as a ground for his inability to agree to any terms or conditions, or to any alteration of any terms or conditions thereof, it shall be the duty of such party to make full disclosure of his financial position, duly supported by all relevant accounting papers and documents to the other party.

In terms of the above, especially where there are allegations of astronomical salaries and benefits being paid to top management, the employers would have a duty to disclose details such as housing allowances; education allowances for managers’ dependents; vehicle and fuel benefits; club subscriptions and so forth. Similarly, is the duty to disclose details of capital investment plans in the last few years and projections in the near future, details the profits or otherwise made by the company; the dividend attributed to the owners or share-holders and so forth. This duty of full financial disclosure is in already widely practiced in industry in relation to applications for exemptions, including with appropriate measures to protect confidentiality.

Alternatively, or additionally, the employer may need to provide mitigatory measures, such as an increment for a shorter duration; subsequent cost of living adjustments; special bonuses on increased production or employee share ownership or profit-sharing schemes.

78 2006 (1) ZLR 491 (H)

Failure to fulfill the above means the employer would have failed to discharge the onus on it, and therefore must pay the PDL-linked living wage as was done in *City of Harare v Harare Municipal Workers Union*, *supra*, where CHITAKUNYE J upheld an award of 120% by an arbitrator and held:

The arbitrator carefully considered the interests of both parties as portrayed by the parties before him. The applicant's argument of inability to pay was well considered... The substantive effect of the award was simply to awaken the applicant to the realities of today's economy... Applicants argued that respondents should not concern themselves with what is being awarded to other employees or officers of the applicant. But surely, the respondents are entitled to point out that those categories of employees or officials are getting astronomical salaries which may in fact be eating more into the applicant's revenue than the paltry salaries and allowances the lowly paid workers are getting. The applicant appeared not to be comfortable to deal with this and appeared content to brush it aside. But surely if you have an entity that pays astronomical salaries to its top-heavy management and officers, but that same entity is reluctant to pay its lowly paid workers a living wage, can such an entity sincerely cry bankruptcy if ordered to pay its lowly graded workers a meaningful salary? There was simply nothing to fault the arbitrator in arriving at the decision he gave on what was placed before him." At 494D-F.

DILEMMA CONCERNING DRAFT LABOUR OFFICER'S RULINGS IN TERMS OF SECTION 93(5) OF THE LABOUR ACT [CHAPTER 28:01] AND AMBIT OF THE LABOUR COURT'S JURISDICTION AND REMEDY IN DEALING WITH A LABOUR OFFICER'S APPLICATION FOR CONFIRMATION OF A DRAFT RULING

There is confusion regarding the legal import and ambit of section 93(5) of the Labour Act particularly whether or not such legal provisions apply to a designated agent appointed in terms of section 63 of the Labour Act. A recent Supreme Court

judgment in **Drum City (2018)** clarified the position section 93(5) of the Labour Act that an employee in whose favour a draft ruling is made by a Labour Officer has a legal right to be joined as a party to an application before the Labour Court for confirmation of that draft ruling by a Labour Officer because he/she has a vested legal interest in the matter. The concerned judgment also bemoaned the absence of a right of appeal by an aggrieved party against a Labour Officer's draft as there is no such appeal remedy in terms of section 93(5) of the Labour Act or anywhere within the four corners of the Labour Act. It is submitted that what is only provided for is a procedure for submitting a Labour Officer's draft ruling in favour of an employee to the Labour Court for confirmation meaning that if a Labour Officer's ruling is not in favour of an employee, legally it cannot be submitted to the Labour Court for any confirmation simply because there is nothing for the Labour Court to confirm. This is a glaring legal anomaly and unfair situation because an employee against whom a draft ruling is made by a Labour Officer reaches a legal dead end since he/she has no appeal remedy to challenge such an adverse draft ruling. The Supreme Court Drum City judgment is legally correct that an employee against whom a draft Labour Officer's ruling is made does not have any right of appeal against such a draft ruling but the view that there is also no review remedy in respect of a Labour Officer's draft ruling made against an employee must be understood as obiter statements which may not be legally binding as the review remedy appears to be still available . There is nothing in section 93(5) of the Labour Act or any other provisions of the Labour Act which precludes an employee against whom a draft ruling is made by a Labour Officer to utilise and invoke a review remedy to the Labour Court in terms of **section 89(1)(d1)** of the Labour Act as read with **section 92EE** of the **Labour Act**. **Section 89(1)(d1) of the Labour Act** avails the Labour Court wide ranging and express review powers for all labour matters in Zimbabwe. There is no legal provision anywhere in the Labour Act which empower a designated agent to make any draft ruling and submit it to the Labour Court for confirmation though **section 63(3a)** of the **Labour Act** ousts the jurisdiction of a Labour Officer where a designated agent is empowered to deal with a dispute. Also the very same section 63 of the Labour Act endows a designated agent with same powers as a Labour Officer in respect of any dispute a designated agent is empowered to determine but unfortunately the legislature did not amend section 63 of the Labour Act to clothe a designated agent with any legal power to make a draft ruling and submit it to the Labour Court for

confirmation. The same Drum City judgment also assisted in making clear that an interested and affected employee is legally allowed to apply for a joinder to a Labour Officer's application for confirmation of a Labour Officer's draft ruling by the Labour Court pursuant to section 93(5) of the Labour Act because such an employee has a real, direct and substantial interest in the matter. This is consistent with the concept of fairness, the right to be heard, equal benefit and protection of the law entrenched in terms of section 56 of the Constitution and access to justice protected in terms of section 69 of the Constitution of Zimbabwe.

In the **Isoquant t/a Zimoco v Darikwa case (2018)**, the **Constitutional Court** ruled *ex tempore* that a designated agent is not a Labour Officer and hence the former cannot make a draft ruling in terms of section 93(5) of the Labour Act but the full judgment with reasons is yet to be delivered by the same court. There is urgent need for the legislature to amend the Labour Act and give legal clarity to the legal enforcement mechanisms for a decision or determination by a Labour Officer since it is excluded from the purview of section 93(5) of the Labour Act. There is no specific legal provision either in section 63 of the Labour Act or any other part of the Labour Act providing for the legal enforcement of a decision or determination by a Designated Agent. A legion of labour disputes decided upon by Designated Agents purporting to make "draft rulings" in terms of section 93(5) of the Labour Act and submitting same to the Labour Court purportedly for confirmation are destined to go up in smoke by becoming legally hollow based on the overall legal effect and binding nature Constitutional Court to the effect that section 93(5) of the Labour Act does not empower a Designated Agent to make a draft ruling .

Another teething unresolved legal question is whether the Labour Court can vary, alter or substitute a Labour Officer's draft ruling pursuant to an application for confirmation of the concerned Labour Officer's draft ruling. It is respectfully submitted that in terms of its broad powers in terms of section 93(5) of the Labour Act, the Labour Court has jurisdiction to vary, alter or substitute a draft ruling submitted for confirmation in terms of section 93(5) of the Labour Act. However, in the absence of definitive court judgment by the Supreme Court as the highest civil appellate court, there is legal uncertainty on whether the Labour Court has powers to vary, alter or substitute a draft ruling in an application for confirmation of a

Labour Officer's draft ruling in terms of section 93(5) of the Labour Act. This legal question remains open awaiting a conclusive Supreme Court judgment relating to the specific subject matter.

In *Air Zimbabwe (Pvt) Ltd v J.V Mateko & Others SC 180/20* the Supreme Court judgment appeal which was basically an appeal against confirmatory proceedings conducted by the Labour Court in terms of s 93(5) of the Labour Act. The respondents were employed by Air Zimbabwe (Private) Limited and following the decision in *Nyamande & Anor v Zuva Petroleum (Pvt) Ltd*⁷⁹ the Airline terminated the employment contracts of the respondents on three months' notice, pursuant to the appellant's alleged common law right to terminate employment on notice.

The respondents collectively lodged a complaint of unfair dismissal with the Labour Officer and argued that the termination of their employment contracts had been carried out contrary to the provisions of s 12(4) of the Labour Act, [Chapter 28:01]. The Airline opposed the claims on three bases.

1. That some of the respondents cited in the proceedings were not party to the proceedings as they had been re-engaged and one of them was deceased.
2. That the amendment to the Labour Act that sought to impose retrospective application of s 12(4)(b) of the Act was unconstitutional.
3. That if the tribunal was inclined to retrospectively apply the section, then the matter must be referred to the Constitutional Court.

The Labour officer found that the respondents had been unfairly dismissed and that the termination was therefore null and void. Pursuant to that draft ruling, the labour officer filed an application with the Labour Court for the confirmation of that ruling. The appellant opposed the application before the Labour Court on several grounds.

1. That the labour officer had erred in failing to refer the matter to the Constitutional Court.

⁷⁹ 2015(2) ZLR 186(5)

2. That the ruling related, in part, to employees who were not party to the proceedings.
3. That the labour officer had granted a declarator in spite of the fact that she had no power to do so.
4. That the order that the appellant complies with s 12(C)(2) of the Act was improper because that section was not applicable to the matter before her.

The Labour Court held that the first part of the operative portion of the draft ruling was a declarator in respect of which the labour officer and the Labour Court itself had no jurisdiction to grant. The court further determined that the labour officer ought to have removed the names of the employees who had been improperly joined to the proceedings. The court also held that the order that the appellant pay the minimum retrenchment package to the employees was misdirection because once the labour officer found that the termination of the employment was unlawful, she should have granted an order of reinstatement.

The court was also of the view that in light of s 93(5b) of the Act (which provides that the Labour Court may grant the application with or without amendments) it had the power to amend the ruling so that the final ruling would be legally sound. The court also determined that although the labour officer had not dealt with the request for the referral of the matter to the Constitutional Court, it was clear that such a referral could only be made by a court and not a labour tribunal. Further that the Labour Act, as amended, was valid notwithstanding that it imposed financial obligations on employees retrospectively.

The gravamen of the appeal was that the court *a quo* was wrong in substituting the ruling of the labour officer with its own determination and that in doing so the court went beyond merely amending the ruling. The issue that consequently arose for determination before the Supreme Court was whether the court *a quo* acted within the bounds of its powers when it amended the labour officer's draft ruling in the manner it did.

The court ruled out that what the court *a quo* did was to confirm that the termination of employment was indeed unlawful. There was no substitution of the

order of the labour officer but rather a correction and addition to make the order acceptable in terms of the law. At the end of the day therefore the order granted by the court *a quo* was one within the contemplation of the labour officer, the amendment having been made merely to ensure that the confirmed order accorded with the dictates of the law. The changes effected by the Labour Court were indeed amendments and could not, by any stretch of imagination, be termed substitution. As a result the appeal was dismissed for lack of merit.

CONCLUSION

In conclusion it is safe to conclude by stating that the principle of fairness is just but a pie in the air for employees. The employer-employee relationship being unequal in nature, fairness will forever remain a pipe dream for the employee. Though the Constitution tries to protect the employees by enshrining the principle of fairness to labour practices, they remain vulnerable since as postulated by the famous dictum of Otto Kahn-Freund:

The relationship between an employer and an isolated employee is typically a relationship between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by the indispensable figment of the legal mind known as the contract of employment. The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.

Further, the court in *Engen Petroleum Ltd v CCMA & Others (2007) 8 BLLR 707 (LAC)* affirms the unfairness which is characteristic of labour relationships. It stated that in relation to the reasonable employer test,

“Such a test is based on the perceptions and values of the employer side to these disputes. It emphasises the interests of employers more than those of workers...”

In *Netone (Pvt) Ltd v L Govera & Anor- 2020* the High Court made it clear that employers terminating a permanent employee's contract can only do so under one of four circumstances set out in the Labour Amendment Act. The High Court ruled, rejecting an argument put forward by NetOne that the common law right to terminate a contract on notice still existed provided a compensation package is offered.

The ground-breaking ruling comes after two NetOne employees sued the mobile phone service provider after the company served them with letters of termination of their contracts of employment on notice. Their successful High Court action challenged the lawfulness of the termination of their contracts by seeking an order confirming the validity of their permanent employment positions and declaring the employer's notices to be invalid for want of compliance with the law.

An employer's absolute common law right to terminate an employment contract on notice was taken away in 2015 and became a conditional statutory right exercisable in one of four specific circumstances prescribed under Section 12(4a) introduced into the Labour Act by the Labour Amendment Act of 2015. The employees argued that any termination on notice outside the four listed circumstances was invalid and attacked the employer for not showing that the purported termination complied with one of the four possibilities.

But the company argued that it exercised its common law right with the Amendment Act simply stating a person whose contract was terminated after 17 July 2015 was entitled to a minimum compensation package. It said the right to terminate a contract of employment on notice was a common law right, with Section 12(4) just regulating that right and that in terms of Section 12(4b), termination of a permanent contract of employment on notice was available where the employer paid the minimum compensation package set out in Section 12C.

In deciding the matter Justice Dube felt that the issues raised by application required to be resolved by way of a declarator which will pronounce the law and

guide the employer on how to proceed. In her decision she zeroed in on the stipulations of the 2015 amendment to the Act dealing with termination of employment contracts on notice. She said NetOne could not seek to rely on the fact that it is prepared to pay compensation to terminate a contract of employment on notice, since compensation is not one of the four criteria listed under Section 12(4a) allowing termination on notice. By failing to comply with the requirements of Section 12(4a) of the Labour Act, NetOne failed to comply with the due process of the law, said Justice Dube.

The court indicated that the notice of termination should contain the factual and legal basis for the termination to enable the employee to be able to challenge the termination. If the employees were not advised of the factual and legal basis for termination of their contracts on notice, any offer of assessment of compensation was invalid. Payment of compensation on its own does not become a basis for terminating a contract of employment on notice. All Section 12(4b) of the Act did was ensure there was compensation where an employee was given notice of termination of contract in terms of one of the four listed reasons in the earlier Section (4a).

Lastly in **Tobacco Processors Zimbabwe (Private) Limited v Tongoona Mutasa SC 12/21** the Supreme Court had to determine an appeal against the whole judgment of the Labour Court upholding the National Employment Council-Tobacco Grievance and Disciplinary Committee's ('NEC GDC Committee') finding that the appellant tacitly renewed the respondents' contracts of employment.

The Labour Court dealt with the issue of whether or not the NEC GDC erred in finding that the contracts of employment had been tacitly relocated. In doing so, it considered the employment status of the respondents at the time their contracts were terminated. The court *a quo* found that there was no evidence to the effect that the new contracts were as a result of any negotiation process as no negotiations were done from 1 May to 22 June 2015. It reasoned that the old contracts were tacitly relocated in that the appellant had allowed the respondents to continue working on the same terms and conditions as before, and did not communicate any intention to change the terms and conditions of the employment.

The court *a quo* also had regard to the precedent that the appellant did not immediately terminate or renew the respondent's contracts but allowed them to continue working, for some period, on the same terms and conditions of the expired contracts. It reasoned that had the appellant not wished to be bound by the old expired contracts, it would have expressed that intention. The court accordingly concluded that the NEC GDC Committee's decision did not constitute an outrageous defiance of logic since the facts indicated that there was tacit relocation of the two year contracts.

The Supreme Court held that an inference of tacit relocation was justified on the facts of this case. The court *a quo*'s finding that those respondents' contracts were tacitly renewed from 1 May 2015 was found to be unassailable. Therefore, the appellant's termination of the respondent's contracts of employment in the circumstances was grossly irregular. An employer clearly cannot terminate a contract that has expired even though it has been tacitly renewed. The appeal was therefore dismissed for lack of merit.

A PRACTICAL APPROACH TO THE APPLICATION OF LABOUR COURT RULES STATUTORY INSTRUMENT 150/17 WITH REFERENCE TO RULE 26, 46, 4(1)(d)(ii), 20 (1), 35(3), 36 and 46.

Introduction

A proper understanding of the practical application of the Rules of the Labour court is indispensable to all members of the legal fraternity. It is important to note that the reason why courts are now so bombarded with applications for indulgence and mercy is mainly that lawyers and even the courts at times, are oblivious of the practical application of certain rules. As will be seen herein, quite a lot of mistakes

are made, both by the courts and the legal practitioners themselves in the application of the rules in everyday practice. The rules which I am going to make a presentation on clearly confirm that fact. It will also be noted that practically, some of the rules are not convenient to the judicial system, some are not relevant, redundant and some are merely there to confuse others. This creates a strong impetus for the Rules to be harmonized so that they are in sync with each other and also their aim in the long run. This will ensure that they have no grey areas which might create difficult situations to the court and the litigants at large. I will address the rules in their chronological order.

Rules 4 (2) (d) (ii) and 20 (1)

Rule 4 basically looks into the aspect of time computation and certain presumptions where anything is required by the Rules or in any order of the Court to be done within a particular number of days. Rule 4 (2) (d) (ii) provides that a person **shall** be deemed to have received:

- (d) for purposes of Rule 20 (1), notice of termination of,
 - (ii) the conduct of any proceedings in terms of an employment code by the fourteenth day after the date indicated on the determination issued after those proceedings as the date of issue thereof.

Any person alleging otherwise shall bear the onus of proof to the contrary.

Rule 20 (1) deals with review applications at the Labour Court and provides that such applications have to be made within twenty one days from the date when the proceedings are concluded.

Practically, the import of these rules when read with each other is that actual receipt of a notice of termination of any proceedings in terms of any employment code is not necessary. There is a presumption created by rule 4 (2) (d) (ii) that within 14 days after the date on the determination, a party would have received the notice, unless the contrary is proven. It therefore literally means the court, where

proceedings are terminated and a party wishes to make an application for review, he must make such an application within 21 days from the date indicated on the notice of termination of those proceedings. As such if for some reason no proof to the contrary is shown regarding receipt of the determination, an application for condonation for non-compliance with the rule has to be made.

It is clear that rule 4 (2) d (ii) is the front side of rule 20 (1). However, Rule 20 (1) seems to be suggesting that an application for review shall be made only within 21 days of conclusion of the proceedings yet Rule 4 (2) d (ii) makes reference to the notice of termination of the conduct of the proceedings, not necessarily the actual conclusion of the matter. For the avoidance of doubt, these rules ought to be properly synchronised. It is also suggested that the presumption of service of the notice of termination of proceedings envisaged in Rule 4 (2) d (ii) be removed and be substituted by a provision of proof of actual service or receipt, more particularly if regard is had to the need to reduce the workload of the Court on applications for condonation which at times are created by the practical inconveniences created by the rules themselves.

Rule 26

This Rule provides for heads of argument. In detail, this rule basically provides that where a party is to be represented by a legal practitioner or a representative at the hearing, such legal practitioner or representative must file and serve heads of argument within ten days of receiving the other party's notice of response and immediately thereafter file a certificate of service. No legal practitioner or representative is allowed to make submissions in a matter without having filed heads of argument. On the other side, where a respondent is to be also represented as such, he or she should do the same within ten days of receiving applicant's or appellant's heads.

A party who fails to so file its heads of argument is barred and he or she may make a chamber application to a judge for the removal of the bar and the judge may allow the application on such terms as to costs and otherwise as he or she thinks fit. A party can, instead of a chamber application, make an oral application at the date of

the hearing and the Judge, upon good cause shown, may condone such non-compliance.

Rule 26 (4) provides that where heads are supposed to be filed by the **Respondent** are not filed within the specified timeframes the Registrar shall nonetheless set the matter down for hearing and the defaulting party, the Respondent, shall be barred and the court may according to the nature of the case, or as the justice of the case requires, enter a default judgment against the defaulting party or proceed to determine the matter. Where a party who is not going to be represented at the hearing by counsel or a representative wishes to file heads, he may she can do so but the provisions of Rule 26 will automatically follow.

This Rule is more or less the same as Rule 238 of the High Court Rules. Practically this rule, when critically looked into, creates a very confusing situation, especially, if read with Rule 46. Rule 26 provides that **a party**, meaning the applicant, appellant or the respondent, who fails to file its heads of argument in terms of the rules, shall be barred. Rule 46 provides that where heads of argument are not filed by the applicant or the appellant, the matter shall be deemed to have been abandoned. A litigant who has been barred will make an application for upliftment of the bar and the one whose matter would have been deemed abandoned will make an application for reinstatement. These rules are therefore not in sync. Obviously the lawmaker could not have foreseen the absurd situation which is created by these rules in that where rules are supposed to be filed by the appellant or applicant are not filed, the matter is deemed abandoned in terms of rule 46 but when it is the Respondent who fails, the effect is a bar on the part of the Respondent in terms of rule 26.

This confusion explains why rule 26 does not in itself make provision for what Respondent should do in the situation where the Applicant/Appellant fails to file its heads. Because of the practical effect of an abandonment, obviously there is nothing Respondent can do given that he matter would have legally died. Applicants or appellants as dominus litis must actively prosecute their case. In the case of *NDEBELE VS NCUBE 1992 (1) ZLR 288 (5) AT 290 C - E* it was stated that:

“...The time has come to remind the legal profession of the old adage vigilantibus non dormientibus jura subveniunt roughly translated the law will help the vigilant but not the sluggard”.

Rule 35 (3)

Rule 35 generally deals with postponements or adjournments generally. Rule 35 (2) provides that where a court postpones a matter sine die or removes it from the roll, the court **shall** direct what a party must do and the timeframes by which the directives must be complied with. Rule 35 (3) then went on to state that where a directive has not been given in terms of Rule 35 (2) and a matter so removed from the roll or postponed sine die has not been set down for hearing within three months from the date on which it was postponed sine die, such matter shall be regarded as abandoned and the Registrar shall advise the parties accordingly.

There is more to say on this particular rule. However for purposes of this presentation I wish to point out the most glaring irregularity on the part of the rule. It seems the rule creates a double standard for the court. It is trite that in practice, interpretation of the word “shall” denotes a peremptory directive. It therefore means once a matter is so postponed or removed from the roll, the court has no choice but “shall” give directions as to what has to be done. Failure to do so will be an irregularity. It will not make judicial sense to have the matter regarded as having been abandoned when such a directive is not given by the court. A party will simply place the blame on the court in an application for reinstatement of the matter and allege that as long as the court failed to do as it is imperatively required to do by the Rules, i.e, to give directions as to what has to be done, it will only be fair for the litigant to be condoned for its failure to set the matter down within the three months. The court will obviously not embarrass itself for double standards and refuse to grant the application. Its hands in this scenario will be tied, it will not approbate on one hand reprobate on the other hand, concurrently.

There is no provision for condonation of the court for non-compliance with its own rules. To avoid unnecessary situations arising out of this rule, the front side of rule

35 (3), i.e rule 35 (2) merely has to be amended to remove the part relating to the peremptory directive which has to be given by the court.

Rules 36 and 46

Rule 36 provides for reinstatement of abandoned matters and rule 46 provides for abandonment of matters in general and gives further instances where a matter is deemed to have been abandoned. Rule 36 says that where a matter has been deemed to have been abandoned in terms of the rules a Judge may upon good cause shown upon application by a party made within twenty one day of the party becoming aware of the abandonment, order that the matter be reinstated. Though there is nothing much to say on this rule it is however important at this juncture to look into the practical import of the meaning of an abandonment of a matter.

We often talk of the need to ensure finality in litigation. We often talk of the maxim “*vigilantibus non dormientibus jura subveniunt*” roughly translated the law will help the vigilant but not the sluggard. We also talk of prescription. All these concepts are designed to create the need for litigants to actively prosecute their cases to finality. When a matter is abandoned, the circumstances will normally be at the instance of the litigant who will be the *dominus litis*. The critical question will be whether or not a matter which would have been deemed to have been abandoned should be reinstated. Obviously it is against the aforesaid principles for party who is the *dominus litis* to be given another chance, and worse further twenty one days to make an application for reinstatement from whatever day it “*becomes aware of such abandonment*”. Practically it is the *dominus litis* who abandons its matter, not the court or the Respondent. Therefore to say that “*within twenty one days from the day the party becomes aware of such abandonment*” might sound ridiculous. The olive branch extended to the owner of proceedings in this scenario seems to be unnecessarily too large.

Further, to ensure finality to litigation, a speedy and active prosecution of cases, a matter that is abandoned must be regarded as having lapsed. Once a matter lapses, it dies. It falls away. It becomes void. A critical look at what was said by Guvava JA in the recent case of *BINDURA MUNICIPALITY V MUGOGO (SC 484/14) [2015]*

ZWSC 32, clearly shows that once a matter has been abandoned, it would have lapsed. The court stated that:

“It seems to me that the restriction on the period within which to rectify the defect was included.....in order to manage cases.....so that the registry would not be cluttered with “dead” files. Thus a litigant who wished to pursue his matter was granted a limited time within which to apply to cure the defect failing which the matter would be deemed abandoned”. (Emphasis added)

As such once a matter is postponed sine die or removed from the roll in terms of Rule 35 (3), the defect should be rectified within three months and failure to do so and reset the matter down, it is deemed to have been abandoned and lapsed. It cannot be re-instated in such a scenario in light of the words of the Supreme Court above. There is no way the matter can be reinvested with legal efficacy for it will now be void. The peremptory directive to set the matter down within three months clearly imposes on a litigant, on a threat of a sanction, a time restriction within which further steps in the prosecution of an action which has been postponed sine die or removed from the roll has to be taken failure of which inevitably results in a permanent non-remittable termination of the right to proceed.

Litigants have to be reminded of the need for the courts to deliver quality adjudication. The quality of adjudication is central to the rule of law. For the law to be respected, decisions of courts must be given as soon as possible after the events giving rise to disputes and must follow from sound reasoning, based on the best available evidence.

Lastly rule 46 states that where for any reason, proof of service is not filed by the applicant or the appellant with the Registrar in the manner and time prescribed or the Registrar does not receive applicant’s or appellant’s heads of argument within the stipulated timeframes, the matter shall be regarded as having been abandoned and the Registrar shall accordingly inform the parties, provided that the provisions of rule 36 are applicable. This rule practically seems to be too rigid because surely a matter cannot be said to have been abandoned because a party has failed to file proof of service. As said above under rule 36 this rule is also confusing if read with

rule 36 on the effect of failure to file heads of arguments on the part of the appellant or the applicant.

A purposive reading of these two rules, 36 and 46 would however seem to suggest that where the Applicant or Appellant fails to timeously file its heads of argument, the matter is deemed to have been abandoned. Therefore such an applicant can only make an application for reinstatement of the matter and not for upliftment of bar. All these application are obviously combined with one for condonation for late filing and extension of time within which to file the heads of argument. However in practice, lawyers often make applications for upliftment of bar even when they represent applicants or appellants yet the correct route will be an application for reinstatement of the matter since such a failure to file heads of argument results in the matter being deemed to have been abandoned in terms of rule 46.

In light of all these discrepancies in the Rule, it is recommended that the concerned stakeholders embark on an extensive process of synchronisation of the rules so that at the end of the day justice is properly done. The rules themselves if they are to be the cornerstone or a guide to the procedure of the Labour Court ought to be clear and straight forward in such a way that even a layman can fully comprehend there meaning. Interpretation of the rules should not be made a thing for legal minds, if not acute ones.

Conclusion

Be that as it may, considering that the rules of the Labour Court are the ones often abused and defied by litigants, the court is strongly encouraged to send a clear message that all applications for condonation for non-observance of the rules are not a mere formality. It is equally important to make the submission that the rules were enacted for the court and not to work at litigants' desired convenience. As the **Honourable Justice Adam J** mentioned in *HPP STUDIOS (PVT) LTD V ASSOCIATED NEWSPAPERS ZIMBABWE (PVT) LTD 2000 (1) ZLR 318* at page 334.

“These rules of court are made in order to prevent delay or injustice being done owing to this delay, and a bar should not be uplifted as a matter of course, it should not be done merely for the asking otherwise the rules may well be torn up”

Time has come for the court to send a clear message that its Rules are not there for decoration or cosmetics but there for parties or any litigant to religiously follow. Everything should however be understood from the angle of rule 12 which gives all labour proceedings an informal face and extends some latitude to the Judges to disregard the rules where the justice of the case or circumstances warrant it, though this generally relates the admissibility of evidence.

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