A CRITICAL LEGAL ANALYSIS OF THE CONSTITUTIONAL RIGHT TO FAIR LABOUR PRACTICES' PROTECTION FOR ZIMBABWEAN & OTHER AFRICAN MIGRANT WORKERS IN SOUTH AFRICA.

By Caleb Mucheche LLM Commercial Law (UNISA-SA), LLM Labour Law (UNILUS-Zambia), LLB Hons (UZ-Zimbabwe)- Head Partner at Caleb Mucheche & Partners Law Chambers and former Executive Dean of Law (Zimbabwe).

Introduction

The right to fair labour practices is a ubiquitous thread that runs throughout the entire employer-employee relationship. Section 23 of the Constitution of South Africa embeds a justiciable constitutional right to fair labour practices. This right universally applies to all employees employed by any particular South African employer whether that employee is a citizen of South Africa or non-citizen like a foreign migrant worker or employee. The purpose of this paper is to analyse the constitutional right to fair labour practices for Zimbabwean and other African migrant workers or employees in South Africa.

> *"The fair labour practice jurisdiction allows for a labour law dispensation that pays due regard to the needs and interests of both employer and employee. Neither employer nor employee benefits from a static employment concept where their respective rights and obligations are cast in stone at the commencement of the employment relationship. What the employer bargains for is the flexibility to make decisions in a dynamic work environment in order to meet the needs of the labour process. What the employee exacts in return is not only a wage, but a continuing obligation of fairness towards the employee on the part of the employer when he makes decisions affecting the employee in his work".*[1]

Globalisation has had a profound effect on international labour migration, and has increased significantly the number of people whomigrate as a means of e scaping poverty, unemployment and othersocial, economic and political pressures in their ho

[1] WL Ochse Webb & Pretorius (Pty) Ltd v Vermeulen 1997 ILJ 361 (LAC):365I-366A.

me countries.[2] The ILO has recorded that illegal immigration has become a particular matter of concern, with some 30 million irregular migrants worldwide (ILO 143) International instruments that seek to address the circumstances particularly of irregular migrants attempt to resolve a tension between the right of states to protect their labour markets and the protection of the fundamental rights of those, who by choice or necessity, seek work in countries other than their own. The ILO has noted that the resulting tension between internal and external forces tends to accentuate further the prejudices, xenophobia and racism of which migrants are often the victims.

ILO Convention 143 (Migrant Workers (Supplementary Provisions) Convention 1975 builds on Convention 97 Migration for Employment Convention (Revised) 1949, and sets out the general obligation of members states to respect the basic human rights of all migrant workers.

Labour migration takes place between developed and developing countries and among developing countries. The countries from which these workers come (country of origin) and those in which they work (destination country), have a shared responsibility to lessen the burdens of unfair labour practices by protecting and promoting workers' rights. Protecting the rights of migrant workers has a positive effect on productivity, in that it results in fewer lost hours of work, reduces health care costs, and increases output.[3] Labour migration takes place between developed and developing countries and among developing countries. The countries from which these workers come (country of origin) and those in which they work (destination country), have a shared responsibility to lessen the burdens of unfair labour practices by protecting and promoting workers' rights. Protecting the rights of migrant workers has a positive effect on productivity, in that it results in fewer lost hours of work, reduces health care costs, and increases output. Again, protecting the rights of migrant workers additionally benefits destination countries by preventing the development of an unprotected working underclass of migrants which harms national workers by undercutting their pay and working conditions. Countries can cooperate by, among other things, exchanging information with each other, engaging in regular dialogue and cooperation on labour migration policy for the protection of workers' rights, and entering into bilateral, multilateral, and regional agreements. Zimbabwean and other African migrant workers' influx into the South African job market has

[2] ILO International Labour Standards A Global Approach ILO Geneva (2002) at 142.

[3] Migration and Development, a Human Rights Approach, Office of the UN High Commissioner for Human Rights, pp. 3-5, 8-10, www.ohchr.org/english/bodies/cmw/docs/.

a long history dating back to pre-independence and post-independence era due to the growth of the South African industry.

At the international level, there are several key instruments catering for a comprehensive protection of migrant workers. Firstly, ILO standards and frameworks offer a solid foundation for protection. Complementary to ILO instruments are the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) and General Recommendation No. 26 on women migrant workers of the Convention on the Elimination of All Forms of Discrimination Against Women.

This can be done by increasing the supervision and regulation of international labour migration and engaging in international cooperation, in the interest of promoting labour rights and promoting fair labour standards. Principle 15 of the ILO's Multilateral Framework on Labour Migration states that, the contribution of labour migration to employment, economic growth, development and the alleviation of poverty should be recognized and maximized for the benefit of both origin and destination countries. The ILO position is that the development benefits of migration and protection of the rights of migrant workers are inseparable.

Benefits and costs of migrant workers.

There are costs and benefits associated with labour migration. On the up side, higher wages and remittances afford migrants and their families better standards of living and security. Migrant-sending countries enjoy several potential benefits, including remittances that contribute to poverty reduction, reduced unemployment, and the sharing of skills and technology. On the down side, the sending countries lose a share of their labour force, often young workers, tax income and national output.

It is not in doubt that the Zimbabwean migrant labourers brings positive development in destination countries. In destination countries, such workers contribute, immensely to development by meeting the demand for workers, increasing the demand for goods and services, particularly where they receive decent wages, and contributing their entrepreneurial skills. Despite such positive developments it is worrisome that unfair labour practices are rampant, in the neighbouring South Africa. It is argued that, though these workers carry a migrant tag status, in the workplace, they are also constitutionally entitled to protection from unfair labour practices. The object of this write up is to assess the constitutional right to fair labour standards protection for Zimbabweans who work in South

Africa. The writer shall commence by shedding light on what is generally understood as the constitutional protection to fair labour standards.

Migrant workers are people who leave home to find work outside of their hometown or home country. Skilled workers and professionals have more bargaining power and consequently enjoy proper compensation and rights' protection. Migrant workers in low and semi-skilled jobs typically fare less well. They are often at a greater disadvantage because they tend to work in occupations or sectors of work at the fringes of legal governance. Low-skilled and semi-skilled migrant workers, who form the majority of migrant workers, usually encounter numerous problems in the migration process and in destination countries. Due to their low levels of education, race or ethnicity, sex, employment and migrant status, they face more risks and vulnerabilities to discrimination, exploitation and abuse than those in highly skilled jobs. In the host countries migrant workers often end up being excluded from the protection, rights and entitlements enjoyed by nationals.

Zimbabwean perspective.

Importantly for individual labour rights, section 2 of the Labour Act of Zimbabwe, defines an unfair labour practice as 'an unfair labour practice specified in Part III, or declared to be so in terms of any other provision of the Act'. According to sections 8 and 9 of the Labour Act, unfair labour practices are limited to specific acts or omissions by employers, trade unions or workers' committees. However, the problem with the approach, however, was that the list of unfair labour practices in the Act was closed and exhaustive. It omitted important unfair labour practices such as transfers of employees, promotions and unilateral changes to terms and conditions of employment by employers.[4] In **Muwenga v PTC 1997 (2) ZLR 483 (S**), the appellant was challenging the decision of the respondent not to promote him in a position in which he had worked in an acting capacity for a long period and had given good service. The appellant argued that the situation surrounding the failure to promote him amounted to an unfair labour practice as defined in the Act. The Supreme Court of Zimbabwe reasoned that not every labour practice that is unfair is an unfair labour practice under the Act. To be an unfair labour practice, an action or omission must specifically be described as such by the Act. If a practice is not specified as an unfair labour practice by the Act, then it cannot be raised as an unfair labour practice under the Act. Therefore, the Court found that the failure to promote the appellant did not amount to an unfair labour practice as it was not specified as such in the Act. Conversely, some courts relied on concepts

[4]Agribank v Machingaifa SC 61/07; Air Zimbabwe (Pvt) Ltd v Zendera & Others 2002 (1) ZLR 132 (S).

consistent with constitutionalism such as lawfulness, reasonableness and good faith, to go beyond the closed list of unfair labour practices protection proffered in the statute law and protect individual labour rights.

Importantly for the present purpose, the codified Constitution guaranteed several protections for individual labour rights. To this end, section 65(1) of the Constitution entrenched the broad right to fair and safe labour practices. In addition, other individual labour rights, such as the right to be paid a fair and reasonable wage, the right to just, equitable and satisfactory conditions of work, the right to equal remuneration for similar work and the right of female employees to fully paid maternity leave for three months, were also included in the Constitution. The inclusion of these rights in the Constitution was generally hailed as a positive step in the march towards the advancement of social justice in the workplace, improving the quality of life of workers, and balancing the power between labour and capital, so that workers would enjoy greater job security, and benefit from basic norms of fairness and proportionality.[5]

However, one cannot successfully challenge the fairness of the practice, relying solely, on the provisions of section 65 of the constitution. This is because the constitution is considered to be the primary law, in which all other laws should confirm to and that when seeking for an order in terms of the constitution, one should make use of the legislation that gives effect to the constitutional provisions. In **Magurure & 63 Others v Cargo Carriers International Hauliers (Pvt) Ltd. (SABOT) (CCZ 15/2016**, the court reiterated that;

> ***Once legislation to fulfil a constitutional right exists, as was made clear in My Vote Counts NPC v Speaker of the National Assembly and Others 2016(1) SA 132(CC), the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The applicants cannot rely directly on s 65(1) of the Constitution as they can claim relief under the Act. It was not the intention of the makers of the Constitution that employees should be able to approach the Constitutional Court to complain that they have not been paid for overtime***

[5] D Beatty 'Constitutional labour rights: Pros and cons' (1993) 14 Industrial Law Journal 1; I Holloway 'The constitutionalisation of employment rights:
A comparative overview' (1993) 14 Berkeley Journal of Employment and Labour Law; RJ Grodin 'Constitutional values in the private sector workplace' (1991) 13 Industrial Relations Law Journal 1; Collins (n 34) 139; E Reid & D Visser Private law and human rights: Bringing rights home in Scotland and South Africa (2014) 391.

worked or that they are made to work longer hours than are prescribed for the particular industry.

The court, in the above case went on to hold that;

This case is governed by the application of the principle of subsidiarity. In **Mazibuko and Others v City of Johannesburg and Others 2010(4) SA 1(CC),** the principle is set out as follows:

"Where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution."

The Constitutional Court of South Africa had earlier on in **South African National Defence Union v Minister of Defence and Others 2007 ZACC 10**, said:

"Where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard."

Essentially a litigant cannot challenge the conduct of a decision maker as breaching a fundamental right in the Constitution, without first utilizing the remedies offered by the legislation that gives effect to that right. In other words, where there is legislation giving life to a right in the Constitution, a litigant cannot found a cause of action directly on the Constitution without attacking that statute as unconstitutional. See ***MEC for Education, Kwa-Zulu Natal and Others v Pillay*** **2008 (1) SA 474.**

The principle of subsidiarity is based on the concept of one-system-of-law. Whilst the Constitution is the supreme law of the land it is not separate from the rest of the laws. The principles of constitutional consistency and validity underscore the fact that the Constitution sets the standard with which every other law authorized by it must conform. The Constitution lays out basic rights and it is up to legislation to give effect to them. This is the nature of the symbiotic relationship between the Constitution and legislation. The legal system is one, wholesome and indivisible. As was put in **Gcaba v Minister for Safety and Security and Others 2010(1) SA 238(CC).**

"The constitutional and legal order is one coherent system for the protection of rights and the resolution of disputes."

An assessment of the above cases shows that, section 65 of the constitution did not come to improve on the affairs of the workers, but has come to serve as a guide to unfair labour practices.

South African perspective.

Before delving into the constitution of South Africa, it is pertinent to note that the protection for unfair labour practice is provided for in terms of Chapter VIII of the Labour Relations Act. In terms of section 186 (2);

2) "Unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving;

a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee;

b) unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee;

c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and

d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

The remedies for unfair labour practices are provided for in terms of section 193 of the Labour Relations Act. In comparison, the South African law extends unfair labour practices to cover instances of promotion and demotion, as opposed to Zimbabwean labour laws.

SECTION 23 OF THE SOUTH AFRICAN CONSTITUTION

In **NEHAWU v University of Cape Town**,[6] Ngcobo J, expressed himself as follows, regarding fair labour practices and in particular, the fairness concept:

[6] National Education Health & Allied Workers Union v University of Cape Town & Others 2003 24 ILJ 95 CC.

"Our Constitution is unique in constitutionalising the right to fair labour practice.
But the concept is not defined in the Constitution. The concept of fair labour
practice is incapable of precise definition. This problem is confounded by the
tension between the interests of the workers and the interests of the employers
that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgment. It is
therefore, neither necessary nor desirable to define this concept. ...The concept
of fair labour practice must be given content by the legislature and thereafter left
to gather meaning, in the first instance, from the specialist tribunals including the
Labour Appeal Court and the Labour Court. These courts and tribunals are responsible for overseeing the interpretation and application of the 1995-LRA, a
statute which was enacted to give effect to section 23(1). In giving content to this concept the courts and tribunals will have to seek guidance from domestic and
international experience. Domestic experience is reflected both in the equity based
jurisprudence generated by the unfair labour practice provision of the 1956-LRA as well as the codification of unfair labour practices in the 1995-LRA.
International experience is reflected in the Conventions and Recommendations
of the International Labour Organisation. Of course other comparable foreign
instruments such as the European Social Charter 1961 as revised may provide

guidance. …That is not to say that this Court has no role in the determination of
fair labour practices. Indeed, it has a crucial role in ensuring that the rights
guaranteed in section 23(1) are honoured".

Also, in **NEHAWU v University of Cape Town***,* it was stated that in determining the meaning of section 23(1), guidance should be sought from the "equity based jurisprudence generated by the unfair labour practices provisions of the 1956 LRA as well as the codification of unfair labour practice in the LRA.
Section 23 of the South African Constitution reads as follows:

*'' **(1) Everyone has the right to fair labour practices.***

(2) Every worker has the right –

- ***a) to form and join a trade union;***
- ***b) to participate in the activities and programmes of a trade union; and***
- ***c) to strike.***

(3) Every employer has the right –

- ***a) to form and join and employers' organisation; and***
- ***b) to participate in the activities and programmes of an employers' organisation.***

(4) Every trade union and every employers' organisation has the right –

- ***a) to determine its own administration, programmes and activities;***
- ***b) to organise; and***
- ***c) to form and join a federation.***

(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit aright in this Chapter, the limitation must comply with section 36(1).

(6) National legislation may recognise union security arrangements contained in collective agreements. To the extent that the legislation may

limit a right in this Chapter, the limitation must comply with section 36(1).”

Any study of section 23(1) of the SA Constitution above, must be conducted in accordance with the recognition of the importance of these rights to ensure the promotion of a fair working environment.[7] Also, international law must always be considered when interpreting section 23 Section 23(1) of the South African Constitution. Although the right to fair labour practices extends to employees and employers alike, for employees it affords security of employment.[8]

In order to determine the scope of the right to fair labour practices, regard must be given to the meaning of the word ‘**everyone**’ as the law provides in terms of section 23 (1), above. The legislature deliberately made use of the word everyone, in order to extent the scope of application of the provision. This extension has the effect of widening the scope and application of the principle of fair labour practice to both natural and juristic persons. Therefore, the different categories of recipients that may enjoy protection of a constitutional right are natural persons, citizens, non-citizens, children, juristic persons, workers and employers. It has also been suggested that the word everyone should be interpreted according to section 9 of the Constitution. Section 9 is the equality clause, which guarantees that everyone is equal before the law and enjoys equal protection of the law. In light of the equal protection guaranteed by section 9, everyone should be accorded the broadest interpretation possible.

However, different opinions exist as to whether, the word everyone has broadened the scope of protection to also protect relationships other than the traditional employer-employee relationship. Accordingly, it was held that the word ‘everyone’ refers to every person, including natural and juristic persons, and also that it does not only refer to employees, because it was not stated that it refers to employees only. Van Jaarsveld,[9] supports this argument by stating that because the constitutional right to fair labour practices guarantees everyone this right, any victim of an unfair labour practice would be entitled to relief in terms of the Constitution and common law.

[7] Cheadle H (ed) et al 2005. South African Constitutional Law: The Bill of Rights. 2nd ed. Durban:LexisNexis.
[8] National Education Health and Allied Workers Union v University of Cape Town and Others 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) (NEHAWU) at paras 14-15.
[9]Van Jaarsveld SR et al 2001a. Principles and Practice of Labour Law. Service Issue 22 (Updated to April 2012). Durban:LexisNexis.

In summation, the protection against unfair labour practices established by section 23(1) of the Constitution is not dependent on a contract of employment. Protection extends potentially, to other contracts, relationships and arrangements in terms of a person who performs work or provides personal services to another.

APPLICATION OF SECTION 23 OF THE SOUTH AFRICAN CONSTITUTION TO MIGRANT EMPLOYEES.

In **NEHAWU** the Court said:

> ***"The focus of s 23(1) is, broadly speaking, the relationship between the worker and the employer and the continuation of that relationship on terms that are fair to both. In giving content to that right, it is important to bear in mind the tension between the interests of the workers and the interests of the employers which is inherent in labour relations. Care must therefore be taken to accommodate, where possible, these interests so as to arrive at the balance required by the concept of fair labour practices. It is in this context that the LRA must be construed.***

The dicta in the preceding paragraph and the ILO Convention clearly illustrate the importance of holding the scales between the competing interests of employees and employers evenly in the balance. As such, South African courts have not hesitated to invoke the right to fair labour practices to invalidate laws, customs, conduct and practices of labour policy that are arbitrary and unfair. For instance, in **Sidumo & Another v Rustenburg Platinum Mines Ltd & Others [2007] 12 BLLR 1097 (CC).**

The above reasoning shows that protection in terms of section 23 of the constitution of South Africa applies to migrant labour, if they acquire the status of being an employee in terms of the South African laws.

Section 213 of the Labour Relations Act of South Africa defines an 'employee' as

a) ***Any person, excluding an independent contractor, who works for another p erson***
   or for the State and who receives, or is entitled to receive, any remunerati on; and
b) ***Any other person who in any manner assist\|s in carrying on or conducting the business of an employer."***

Again, the definition of 'employee' in the Basic Conditions of Employment Act (BCEA) is cast in identical terms, with the above. Thus, it is argued that the protection against unfair labour practices established by section 23(1) of the Constitution is dependent on a contract of employment. However, the protection seems to extend, potentially to other contracts, relationships and arrangements in terms where a person performs work or provides personal services to another. In the case of **Helen Suzman Foundation and Consortium for Refugees and Migrants in South Africa v Minister of Home Affairs Case No: 32323/2022,** on 28 June 2023, the High Court of South Africa (Gauteng Division, Pretoria) delivered a progressive judgment protecting Zimbabwean migrants in South Africa by declaring unlawful, unconstitutional and invalid the decision by the Minister of Home Affairs to terminate the Zimbabwean Exemption Permit (ZEP), to grant a limited extension of ZEPs of only 12 months and to refuse further extensions beyond 30 June 2023. This judgment is a good legal launch pad for the protection of the legal rights of other African migrants residing in South Africa.

Again, where the text of the Constitution refers to everyone, it can be assumed that reference is made both to citizens and aliens alike.[10] Woolman states that;

> ***"...the text gives us no reason to assume that resident aliens – who have legally entered the country and who remain in good legal standing – will receive anything less than the levels of constitutional protection required for person-hood. That does not mean that every right extended to persons will afford equal levels of protection to all classes of alien. That illegal or undocumented aliens may receive diminished levels of procedural or substantive protection in specific situations..."***

The above shows that immigrant employees are also protected as employees on an equal basis with the citizens, as long they qualify to be an employee, for the purposes of the South African Constitution. It is clear from the above quotation that the South African law discriminates against illegal foreigners, on the basis of that status. However, this discrimination was later cleared by the courts. In Discovery v CCMA,[11] the court was confronted with the following pertinent question in relation to migrant employees;

[10] Woolman S et al 2004. Constitutional Law of South Africa. Volume 1. 2nd ed. Cape Town:Juta & Co Ltd
[11] Discovery v CCMA CCT 18/03

Is a foreign national who works for another person without a work permit issued under the Immigration Act an 'employee' as defined by the Labour Relations Act?

The court went on to reason that;

> ***The right to fair labour practices is a fundamental right. There is no clear indication from the terms of s 38(1) of the Immigration Act (or any of the Act's other provisions) that the statute intends to limit that right, or accomplish more than to penalise persons who employ others on unauthorised terms. As I have noted, the Act does not penalise the conduct of any person who accepts or performs work that is not authorised. The Act does not explicitly proscribe contracts concluded with those who are engaged to render work in circumstances where their engagement is unauthorised, nor does it provide that contracts are not enforceable in those circumstances.***

In conclusion the court held that, although the absence of a valid work permit may render the status of a foreigner as illegal, nothing precludes that foreigner to conclude a valid contract of employment and to enjoy protection against unfair labour practice, as enunciated in the constitution. The court reasoned further in the same case, in obiter, that if contracts of employments concluded between an illegal foreigner and employers are not protected by the Constitution and relevant labour laws, the result would be gross injustices, in the workplace. In the same case, Van Niekerk A, AJ, had the following to say;

> ***There is a sound policy reason for adopting a construction of s 38(1) (Immigration Act)***
> ***that does not limit the right to fair labour practices. If s 38(1) were to render a contract of employment concluded with a foreign national who does not possess a work permit void, it is not difficult to imagine the inequitable consequences that might flow from a provision to th at effect. An unscrupulous employer, prepared to risk criminal sanction under s 38, might employ a foreign national and at the end of the payment period, simply refuse to pay her the remuneration due, on the basis of the invalidity of the contract. In these circumstances, the employee would be deprived of a remedy in contract, and if Discovery Health's contention is correct, she would be without a remedy in terms of labour legislation. The same employer might take advantage of an employee by requiring work to be performed in breach of the BCEA, for example, by requiring the employee to work hours in excess of the statutory maximum and by denying her the required time off and rights***

to annual leave, sick leave and family responsibility leave. It does not require much imagination to construct other examples of the abuse that might easily follow a conclusion to the effect that the legislatur e intended that contract be invalid where the employer party acted in breach of s 38(1) of the Act. This is particularly so when persons without the required authorisation accept work in circumstances where their life choices may be limited and where they are powerless (on account of their unauthorised engagement) to initiate any right of recourse against those who engage them.Far from defeating the purposes of the Immigration Act, to sanction aclaim of contractual invalidity in thes e circumstances would defeat the primary purpose of s 23 (1) of the Constitution which is to give effect,thro ugh the medium of labour legislation, to the right to fair labour practices.

However, recent decisions by the Constitutional Court, through a number of judgments suggest that the existence of a contract of employment is not the sole basis on which a person performing work might be considered to be an 'employee' for the purposes of the LRA. In **Rumbles**,[12] the Labour Court adopted the approach that a contractual relationship is not definitive as to whether a person was an 'employee' as defined, and that the court must examine the true nature of the relationship between the parties. Again, in **White v Pan Palladium SA (Pty) Ltd**,[13] the court held that the definition of 'employee' in section 213 of the Labour Relations Act was not dependent, solely on the conclusion of a contract recognised at common law as valid and enforceable. It was also the court's opinion in **White v Pan Palladium SA (Pty) Ltd,** that;[14]

"Someone who works for another, assists that other in his business and receives remuneration may, under the statutory definition, qualify as an employee even if the parties inter se have not yet agreed on all the relevant terms of the agreement by which they wish to regulate their contractual relationship"

The crux of the above reasoning shows that a person who renders work on a basis other than that recognised as employment by the common law may be an

[12] Rumbles v Kwa-Bat Marketing (2003) 24 ILJ 1587 (LC)
[13] (2006) 27 ILJ 2721 (LC)
[14] At 391 B – C.

'employee' for the purposes of the definition. This is because a contract of employment is not the sole ticket for admission into the golden circle reserved for 'employees'. This offers greater protection to the Zimbabwean and other African migrant labourers in South Africa, regardless of them having legal documentation for their stay, as long one proves a contractual relationship. In other words, the court should ask itself whether one was working for the other, in anticipation of remuneration or not.

South African courts have not hesitated to invoke the right to fair labour practices to invalidate laws, customs, conduct and practices of labour policy that are arbitrary and unfair. For instance, in **Sidumo & Another v Rustenburg Platinum Mines Ltd & Others [2007] 12 BLLR 1097 (CC)** the Constitutional Court of South Africa underscored the doctrine of reasonable decision maker test in considering whether or not an employer's dismissal of an employee from employment is fair or unfair.

Conclusion

The struggle for better labour rights and improved working conditions is an ongoing struggle for the working class or workers in Africa and the entire global village. Employers expect performance and productivity from employees. In the case of a profit making employer, the employer expects the employee or worker to enhance the employer's profit. On the other hand, as a countervailing factor, an employee or worker reasonably and legitimately expects an employer to pay him or her good remuneration made up of fair or living wages/salaries and benefits coupled with conducive terms and conditions of employment. Labour law adorns a human face by seeking to counter-balance the competing interests between employers and employees.