**A LEGAL ANALYSIS OF THE RIGHT TO FAIR LABOUR PRACTICES, SOCIAL JUSTICE AND INTERNATIONAL LAW PILLARS OF THE PROGRESSIVE CONSTITUTIONAL COURT OF ZIMBABWE JUDGMENT IN GREATERMANS STORE (1979)(PRIVATE) LIMITED T/A THOMAS MEIKLES STORES AND ANOTHER VS THE MINISTER OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE AND ANOTHER CCZ JUDGMENT NO. CCZ 2/18 DELIVERED ON 28 MARCH 2018, UPHOLDING THE CONSTITUTIONALITY OF THE RETROSPECTIVE APPLICATION OF THE LABOUR AMENDMENT ACT NO. 5 OF 2015 TO COMPENSATE EVERY EMPLOYEE WHOSE CONTRACT OF EMPLOYMENT WAS TERMINATED ON THREE MONTHS NOTICE UNDER THE COMMON LAW FROM 17 JULY 2015 ONWARDS : THE DAWN OF A NEW LEGAL DISPENSATION IN LABOUR MATTERS IN ZIMBABWE**

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**INTRODUCTION**

On 28 March 2018, the Constitutional Court of Zimbabwe per Honourable Chief Justice L. Malaba with the unanimous agreement of other Honourable Judges of the Constitutional Court delivered a landmark judgment in **Greatermans Store (1979) (Private) Limited t/a Thomas Meikles Stores & Anor v The Minister of Public Service, Labour & Social Welfare & Another (**hereinafter referred to as the **Greatermans judgment**), Judgment No. CCZ 2/18, upholding the retrospective enactment and application of the Labour Amendment Act No. 5 of 2015 providing for employers to pay employees monetary compensation for termination of employment on 3 months notice from 17 July 2015 onwards. This judgment underscores social justice for a legion of employees who fell victim to a labour genocide

under the arbitrary and capricious common law from 17 July 2015 going forward. The concerned Constitutional Court judgment exorcises the ghost of the common law which wreaked havoc on employees from 17 July 2015 to date. Every employee who lost a job on 3 months notice under the common law from 17 July 2015 to date is entitled to monetary compensation for losing a job, thanks to this Constitutional Court judgment which puts paid the issue. The aforesaid judgment is anchored on three pillars, namely, right to fair labour practices and fair labour standards enshrined in terms of section 65(1) of the Constitution of Zimbabwe, social justice embedded in terms of section 2A of the Labour Act and international law espoused in terms of the International Labour Organisation (ILO) Conventions such ILO Convention No. 158 and some useful contemporary international law from other jurisdictions in the global village. Suffice to mention that this paper seeks to unpack the pillars that pivoted this trail blazing judgment which is legally pregnant and jurisprudentially sound.

**Right to fair labour practices in terms of section 65(1) of the Constitution of Zimbabwe pillar.**

The Constitution of Zimbabwe(hereinafter referred to as the " Constitution") provides for justiciable labour rights[1] in a clear and unequivocal language which admits of no ambiguity. These labour rights are ironclad in terms of section 65 of the Constitution. Section 65 of the Constitution is the orchard for labour rights in Zimbabwe. In the history of labour law in Zimbabwe, the elevation of labour rights to become fundamental human rights and freedoms codified in the Constitution as the supreme law of the country is a revolutionary and remarkable achievement that was hard won and is a fruit of the struggle for labour rights and overthrow of colonial bondage whose firm foundation was laid by pioneer labour trade unionists cum African nationalists in the country like Benjamin Burombo, Masotsha Ndhlovu,

[1] ***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.***

***(2) Except for members of the security services, every person has the right to from and join trade unions and employee or employers' organisation of their choice, and to participate in the lawful activities of those unions and organisations.***

***(3) Except for members of the security services, every employee has the right to participate in collective job action, including the right to strike, sit in, withdraw their labour and to take other similar concerted action, but a law may restrict the exercise of this right in order to maintain essential services.***

***(4) Every employee is entitled to just, equitable and satisfactory conditions of work.***

***(5) Except for members of the security services, every employee, employer, trade union, and employee or employer's organisation has the right to –***

***(a) engage in collective bargaining;***

***(b) organise; and***

***(c) form and join federations of such unions and organisations.***

***(6) Women and men have a right to equal remuneration for similar work.***

(7) ***Women employees have a right to fully paid maternity leave for a period of at least three months.***

Joshua Nkomo, Leopold Takawira, George Silundika, Jason Moyo, James Chikerema and Mayor Urimbo among others. This labour struggle was accelerated after Zimbabwe gained its independence in 1980 by veteran trade union stalwarts like the late Prime Minister Morgan Tsvangirai (Save/Dziva) and Gibson Sibanda among others. This therefore means that labour rights under the Constitution of Zimbabwe did not come on a silver platter but they are an outcome of bitter and protracted struggles by labour trade unionists and their general membership in both colonial and post-colonial Zimbabwe. It is noteworthy that one of the reasons that inspired the liberation struggle in the country was the impetus to emancipate African workers from exploitative and oppressive conditions of employment at the hands of colonial masters. By being included in the bill of rights in terms of the Constitution of Zimbabwe, one may be persuaded to respectfully submit that labour rights are now perched on a firm pedestal. One of the ubiquitous labour right that sticks out like a sore thumb from reading of the Constitution of Zimbabwe is the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage.

Until this Constitutional Court judgment under spotlight, the right to fair labour practices entrenched in terms of section 65 of the Constitution of Zimbabwe lay dormant as if it never existed but all that is now a thing of the past as the Greatermans judgment has unearthed and unmasked labour rights like fossil material. It cannot be gainsaid that this judgment is a first in the legal history of labour law in Zimbabwe viewed from the lens of labour rights as constitutional rights. The fundamental principles that undergird labour rights are twins known as fairness and reasonableness which are some of the chief characteristics of good law. The principle of fairness is the thread that runs through the whole essence of law and justice such that fairness and justice have an umbilical cord which is inseparable. The weight of justice was aptly pitched high in the eloquent words of the late USA based civil rights activist, Dr Martin Luther Jnr in the following words, "an *injustice anywhere is a threat to justice everywhere*." The dual principles of fairness and reasonableness occupy a special and soft spot in labour matters due to the absence of equilibrium in the employer-employee relationship in terms of which the employer wields a higher bargaining power than an employee. The law must act as a day and night watchman located at a vantage point with a birdy eye view to observe and enforce fairness and reasonableness in the employer-employee relationship. It is submitted that fairness and reasonableness in the employment relationship are grundnorms that are meant to combat and prevent abuse of one party by the other in the employment relationship. Fairness and reasonableness serve as yardsticks to measure and align the employer -employee relationship and accord it a human face in tandem with the law. One may as well opine that fairness and reasonableness are akin to guardian angels that are meant to preserve and protect the dignity, integrity and subsistence of the employer-employee relationship.

The right to fair labour practices is at the nerve centre of section 65(1) of the Constitution whose epicentre hinges on fairness and reasonableness as follows:

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

In elucidating and exposing the length, breadth, width and import of labour rights under the Constitution, the learned **MALABA CJ** at **pages 39** and **40** of the concerned Constitutional Court judgment, made the following apposite and illuminating remarks:

"***Section 65(1) of the Constitution guarantees in a wholesome fashion the right to fair labour practices. The right to fair labour practices is conferred on "every person". It is a labour right claimable by a person in an employment relationship. The word "person" is defined in s 332 of the Constitution to mean an individual or a body of persons, whether incorporated or unincorporated.***

> ***In the founding affidavit the applicants state:***
>
> ***"...<u>Sight cannot be lost of the fact that this kind of conduct constitutes unfair labour practice as defined in section 65 of the Constitution of Zimbabwe</u>. The whole process lacks elements of basic fairness." (my emphasis)***

***Section 2, as read with Part III, of the Act gives effect to s 65(1) of the Constitution. Section 2 of the Act define "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. The Act codifies what the Legislature considered to be actions or omissions which if committed by the employer, a trade union, a workers' committee and in certain circumstances other persons against an employee would amount to unfair labour practices.***

***In Boniface Magurure and 63 Ors v Cargo Carriers International Hauliers (Pvt) Ltd t/a Sabot CCZ-15 – 16 the court held that the Act only defines those labour practices which if proved would amount to unfair labour practices in violation of the constitutional right to fair labour practices. These acts are committed as a matter of practice by an employer or employee contrary to what is required by the law to be done. For a person to allege an unfair labour practice as a violation of the right enshrined in s 65(1) of the Constitution, the conduct complained of must constitute one of the acts or omissions listed by the Act as unfair labour practices.***

***The general requirements that must be satisfied before conduct, positive or otherwise, can be held to fall within the definition of unfair labour practice are that –***

***(i) The "act or omission" must constitute a "labour practice". An "act" or "omission" may refer to either a single act or single inaction which may or may not have lasting consequences and having occurred during the subsistence of the employment relationship, that is, in the period between the conclusion of the contract of employment and its termination. The word "practice" suggests that the employer must have actually done something or declined to do something.***

***(ii) The unfair labour practice can arise only if the employer does something or refrains from doing something ("act or omission"). In Zimbabwe the employer must have actually done something listed in Part III of the Act, which act or omission the employee claims the employer should have done or should have refrained from doing.***

***(iii) The unfair labour practice must be between an employer and an employee. In Zimbabwe, however, the unfair labour practice may be between the employee and a trade union, a workers' committee or any other person for sexual conduct amounting to an unfair labour practice.***

***(iv) The unfair labour practice must involve one of the practices specified, for our purposes listed in Part III of the Act or declared to be so in terms of any other provision of the Act; and***

***(v) The act or omission complained of must be unfair."***

In the premises, it is submitted that the right to fair labour practices forms the bedrock of the Constitutional Court judgment under consideration. Also this judgment has laid the necessary preparatory ground for the application of the constitutional right to fair labour practices as the yardstick in all labour disputes that include but not limited to disputes over unfair dismissal from employment.

**SOCIAL JUSTICE IN TERMS OF SECTION 2A OF THE LABOUR ACT [CHAPTER 28:01] PILLAR.**

The whole essence and fabric of the retrospective application of the Labour Amendment Act No. 5 of 2015 is social justice. Social justice is the chief cornerstone of the Labour Act which is graphically underscored as follows:

***2A Purpose of Act***

***(1) the purpose of this Act is to advance social justice and democracy in the workplace by-***

***(a) giving effect to the fundamental rights of employees provided for under Part II;***

***(b) …***

***(c) providing a legal framework within which employees and employers can bargain collectively for the improvement of conditions of employment;***

***(d) the promotion of fair labour standards;***

***(e) the promotion of participation by employees in decisions affecting their interests in the workplace;***

***(f) securing the just, effective and expeditious resolution of disputes and unfair labour practices.***

Section 2A is the at the heart of labour law in Zimbabwe which forms the purpose of the Labour Act itself. The importance of section 2A (1) of the Labour Act is further cemented by its kindred provision, namely section 2A (2) of the Labour Act which reinforces the need to interpret and apply the Labour Act it in tandem with its purpose in the following salutary peremptory words by virtue of the use of the word **shall** therein:

" ***This Act <u>shall</u> be construed in such manner as best ensures the attainment of its purpose referred to in subsection (1).”*** (emphasis added by underlining).

The Greatermans judgment places social justice at a legal pinnacle as can be gleaned from **MALABA CJ**'s scintillating and enlightening remarks at page 21 of that judgment as follows:

" ***The purpose was to ensure that the employment that was lost on notice at the initiative of the employer on or after 17 July 2015 was compensated.***

***There is no doubt that the welfare of employees upon termination on notice is a matter of public interest deserving of legislative protection. The law cannot be interpreted against the employees unless the objective is shown to be unconstitutional or the means chosen for its achievement are disproportionate to it. At no time did Mr Mpofu suggest in the argument advanced that the purpose of the retrospective application of the legislation to the applicants was not legitimate.***

***The raison d'etre of constitutional law is the human being. Section 56(1) of the Constitution enshrines three separate but related fundamental human rights. The rights are: the right to equality before the law; the right to equal protection of the law; and the right to benefit of the law."***

Social justice epitomizes a society characterized by a fair distribution of wealth through employment and not misery of employees losing employment empty handed. In the same vein, social justice entail that any employee who has supported and contributed towards the business or work of the employer by availing his/her labour must get a fair compensation from the employer should the concerned employer decide to terminate the contract of employment for such employee for no fault of the employee like in a situation of termination on three months notice under the common law. The idea behind social justice is to prevent exploitation and oppression of usually the weaker party by the stronger party in any relationship in general and in the employment relationship in particular. In the employment arena, the employer is economically non dependent and the benefactor whereas the employee is economically dependent and a vulnerable beneficiary whose employment income is a source of livelihood which if withdrawn is tantamount to having bread and butter removed from his/her mouth. This principle of social justice dovetail with the adage that mighty is not right and the means does not justify the end. Also social justice signposts justice as foundation of any fair society cognizant of the natural law school of thought by Thomas Aquinas that an unjust law is no law at all. Thus social justice seeks to produce a just society. A society where the economically well to do (rich) employers exploit and discard the economically vulnerable (poor) employees into the jaws of abject poverty and penury is an unjust society. This very same principle of social justice is applicable with full force and effect in deciding labour cases dealing with other labour disputes such as the fairness or otherwise of the dismissal of an employee.

**INTERNATIONAL LABOUR ORGANISATION (ILO) CONVENTION 158 AND OTHER FORMS OF INTERNATIONAL LAW PILLAR.**

Labour law has immensely evolved out of international law. The International Labour Organisation (ILO) is a reservoir for the development and propagation of labour law worldwide. ILO Convention 158 on Termination of Employment underscores the need for a just cause to precede any termination of employment for an employee or worker with a view to protect and insulate an employee from unjust and arbitrary termination of employment at the instance of an employer. Zimbabwe is a member of the international community to which ILO Convention 158 applies and hence the labour laws of the country do not exist in a vacuum.

A recognition of the importance and relevance of ILO Convention 158 to the labour law jurisprudence of Zimbabwe arises from some excerpts from the Greatermans judgment particularly at **pages 41** and **42** thereof where the learned MALABA CJ succinctly says:

" ***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 the employer must be treated under national law.***
***Article 12(1) of the Convention provides:***

***" 12 (1) A worker whose contract has been terminated shall be entitled, in accordance with national law and practice, to-***

***(a) a severance allowance or other separation benefits, the amount of which shall be based, inter alia, on length of service and the level of wages paid directly by the employer….."***

***Section 12C(2) of the Act gives effect to the purpose of Article 12(1) of the Convention by 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 of employment.***

***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 was terminated for a reason other than misconduct has always been viewed as a means of ensuring that the employee has a soft and safe landing after losing employment.***

***The adoption of principles of Article 12(1)(a) of the Convention is an important factor which serves to show that the decision to retrospectively apply the financial obligation on employers who had terminated employees' contracts on notice on or after 17 July 2015 to pay them the minimum retrenchment package based on length of service was not based on arbitrariness. It was based on internationally acceptable legal standards.***

***The provisions of Article 12(1)(a) of the Convention are relevant in testing the constitutionality of the retrospective application of s12 of the Act to the applicants. An***

***examination of the provisions of section 12C (2) of the Act show that they closely reflect the requirements of Article 12(1)(a) of the Convention. The Convention contains universally accepted norms. It constitutes a touchstone against which the notion of fairness can be gauged. This is not to suggest that the notion of fairness is exclusive of employers' legitimate commercial interests. It indicates that a central purpose of modern employment law is to guarantee the protection of workers even at the time of termination of employment on notice at the initiative of the employer."***

**OTHER FORMS OF INTERNATIONAL LAW**

Apart from ILO Convention 158, the Constitutional Court also made reference to other forms of international law in its judgment to buttress the importance of labour rights as internationally recognised rights as can be seen from pages 21 of the record wherein the Court had this to say:

" ***The contents of the rights must be available and claimable under any measure which meets the standard of legality. Article 1 of the Universal Declaration of Human Rights declares that: " all human beings are born free and equal in dignity and rights". Equality is a fundamental principle of social justice. Every person is by virtue of being human entitled to equal access to remedies, protection and benefits provided under the law. AS all human beings are equal, they are entitled to equal treatment as such under the law. The idea of equality of human beings and equal treatment as such underlies all modern, democratic and humanitarian legal systems."***

In the same wavelength, the Court borrowed a leaf from the International Covenant on Civil and Political Rights to throw weight behind labour rights as possessing international legal recognition and protection. This position can be noted from **pages 25** & **26** of the judgment where the Court had this to say:

" ***Article 26 of the International Covenant on Civil and Political Rights ("ICCPR") recognises and protects the right to equal protection of the law as follows:***

" ***All persons are equal before the law and entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any form of discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."***

***Commenting on non-discrimination as it relates to the right to equal protection of the law, the United Nations Human Rights Committee on the ICCPR in General Comment 18 adopted on 10 November 1989 stated as follows:***

***"13. Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."***

**INTERNATIONAL CASE LAW ON RIGHT TO EQUALITY BEFORE THE LAW**

To demonstrate the justiciable nature of labour rights under international law, the Court made extensive reference to international case law e.g at **page 26** of the judgment, the Court made an extensive reference to a case which was decided by Judge Tanaka of the International Court of Justice, giving a dissenting opinion in **South- West Africa Cases (Ethiopia v South Africa; Liberia v South Africa); Second Phase, International Court of Justice (ICJ) 18 July 1966.** See also **V.M. Syed Mohammad and Company v The State of Andhra 1954 AIR 314, [1954] SCR 1117 at p 1120** dealing with the right to equal protection of the law in India as provided for under Article 14 of its Constitution ***which provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*** See also **Budhan Choudhry v The State of Bihari [1955] 1 SCR 1040.**

Regarding the legal position in Europe concerning equality before the law as one of the tenets for the enforcement of labour rights, the Court made reference to a legal academic article at **page 27** as follows:

**"** ***McCrudden C and Prechal S, in an article entitled " The Concepts of Equality and Non-Discrimination in Europe: A practical approach", European Network of Legal Experts in the Field of Gender Equality, November 2009, refer to the Aristotelian conception of equality applied in Europe which has two dimensions: like cases should be treated alike, and different cases should be treated differently. An example of Cyprus is given where it is stated that the Supreme Constitutional Court of that country accepts that the:***

**"*...right to equality is subject to reasonable differentiations between inherently different situations. On the other hand, arbitrary unreasonable differentiations not justified by the intrinsic nature of things, will contravene the equality principle."***

The Court further referred to the legal position on the right to equality before the law under which labour rights are also subsumed with reference to the law of the United States of America (USA) at **page 29** of the judgment as follows:

" ***In America, the right to equal protection of the law is found in the Fourteenth Amendment to the United States Constitution under section 1. Among others, the section provides that no State in America shall deny to any person within its jurisdiction the equal protection of laws. As far back as 1897 the United States Supreme Court in the case of Gulf, Colorado & Santa Fe Ry.Co. v Ellis 165 U.S 150 (1897) held that equal protection of the law means subjection to equal laws applying alike to all in the same situation. In 1910 the same court in Southern Railway Co. v Greene, 216 U.S 400 (1910) made the point that while reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based on some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed. Classification cannot be made arbitrarily without any substantial basis. Arbitrary selection cannot be justified by calling it classification."***

Also the Court made reference to South African Law on equality before the law at pages 29 &30 of the judgment as follows:

" ***Currie & de Waal: "The Bill of Rights Handbook" 6 ed Juta at p218 explain that classification of people for purposes of legislation does not violate the right to equal protection when it is based on reasonable grounds. The learned authors state as follows:***

***"The equality right does not prevent the State from making classifications and from treating some people differently to others. This is because <u>the principle of equality does not require everyone to be treated the same, but simply that people in the same position from a moral point of view should be treated the same. Laws may therefore classify people and treat them differently to other people for a variety of legitimate reasons.</u> Indeed, laws almost inevitably differentiate between persons. <u>It is impossible to regulate the affairs of the inhabitants in a country without differentiation and without classification that treat people differently and that impact on people differently. Not every differentiation can therefore amount to unequal treatment</u>. If it did, the courts could be called on to review almost the entire legislative programme." (my emphasis)***

***In Prinsloo v Va der Linde 1997 (3) SA 1012 (CC) the Constitutional Court of South Africa explained that mere differentiation without a rational relationship to the legislative purpose and not based on objective criteria would constitute a violation of the right to equal protection of the law. the court said at pp 1024G – 1025B:***

***"In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences' that serve no legitimate governmental purpose. For that would be inconsistent with the rule of law and the fundamental premises of a constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner…***

***Accordingly, before it can be said that mere differentiation infringes s 8[IC] (now s 9(1) of the South African Constitution) it must be established that there is no rational relationship between the differentiation in question and the government purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe s 8."***

**INTERNATIONAL CASE LAW GIVING LEGAL RECOGNITION TO THE RETROSPECTIVE APPLICATION OF LEGISLATION**

With regard to the legal recognition of the retrospective application of legislation, the Court cited a pedigree of case authorities at page 17 of the judgment as follows:

"***In British Columbia v Imperial Tobacco Canada Ltd [2005] 2 SCR 473 the Supreme Court of Canada held that:***

***"the absence of a general requirement of legislative prospectivity exists despite the fact retrospective and retroactive legislation can overturn settled expectations and in sometimes perceived as unjust: see E. Edinger, 'Retrospectivity in Law' (1995), 29 U.B.C.L. Rev. 5, at p. 13. Those who perceive it as such can perhaps take comfort in the rules of statutory interpretation in that they require the legislature to indicate clearly any desired retroactive or retrospective effect …..".***

***In Gustavson Drilling (1964) Ltd v The Minister of National Revenue [1977] 1 SCR 271, cited by the respondents' counsel, the same Court held at p 279 that:***

***"The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances, the statute operates retrospectively."***

***P.W. Hogg in Constitutional Law of Canada 3 ed (1992) at p 1111 wrote:***

***"Apart from s. 11(g), Canadian constitutional law contains no prohibition to retroactive (or ex post facto) laws. There is a presumption of statutory interpretation that s statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statues are in fact common. The power to enact retroactive laws, if exercised with appropriate restraints, is a proper tool of modern government. Section 11(g) diminishes this power only by excluding the creation of retroactive criminal offences. Other kinds of laws may still be made retroactive."***

There can be no doubt that a very strong legal foundation has been laid by this judgment for the application of relevant international law in determining labour disputes in Zimbabwe and this equally applies to disputes like unfair dismissal from employment.

**WHAT IS THE APPLICABLE COMPENSATION FOR LOSS OF EMPLOYMENT FOR AN EMPLOYEE WHOSE CONTRACT OF EMPLOYMENT WAS TERMINATED ON THREE MONTHS NOTICE UNDER THE COMMON LAW ON OR AFTER 17 JULY 2015?**

The legal framework for compensation of loss of employment applicable to an employee whose contract was terminated on three months notice on or after 17 July 2015 is provided for in terms of section 18 of the Labour Act (as amended by the Finance Amendment Act of 2015) entitled Transitional provision whose provisions say:

"***18 Transitional provision***

***The Labour Act [Chapter 28:01] as amended by this Act applies to every employee whose services were terminated on three months' notice on or after 17th July 2015."***

Also section 12(4b) of the Labour Act (as amended by the Labour Amendment Act No. 5 of 2015) provides for the applicable compensation for loss of employment under such circumstances as follows:

'' ***Where an employee is given notice of termination of a contract in terms of subsection (4a) and such employee is employed under the terms of a contract without limitation of time, the provisions of section 12C shall apply with regard to compensation for loss of employment."*** A reading of the provisions of **section 12**(**4b**) of the **Labour Act** aforementioned reveal that for an employee whose contract of employment was terminated on three months notice to legally qualify for compensation of loss of employment, that employee must meet two requirements, namely, firstly, termination of employment on three months notice on or after 17 July 2015 and secondly, that the employee was employed under the terms of a contract of employment without limitation of time. A contract of employment with limitation of time is sometimes known as a permanent contract of employment or an open ended contract of employment. It is a contract of employment of an indefinite duration or one which runs until an employee reaches the retirement age.

The quantum of compensation for loss of employment pursuant to the termination of an employee's contract of employment on three months' notice on or after 17 July 2015, being the minimum retrenchment package made up of at least one month's salary for every two years of service as an employee or the equivalent lesser proportion of one month's salary or wages for a lesser period of service, is tabulated in terms of **section 12C** (**2**) of the **Labour Act** in the following terms:

" ***Unless better terms are agreed between the employer and employee concerned or their representatives, a package (hereinafter called 'the minimum retrenchment package') of not less than one month' salary or wages for every two years of service as an employee (or the equivalent lesser proportion of one month's salary or wages for a lesser period of service) shall be paid by the employer as compensation for loss of employment (whether or not the loss of employment is occasioned by retrenchment or by virtue of termination of employment pursuant to section 12 (4a)(a), (b) or (c), no later than the date when the notice of employment takes effect.***

The legal import of section 12C(2) of the Labour Act is that if an employer and employee fail to agree on the payment of compensation for loss of employment or retrenchment package which is better or higher than the statutory minimum retrenchment package of one month's salary of every two years of service as an employee or the equivalent lesser proportion of one month's salary or wages for a lesser period, the employee shall automatically be legally entitled to be paid the stipulated minimum retrenchment package by the employer by operation of the law unless the concerned employer is legally granted an exemption from paying that minimum retrenchment package to the affected employee. The law that gives an employer a legal right to apply for an exemption from paying an employee part of or the whole of (zero payment) the minimum retrenchment package in the case of financial incapacity to pay the minimum retrenchment package is **section 12C** (**3**) of the **Labour Act** whose instructive provisions say:

> **"** ***Where an employer alleges financial incapacity and consequent inability to pay the minimum retrenchment package timeously or at all, the employer shall apply in writing to be exempted from paying the full minimum retrenchment package or any part of it t0-***
> ***(a) the employment council established for the undertaking; or***
> ***(b) if there is no employment council for the undertaking concerned, to the Retrenchment Board;***
> ***which shall respond to the request within fourteen days of receiving the notice (failing which response the application is deemed to have been granted."***

The practical legal meaning of section 12C(3) of the Labour Act is that an employer who makes an allegation of financial incapacity to pay an employee the minimum package is bestowed with the legal right to apply to either the employment council for the industry or sector concerned or in its absence, to the Retrenchment Board for an exemption which may come in the complexion of being allowed not to pay the minimum package timeously or total exemption from paying any part of the minimum package which is essentially a nil payment to the affected employee. A failure by either the employment council or Retrenchment Board within fourteen working days of receiving the notice of response automatically results in the legal approval of that application for exemption from paying the minimum retrenchment by default. Due to the bureaucratic nature of some employment councils and the Retrenchment Board in terms of convening meetings, chances of failure by either an employment council or the Retrenchment Board to respond to an application for an exemption by the employer may be high resulting in most applications for an exemption from paying the minimum retrenchment package being

granted by default. However, at face value, the wording of section 12C (3) of the Labour Act in terms of its literal, ordinary and grammatical meeting seem to suggest all that is required of an employment council or the Retrenchment Board in terms of section 12C (3) as opposed to section 12C (4), is to do a response to an application for an exemption without necessarily stating it as a substantive determination or decision. A response may merely mean a letter confirming receipt of an application for an exemption in terms of section 12C (3) of the Labour Act without necessarily delving into the nitty-gritties of delivering a substantive determination or decision on such an application for exemption. However, section 12C (4) of the Labour Act does not deal with or contemplate a cursory response but rather a substantive response dealing with the merits of the application for exemption. The disposal or consideration of an application for exemption from paying the minimum package and the several factors, payment options and modalities for consideration is provided for in terms of section 12C (4) of the Labour Act which provides the following:

" ***In considering its response to a request for exemption in terms of subsection (3) the employment council or Retrenchment Board-***

***(a) shall, where the employer alleges complete inability to pay the minimum retrenchment package, be entitled to demand and receive such proof as it considers requisite to satisfy itself that the employer is unable, and if so unable on the date the notice of termination of employment takes effect, may propose to the employer a scheme to pay the minimum retrenchment package by instalments over a period of time;***

***(b) shall, where the employer offers to pay the minimum retrenchment package by instalments over a period of time, consider whether the offer is a reasonable one, and may propose an alternative payment schedule;***

***(c) may inquire from the employer where he or she has considered, or may wish to consider, specifically or in general, the alternatives to termination of employment provided for in section 12D."***

**PRACTICAL LEGAL PROCEDURE FOR AN EMPLOYEE WHOSE CONTRACT OF EMPLOYMENT WAS TERMINATED ON THREE MONTHS NOTICE ON OR AFTER 17 JULY TO GET COMPENSATION FOR LOSS OF EMPLOYMENT IN THE EVENT THAT THE EMPLOYER HAS NOT VOLUNTARILY PAID SUCH COMPENSATION IN THE FORM OF EITHER BETTER TERMS OR FAILING WHICH THE MINIMUM RERTRENCHMENT PACKAGE AS STIPULATED IN TERMS OF SECTION 12C(2) OF THE**

**LABOUR ACT [CHAPTER 28:01): REFERRAL TO A LABOUR OFFICER OR DESIGNATED FOR RESOLUTION VIA CONCILIATION OR RULING IN TERMS OF SECTION 93(5) OF THE LABOUR ACT**

A law that is not enforceable is an empty noise (***brutum fulmen***) and is just as good as dead law. Not all legal hope is lost for an employee whose contract of employment was terminated on three months' notice on or after 17 July 2015 as there is a practical legal procedure in the Labour Act which the affected employee must invoke to get compensation in the event that the employer fails, refuses or neglects to willingly pay such compensation in terms of section 12C (2) of the Labour Act.

For an employee who is not covered by an employment council for a particular industry, the legal procedure to follow in claiming compensation for loss of employment arising from termination of a contract on three months' notice is to refer a dispute to a labour officer in terms of section 93(1) of the Labour Act which provides as follows:

"***A labour officer to whom a dispute or unfair labour practice has been referred, or to whose attention it has come, shall attempt to settle it through conciliation or, if agreed by the parties, by reference to arbitration."***

The labour officer is enjoined and mandated to record in writing if a dispute or unfair labour practice is settled by conciliation[2]. Where a dispute or unfair labour practice is not settled via conciliation within a period of thirty days after a labour officer attempted to settle it, the law imposes a legal obligation for a labour officer to issue a certificate of no settlement to the parties to the dispute or unfair labour practice[3]. The law allows the parties, at their own volition, to agree to extend the thirty day period for conciliation stated in section 93(3) of the Labour Act to give each other enough time to try and resolve the dispute amicably via conciliation without being stampeded[4]. This is a very commendable provision which allows parties ample time to explore a resolution of a dispute or unfair labour practice via conciliation without being hamstrung by time constraints.

In the case of an employee who is governed by an employment council for a particular industry or sector with designated agents, the jurisdiction of a labour officer to resolve such a dispute is expressly ousted by operation of the law and hence such an employee must refer his/her dispute to a designated agent

[2] See section 93(2) of the Labour Act
[3] See section 93(3) of the Labour Act
[4] See section 93(4) of the Labour Act

pursuant to the pertinent provisions of section 63(3b) of the Labour Act which states in mandatory terms because of the use of the word **shall**, as follows:

"Where ***a designated agent is authorised to redress any dispute or unfair labour practice in terms of subsection (3a), no labour officer shall have jurisdiction in the matter."*** (emphasis added by underlining).

A designated agent with an employment council is legally empowered to resolve labour disputes in terms of section 63(3a) whose instructive provisions provides as follows:

" ***A designated agent of an employment council who meets such qualifications as may be prescribed shall, in his or her certificate of appointment, be authorised by the Registrar to redress or attempt to redress any dispute which is referred to a designated agent or has come to his or her attention; where such dispute occurs in the undertaking or industry and within the area of which the employment council is registered, and the provisions of Part XII shall apply, with the necessary changes to the designated agent as they apply to labour officers."***

Both a labour officer and a designated agent are endowed with broad legal powers to dispose of labour disputes by referring such to compulsory arbitration if the dispute is a dispute of interest and the parties are engaged in an essential service[5]. A dispute of interest is a dispute about non existing legal rights which is basically a dispute concerning the creation of new legal rights e.g wage or salary increases. If the parties to a dispute or unfair labour practice are not employed in the essential service, there is no legal provision for a labour officer or designated agent to refer such a dispute to compulsory arbitration but rather he/she may, with the consent or agreement of the parties, refer it to voluntary arbitration[6]. In the same vein, where a labour officer is faced with a dispute of right i.e a dispute about the interpretation or applicability of existing legal rights provided for in terms of the law e.g the legal right of an employee whose contract of employment was terminated by the employer on three months' notice which is already availed and legally enforceable as a right in terms of sections 12(4b), 12C (2) and 18 of the Labour Act, that dispute or unfair labour practice must be resolved by the designated agent or labour officer making a ruling on its merits[7]. The aforesaid ruling is actually a determination on the substantive merits of the case. It is a ruling that considers both the facts and the law applicable to a given case. This means that a labour officer or designated agent is now a quasi-judicial officer who is legally empowered to preside

[5] See section 93(5)(a) of the Labour Act
[6] See section 93(5)(b) of the Labour Act
[7] See section 93(5)(c) of the Labour Act

over labour disputes and produce rulings akin to a judgment of a formal court. There is need to train labour officers and designated agents to equip them with sufficient and requisite skills that will enable them to discharge this onerous and necessary mandate to deliver rulings as not doing so will gravely endanger the administration of justice in the area of labour law in Zimbabwe.

## CHALLENGES PAUSED BY THE LEGACY OF THE NYAMANADE AND ANOTHER VS ZUVA PETROLEUM (PVT) LTD SUPREME COURT JUDGMENT OF 17 JULY 2015

The Nyamande and Another vs Zuva Petroleum Supreme Court labour related judgment of 17 July 2015 confirming an employer's common law right to terminate an employee's contract of employment was premised on a time honoured legal presumption against the alteration of the common law by legislation in the absence of express terms evincing such an alteration. South Africa, unlike Zimbabwe, expressly altered the aforesaid common law presumption expressly by enacting a specific provision in the Labour Relations Act of 1995 which proscribe an employer's termination of an employee's contract of employment with or without notice as an unfair dismissal. The Zimbabwean Labour Act does not have a corresponding legal provision like the South African Labour Relations Act when it comes to termination of a contract of employment on notice by an employer. Consequently, academically, one may attempt to fault the Zimbabwe Supreme Court judgment of 17 July 2015 but practically that judgment is difficult to legally assail given the fact that the Zimbabwean Labour Act has allowed the common law to rear its ugly head concerning termination of employment on notice by an employer. In fact, even the Labour Amendment Act No. 5 of 2015 which came into force in August 2015 hot in the heels of the Zuva judgment of 17 July 2015 did not extinguish an employer's common law right to terminate an employee's contract of employment on notice but rather merely modified that common law right under the new section 12(4a) of the Zimbabwean Labour Act (as amended). It is respectfully submitted that the Greatermans Constitutional Court judgment of 28 March 2018 actually endorsed the Zuva Supreme Court judgment of 2015 as legally correct by only dealing with its after effects on compensation for loss of employment without demolishing an employer's common law right to terminate a contract of employment on notice. Consequently, there is no more job security in Zimbabwe as employees are now precariously at the mercy of the whim and caprice of the common law in terms of which an employer can wield the axe and guillotine an employee at anytime and choose to pay a paltry meagre typical of chicken feed, as compensation for loss of employment or actually apply for an exemption to pay zero compensation in terms of section 12C of the Labour Act.

## CONCLUSION

The instant Constitutional Court judgment has opened room for the development of labour rights in Zimbabwe tailor-made with international law. This new legal chapter will spur the progressive evolution of labour law jurisprudence in the country as it has heralded the dawn of a new legal era in labour matters. The blend of national legislation with international law is likely to produce a hybrid legal framework for the betterment of the nation's labour law through cross-pollination and cross-fertilization of legal ideas. The Constitutional Court deserves a commendation for churning out this progressive labour judgment which has created a fertile breeding ground for the practical realization of labour rights in the country both in terms of the Constitution of Zimbabwe and international law. It is hoped that this legal trajectory will be developed further for the betterment of labour rights without regressing or digressing.