UNPACKING PRACTICAL RETRENCHMENT LABOUR LAWS, OTHER LABOUR LAW CURRENT AFFAIRS & MINIMUM RETRENCHMENT PACKAGE IN ZIMBABWE IN TERMS OF STATUTORY INSTRUMENT (S.I.) 191 OF 2024 AS READ WITH SECTIONS 12C &12CC OF THE LABOUR ACT: RETRENCHMENT PACKAGE LESSONS FROM OTHER SOUTHERN AFRICA DEVELOPMENT COMMUNITY (SADC) COUNTRIES BY CALEB MUCHECHE[1]

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INTRODUCTION

Government of Zimbabwe commendably filled a legal void in the retrenchment law by gazetting the minimum retrenchment package of **one month's salary or wages** for **every year served as an employee**, via Labour (Retrenchment) Regulations, 2024 enacted by the Minister of Public Service, Labour and Social Welfare as Statutory Instrument 191 of 2024 (hereinafter referred to as **S.I. 191 of 2024**), on 6 December 2024. This retrenchment legislation was enacted in terms of section 17 of the Labour Act [Chapter 28:01]. The effect of this legislation is to close the legal gap (*lacuna*) that existed when Labour

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Amendment Act No. 11 of 2023[3] was passed into law on 14 July 2023, in that section 12C and 12CC of the Labour Act did not provide for a minimum retrenchment package. This closure of the legal gap via enactment of the minimum retrenchment is a progressive move by the government of Zimbabwe which deserves a pat on the back, as it creates legal certainty for both employers and employees in Zimbabwe concerning retrenchment as one of the lawful methods of termination of employment. It is important to note that section 7 of S.I. 191 of 2024 repealed the old retrenchment legislation in terms of Statutory Instrument 186 of 2003 with effect from 6 December 2024, meaning that it is no longer legally valid legislation. This legal testament unpacks contemporary retrenchment laws in Zimbabwe and some other African countries in the Southern Africa Development Community (SADC) region.

SECTION 65 OF THE CONSTITUTION OF ZIMBABWE LABOUR RIGHTS AND ITS APPLICATION TO RETRENCHMENT MATTERS

The constitutional right of every person to fair labour practices and fair labour standards in terms of section 65 of the Constitution of Zimbabwe applies to both employers and employees. However, the right to be paid a fair and reasonable wage in terms of section 65(1) of the Constitution of Zimbabwe only applies to an employee and not an employer. Both employers and employees still have room availed by government to participate towards the continuous improvement of our retrenchment law via social dialogue. The purpose of this paper is to briefly unpack the legal import of Statutory Instrument 191 of 2024, for guidance to both employers and employees.

OVERVIEW OF RETRENCHMENT LAW IN ZIMBABWE

One of the ways in which companies can shed labour is through retrenchment. Instead of going through lengthy and costly disciplinary hearings for misconduct of employees, a business can use retrenchment as a convenient way to remove excess labour, on no-fault basis. Previous procedures involved long drowned out negotiations with employees often resulting in deadlocks that needed to be dealt with by a Retrenchment Board that was overwhelmed and had resource challenges resulting in a backlog of cases. This scenario seemed to frustrate the retrenchment process and some businesses opted to close down. This did not improve the industrial relations regime in the country and did little to create a positive investment climate both locally and internationally. In the case of Don Nyamande and Anor

[3] Refer to Caleb Mucheche's book titled, Advanced Labour Law in Zimbabwe Commentary on Labour Amendment Act, 2023 and other previous labour amendments from 1980 to 2023, for a detailed analysis of section 12C and 12CC of Labour Act as amended by Labour Amendment Act No. 11 of 2023

vs Zuva Petroleum Private limited SC 43/15, after the parties had made recourse to the Supreme Court to resolve a dispute on termination of employment on notice after a failed or botched retrenchment process, the Government amended the law in 2015 and made more convenient rules for retrenchment. In the judgement the Supreme Court had upheld the employer's common law right of an employer to terminate an employee's contract of employment on notice. The business community responded by terminating the contracts of employees in so large numbers it was a scandal. This resulted in the current amendments which now limits termination to four conditions including retrenchment which shall be dealt with below.

RETRENCHMENT DEFINITION

Retrenchment is the reduction of employees at work by the employer due to financial and operational reasons. While some, especially trade unions, see retrenchment as a technical way of dismissing employees, others in particular stressed businesses, view it as a way to provide tentative relief in difficult economic times.

The International Labour Organization (ILO), makes reference to termination of employment based on operational needs of the enterprise in Article 4 of Convention 158 of 1982 which states;

> "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service".

Besides this section of the convention, nowhere else is there reference to termination for operational reasons. The ILO Conventions always refer to national laws and practice which must provide procedures and remedy for operationalizing the articles of the Convention. Zimbabwe has not ratified the said Convention but has tried to make provisions in the Labour Act that provide procedural fairness in matters of retrenchment.

The Labour Act [Chapter 28.01] provides a wider and more detailed definition of 'Retrenchment'. Under section 2, to retrench means,

> ***"...terminate the employee's employment for the purpose of reducing expenditure or loss, adapting to technological change, reorganizing the undertaking in which the employee is employed, or for similar reasons, and includes the termination of employment on account of the closure of the enterprise in which the employee is employed".***

This definition, unlike most, includes situations of liquidation or winding up or closure of business, which will inevitably result in the retrenchment of employees. Employees are in a position of economic dependence upon the employer due to the unequal barraging power inherent in the employment relationship, which is skewed and lopsided in favour of the

employer, such that in some cases, a retrenchment of an employee is tantamount to the imposition of a death sentence of poverty upon the affected retrenched employee and his/her family and dependants. The Supreme Court defined the meaning of retrenchment as a method of termination of employment in the cases of **Retrenched Employees of National Breweries Limited as represented by Nathan Mudondo v National Breweries Limited and Anor SC 121/02, Freda Rebecca Gold Mine Holdings Limited v M Nhliziyo and Ors SC 16/13, Continental Fashions (Pvt) Ltd v Mupfuriri & Ors 1997 (2) ZLR 405 (S), kadir and Sons (Pvt) Ltd v Panganai & Anor 1996 (1) ZLR 598 (S).**

Labour (Retrenchment) Regulations Statutory Instrument 191 of 2024 which repealed Statutory Instrument 186 of 2003, is useful in the retrenchment procedures in that it specifies the standard prescribed legal forms to be used by an employer engaging in a retrenchment process. The LRR 1 form being the form to be filled by the employer in giving notice of the intention to retrench, the LRR2 form being the schedule for approval or confirmation of the retrenchment and the LRR 3 form for reference of matter to the retrenchment board.

UNPACKING AND UNMASKING RETRENCHMENT PROCEDURES

Under the Labour Act, section 12C and 12CC outline the retrenchment procedures, giving employers the right to retrench and specifying the minimum retrenchment package which the employers have to pay to affected employees.

Procedurally, an employer who intends to retrench employees has to give **written notice** of intention to either;

-the Works Council, or

Employment Council, or

-the Retrenchment Board if the Works Council or Employment Council does not exist,

The written notice should state the reasons for the proposed retrenchment and the details of the employees that are to be retrenched. The copy of the notice to retrench must be sent to the Retrenchment Board.

It is envisaged that the employer and the employees or their representatives will negotiate and agree on a retrenchment package that mutually suits them. Where there is no agreement the basic minimum retrenchment package shall be paid. This package is,

-one month's salary or wages for every year of service

-notice payment (normally three months)

The Labour Act states that unless better terms are agreed between the employer and employees concerned, the minimum package above is in full and final settlement of such a retrenchment.

1.Under the old section 12 C (3) of the Labour Act as enacted by Labour Amendment Act, 2015, an employer could seek to be **EXEMPTED** from paying the minimum package if he or she alleges 'financial incapacity and consequent inability' to pay the minimum retrenchment package. This is achieved through an application by an employer to the Employment Council and the Retrenchment Board both of which have **14 days** to respond. If they a failed respond within that stipulated time, the application shall be regarded as approved. The old section 12C of the Labour Act was repealed by sections 9 and 10 of the Labour Amendment Act, 2023 and

replaced with new section 12C and 12CC of the Labour Act which initially did not specify the quantum of the minimum retrenchment package. The minimum retrenchment package was later specified as one month for every year served as an employee on 6 December 2024, by virtue of Statutory Instrument 191 of 2024. Kind or warm hearted employers who can afford to pay their employees a better package other than the statutory minimum retrenchment package are respectfully encouraged to do so, so that their employees do not permanently lose work with a paltry retrenchment package, under circumstances whereby the minimum retrenchment package is unjustly and unfairly applied as one-size-fits all maximum retrenchment package.

2.Applications for exemption may show complete inability to pay or payment by instalments or alternative to termination. Any authority, as in an employment council and or the Retrenchment Board 'special measures' that is seized with such an application for exemption, shall 'demand and receive proof' that is needed from the employer to justify their application.

3.Under section 12D, the Act states terms and provisions for employers to provide to '**special measures'** to avoid retrenchment and this begins by consistent communication between the employers and employees on any structural or operational changes in the organization.

The special measures may include;

-short time work,

-shift work system,

This has to be for a period not exceeding twelve months.

3.Agreements and disagreements over how to implement new special arrangements dealing with ways to avoid retrenchment are provided for in that same said section 12D. Each time the employers and the employees and their representatives agree or disagree over the nature of any special measures of avoiding retrenchments, the relevant or appropriate employment council or where there is none, the retrenchment board, needs to be in formed. In the same section the Minister responsible for Labor matters may be informed of any changes to the work arrangements and he or she may make changes within 30 days of receiving any changes to work arrangements.

In brief, the current procedures for retrenchment are;

1.The authorities for retrenchment are:

Employment Council

Retrenchment Board

2. Employers who wish to retrench

-give notice to an appropriate authority

-provide details of employees affected

-give reasons for the retrenchment

-send copy of notice to retrench to the Retrenchment Board

3. Employers and employees have to negotiate for a better package than what is minimum in terms of the Act.

-minutes of meeting or meetings to be recorded

-record of meeting to be submitted when required

4. When parties AGREE, both have to sign and inform the Retrenchment Board, which issue Certificate of Retrenchment

5. When the parties are in DISAGREEMENT, the employer should go ahead and pay a retrenchment package in terms of the minimum retrenchment package set by the Labour Act.

6. Employer has to advise the Retrenchment Board at all stages of the process and should provide each affected employee with his/her own notice letter of intention to retrenchment

7. Upon advising the Board on retrenching, the employer must provide minutes of the negotiation process,

8. The Retrenchment Board, after verifying the terms of the agreement, shall issue a certificate which shall be used for taxation assessment of the tax-fee retrenchment package amount before the Zimbabwe Revenue Authority (ZIMRA).

CURRENT LEGAL PROVISIONS ABOUT RETRENCHMENT IN ZIMBABWE

9 New sections substituted for section 12C of Cap. 28:01

Section 12C ("Retrenchment and compensation for loss of employment on retrenchment or in terms of section 12(4a)") of the principal Act is repealed and the following is substituted—

"12C Retrenchment and compensation for loss of employment on

retrenchment

(1) In this section—

Labour Amendment No. 11 2023

"capacity to pay", in relation to an assessment of an employer's capacity to pay a minimum or an enhanced retrenchment package, shall not be deemed to be affected by any action of the employer done in contemplation of retrenchment that diminishes or apparently diminishes his or her capacity to pay a minimum or an enhanced retrenchment package, and includes any action done at any time up to twelve months before the retrenchment; "employer" for the purposes of this section includes any person, entity or trust that is a successor to the employer, whether domiciled in Zimbabwe or not;

"retrench", with reference to the date on which an employment contract is terminated for the purpose of retrenchment, means any date specified by the employer that is not earlier than the date on which the employer lodges written notice of retrenchment in terms of subsection (3)(a) and not later than the date on which the employer lodges written notice of

retrenchment with the Retrenchment Board in terms of subsection (5) (and in the absence of such specification, the latter date shall be presumed to have been the intended date).

(2) Unless better terms are negotiated and agreed between the employer and the employee or employees concerned or their representatives—

(a) a minimum retrenchment package shall be payable by the employer as compensation for retrenchment not later than days from the date on which the retrenchment takes effect,

unless the affected employees agree to a longer or shorter or staggered period of payment of the package; and

(b) if the employees concerned or their representatives, having alleged that the employer has the capacity to pay an enhanced retrenchment package, and having satisfied the Retrenchment Board to that effect, the enhanced retrenchment package shall be payable with effect from the notification of the Retrenchment Board's decision.

(3) An employer who intends to retrench any one or more employees or has negotiated with his or her employees a retrenchment package better than the minimum retrenchment package (hereafter called the "agreed retrenchment package") shall—

(a) give fourteen days written notice—

(i) of the intention to retrench in the absence of an agreed retrenchment package to the works council established for the undertaking or, if there is no works council established for the undertaking concerned or if a majority of the employees concerned agree to such a course, to the employment council established for the undertaking or industry; and

(ii) of such intention or the agreed retrenchment package, as the case may be, to the Retrenchment Board; and

(iii) of the intention to retrench in the absence of an agreed retrenchment package to the employee or employees concerned;

(b) in the absence of an agreed retrenchment package, provide the works council or employment council, as the case may be, and the Retrenchment Board with details of every employee whom the employer wishes to retrench and of the reasons for the proposed retrenchment.

(4) Where negotiations for a retrenchment package better than the minimum retrenchment package are undertaken after the notice given to the Retrenchment Board under subsection (3)(a)(ii) and an agreement is secured (including the date or dates when it shall be paid to the employees), any payments required to be made in terms of the retrenchment package must be made on the day or days so agreed and the signed retrenchment package shall be notified in writing in accordance with subsection (5)(a) to the Retrenchment Board no later than the end of the notice period or seven days thereafter.

(5) No later than fourteen days when any employee is retrenched, the employer shall notify the Retrenchment Board—

(a) of the fact and the particulars of any agreed retrenchment package, if any (in which event the Retrenchment Board will no later than fourteen days from the date of when the employer notified the Board issue to the employer a certificate (hereinafter called a "notification certificate") to that effect if is satisfied that the agreed retrenchment package is indeed better than the minimum retrenchment package);

or

(b) in the absence of an agreed retrenchment package, of the fact that the minimum retrenchment package is being or is to be paid, together with details of every retrenched employee (in which case the Retrenchment Board will no later than fourteen days from the date of when the employer notified the Board issue to the employer a notification certificate to that effect):

Provided that—

(i) if an employer does not comply with this subsection, the full amount of the monies and other benefits pursuant to the agreed retrenchment package or minimum retrenchment package, as the case may be, shall vest (notwithstanding any provision for staggering the payment thereof) in the affected employee, employees or their representatives on the 21st day after the employee or employees concerned or any of them are first retrenched and the employee, employees or their representatives may proceed to enforce the package in terms subsections (6) and (7);

(ii) where the Retrenchment Board issues a certificate under paragraph (a) or (b) it shall post a copy of it on any actual or virtual notice Labour Amendment No. 11 2023 board of the Retrenchment Board for a period of not less than seven consecutive days;

(iii) if there is a question in any judicial or other proceedings whether the Retrenchment Board issued a notification certificate to the employer, an affidavit by the employer to the effect that he or she notified the Board in compliance with paragraph (a) or (b) shall be prima facie proof to that effect.

(6) If it is alleged by any employee or employees or their representatives that any agreed retrenchment package or minimum retrenchment package has not been paid within the time or times stipulated or agreed, such employee, employees or their representatives must, before proceeding to enforce the package in terms of subsection (7), satisfy the Retrenchment Board to that effect in the form of an affidavit in which the extent of non-compliance shall be clearly set forth, whereupon the Retrenchment Board shall notify the employer of the allegation in writing and afford him or her an opportunity to make representations to the Board in writing in rebuttal of the allegation, and if no such representations are received or the Board is satisfied that compliance has not been made with the minimum or agreed package, the Board shall issue a certificate (hereinafter called a "non-compliance certificate") to that effect in which the extent of non-compliance shall be clearly set forth.

(7) Upon issuance of the notification certificate, the retrenchment package to which the certificate relates, shall be binding on the employer and the employee or employees concerned, and the package shall be paid (subject to proviso (i) to subsection (5)) in accordance with its terms, failing which the employee or employees concerned or their representatives may—

(a) apply to the Labour Court for an order enforcing the package on the basis of the non-compliance certificate, for which purpose the Labour Court shall deem the non-compliance certificate to be a liquid document, determinable by default judgment proceedings in the same way as such documents are determinable in the magistrates courts or High Court;

and

(b) upon obtaining such order, submit for registration a copy of the order to the court of any magistrate which would have had jurisdiction to order the payment of the retrenchment package to which the order of the Labour Court relates had the matter been determined by it, or, if the amount of the order exceeds the jurisdiction of any magistrates court, the High Court.

(8) Where a decision, order or determination has been registered in terms of subsection (7) it shall have the effect, for purposes of enforcement, of a civil judgment of the appropriate court.

(9) Where an employer alleges lack of capacity to pay any part of the minimum retrenchment package—

(a) the employer shall within fourteen days of any employee being retrenched comply with subsection (5)(b) as if reference to minimum retrenchment package in that provision is Labour Amendment 2023 No. 11 a reference to the portion of the minimum retrenchment package that he or she is able to pay not being less than twenty-five per centum of the total package and subsections (6) and (7) shall apply to that portion accordingly;

and

(b) the employer shall apply in writing to the employment council or the Retrenchment Board, if there is no employment council for the undertaking concerned, for exemption from paying such part of the minimum retrenchment package in respect of which he or she alleges incapacity to pay, providing such evidence as is necessary in support of its application and such additional evidence as the employment council or the Retrenchment Board may require in making its determination;

and

(c) a copy of the application referred to in paragraph (b), together with the supporting documents, shall be made available by the employer to the employees concerned or their representatives.

(10) The employment council or the Retrenchment Board shall consider the application and make its determination within thirty days of the date of receipt of the application and, before making its determination, the employment council or the retrenchment board shall call a hearing of the parties.

(11) If the employment council or the Retrenchment Board fails to make a determination within thirty days as specified in subsection (10), or if any party is aggrieved by any determination of the employment council or the Retrenchment Board, the aggrieved party may appeal to the Labour Court within twenty-one days of the expiry of the said period of thirty days or of the date of the determination, as may be appropriate.

(12) An employer who purports to retrench any employee without giving notice of retrenchment to the Retrenchment Board in accordance with subsection (5) shall be guilty of an offence and liable to a fine not exceeding level 12 or to imprisonment for failure to pay the fine in full within six months (the reference to an employer for the purpose of imprisonment shall be a reference to any member of the governing body of a corporate employer).

(13) Where an employer gives notice in accordance with subsection (3)(a) (iii) that he or she is to pay the minimum retrenchment package, then upon completion of the steps specified in subsections (4) and (5) and without prejudice to the payment of the minimum retrenchment package, it is open to—

(a) any trade union representing retrenched employees or representative; or

(b) any retrenched employee (if he or she is the only retrenchee) or any retrenched employee acting with the written authority of the majority of any group of retrenched employees no later than 60 days from the date of issuance of the notification certificate under subsection (5), to allege in writing to the Retrenchment Board that the employer has the capacity to pay an enhanced retrenchment package, giving particulars of any proof to that effect and specifying the amount of the enhanced retrenchment package sought.

(14) The employment council or the Retrenchment Board shall consider the application and make its determination within thirty days of the date of receipt of the application and, before making its determination, the employment council or the Retrenchment Board shall call a hearing of the parties at which—

(a) the employer shall disclose its audited financial statements;

(b) the employment council of the Retrenchment Board may require the employer to respond by way of affidavit to any specific allegation concerning its ability to pay an enhanced retrenchment package made by any employee, group of employees or any representative thereof.

(15) If the employment council or the Retrenchment Board fails to make a determination within thirty days as specified in subsection (10), or if any party is aggrieved by any determination of the employment council or the Retrenchment Board, the aggrieved party may appeal to the Labour Court within twenty-one days of the expiry of the said period of thirty days or of the date of the determination, as may be appropriate.

(16) Any employer who fails to comply within the time specified by the employment council or by the Retrenchment Board in terms of subsections (14) and (15) shall be deemed to be guilty of the crime of contempt of court contrary to section 182 of the Criminal Law (Codification and Reform) Act [Chapter 9:23] and subject to the penalties therefor.".

10 New section inserted in Cap. 28:01

The principal Act is amended by the insertion after section 12C of the following section—

"12CC Non-payment of retrenchment package due to fraudulent, reckless or grossly negligent conduct by employer

(1) If an employer alleges in terms of section 12C (9) partial or total incapacity to pay the minimum retrenchment package and it emerges in the course of proceedings in terms of section 12C (9) and (10) that there are indications prompting a reasonable suspicion that—

(a) the employer deliberately stripped the assets of the business or otherwise degraded it in contemplation of retrenchment;

or

(b) the business of the employer was or is being carried on—

(i) recklessly; or

(ii) with gross negligence; or

(iii) with intent to defraud any person or for a fraudulent purpose;

the Retrenchment Board or the employment council, as the case may be, having invited the employer concerned to respond to the allegations by way of affidavit within a specified time, and not having received such affidavit within the specified time or not being satisfied that the affidavit constitutes an adequate response to the allegations, may issue a provisional statement setting forth its grounds for believing that the business of the employer was being carried out in manner described in sub paragraphs (i), (ii) or (iii), and serve copies of the statement to the employer and to any employee or representative of employees who requests the statement.

(2) Having received a copy of a provisional statement under subsection (1)—

(a) any trade union representing retrenched employees or representative; or

(b) any retrenched employee (if he or she is the only retrenchee) or any retrenched employee acting with the written authority of the majority of any group of retrenched employees;

may on notice to the employer and any person to be named in paragraph (d), make an application to the Labour Court to seek—

(c) a general declaration confirming the statement (any allegation of which the employer may rebut on a balance of probabilities); and

(d) a specific declaration to the effect that any one or more of the following—

(i) the employer;

(ii) any named person who is or was an owner, director or partner of the business or any other named persons who were knowingly parties to the carrying on of the business in such manner or in such circumstances;

shall be personally responsible, without limitation of liability, or the total amount of the minimum retrenchment package, on the basis of joint or several liability or as the court may direct, and the court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing the liability, including an order under paragraph (e):

Provided that every person named under subparagraph (ii) must be afforded an opportunity by the Labour Court to rebut any allegations against him or her for the purpose of this paragraph on a balance of probabilities;

(e) if the general declaration is confirmed and the specific declaration is granted, an order may be made by the Labour Court for payment of the minimum retrenchment package to every retrenched employee (whether or not he or she is a party to the application), and for the payment of the costs of the application by the employer or any named person (the award of which costs shall be at the discretion of the Labour Court).

(3) If the Labour Court grants the order under subsection (2)(e) the applicant may submit for registration a copy of the order to the court of any magistrate which would have had jurisdiction to order the payment of the retrenchment package had the matter been determined by it, or, if the amount of the retrenchment package exceeds the jurisdiction of any magistrates court, the High Court.".

LEGAL EFFECT OF THE EMPLOYER FAILING TO SERVE A WRITTEN NOTICE OF INTENTION TO RETRENCH ON THE APPLICABLE PARTIES

The legal effect of an employer failing to serve fourteen days' notice of intention to retrench on the applicable parties is that it renders the purported retrenchment null and void ab initio or a legal nullity. It is also a criminal offence punishable by jail or fine or both jail and fine for an employer to fail to serve a written notice on intention to retrench. In the case of **ZIMASCO (Pvt) Ltd v Justin Phiri and 139 Others LC/H118/25,** the employer tried to retrench some employees without first serving a written notice of intention to retrench in terms of the law. The Labour Court ruled that the employer jumped the gun by placing the card before the horse and that retrenchment process was held unlawful for want of compliance with the employer's legal obligation to serve a written notice of intention to retrench, and consequently, the affected employees were reinstated back to their jobs without loss of salaries and benefits. In the case of **Stanbic Bank Zimbabwe Limited v Charamba 2006 (1) ZLR 368 (S) at 379 (SC 77/2005),** the Supreme Court adopted a very strict approach concerning retrenchment by holding that if an employer flouts or violates the retrenchment statutory legal provisions, such a retrenchment process becomes unlawful and the affected employee is legally entitled to the remedy of reinstatement back to his/her job without loss of salaries and benefits or alternatively payment of damages in lieu of reinstatement.

IS THE EMPLOYER LEGALLY OBLIGED TO FIRST IMPLEMENT SECTION 12D OF THE LABOURACT ANTI-RETRECHMENT MEASURES LIKE SHORT-TIME/SHIFT/ROTATIONAL WORK/UNPAID LEAVE E.T.C BEFORE EMABARKING ON THE ACTUAL RETRENCHMENT PROCESS?

The teething legal issue about whether an employer is legally mandated to first to implement section 12D of the Labour Act anti-retrenchment measures (like short-time/shift/rotational work or unpaid leave e.t.c), before resorting to the actual retrenchment process, typical of first firing warning shots before live ammunition remains a hot legal potato. This issue was answered by the Supreme Court in the case of **Ronald Kandemiri & 56 Others v First Capital Bank Ltd SC 22/25,** a case in which the affected employees of a local bank legally contested what they perceived to be a "shock" decision by the employer to expose them to a live retrenchment process in terms of section 12C of the Labour Act, before pursuing the anti-retrenchment measures in terms of section 12D of the Labour Act. The Supreme Court skirted on thin ice by basing its reasoning on the current legal provisions and came to the conclusion that there is no legal requirement anywhere in the Labour Act or any other legislation which compels an employer to invoke anti-retrenchment measures before resorting to the actual retrenchment process. The reasoning of the Supreme Court cannot be faulted at law if one pays heed to the current legal provisions of the Labour Act which do not make it legally mandatory or obligatory or peremptory that an employer utilise the section 12D of the Labour Act anti-retrenchment measures to give employees a soft landing, before a full throttle retrenchment process jostling employees into crash landing. Clearly, one may respectfully contend and submit that the failure by the legislature to make it legally compulsory for an employer to use the section 12D of the Labour Act anti-retrenchment measures before wielding the retrenchment axe or sword renders the anti-retrenchment measures legal provisions a hollow and high sounding nothing legally described as an empty noise (*brutum fulmen*), as that drains or saps up an employer's appetite to use anti-retrenchment measures to quench an employer's insatiable appetite for retrenchment. Unfortunately, in a constitutional democracy like Zimbabwe underpinned by the principle of separation of powers and checks and balances between the three arms of the state, namely the legislature,

executive and the judiciary, the role of courts of law is legally confined to interpreting and applying the law as given by the legislature or lawmaker, and not to make law, no matter how sympathetic the courts maybe to a cause before them. This may be a yawning gap in the law or lacuna which requires the legislature to amend it so that before employers rush or accelerate to retrenchments sign, they apply the braking distance via anti-retrenchment measures, as a form of trying to curtail unjustified and unfair retrenchments by making the anti-retrenchment measures legal provisions practically applicable and also to preserve the job security of employees. There may be no incentive for some employers to use and exhaust anti-retrenchment measures before going for a full retrenchment process, without being compelled to do so by the **gripping might** hand of the law.

Labour matters are decided on the basis of equity which is at the heart of social justice as exemplified by section 2A of the Labour Act. See **Madhatter Mining Company v Tapfuma SC 51/14 at p 15, Delta Beverages (Pvt) Ltd v Murandu SC 38/15 at p14, Mapondera and 55 Ors v Freda Rebecca Gold Mine Holdings Limited SC 81/22, Edmore Taperesu Mazambani v International Trading Company (Private) Limited and Anor SC 88/20.**

CAN AN EMPLOYER WITHDRAW THE RETRECHMENT PROCESS AFTER THE APPROVAL OF THE RETRECHMENT BY THE RETRECHMENT BOARD?

The nail-biting question about whether an employer can withdraw a retrenchment process after the approval of such retrenchment by the Retrenchment Board in terms of section 12C of the Labour Act was answered in the affirmative by the Supreme Court of Zimbabwe in the case of **Freda Rebecca Gold Mine Holdings Limited v M. Nliziyo & 180 Ors SC 16/13.** In that case the employer retrenched a mammoth legion of employees and the affected employees accepted their fate and left employment because the employer had secured the written approval of the retrenchment process from the Retrenchment Board. Some of the retrenched employees moved on with their lives after thinking that their blissful marriage with the employer had been lawfully terminated by the employer, albeit with retrenchment packages to be paid at a later stage. Little did the retrenched employees know or anticipate that their former employer (lover) was nursing a plan for a re-marriage after a putative termination of the old marriage by the retrenchment process. The employer pulled a hat-trick via a volte face and somersault U-turn by recalling back to work the same employees for which it had obtained a written approval of their retrenchment from the Retrenchment Board, without paying such employees any retrenchment package money. The affected employees failed to report for duty and the employer proceeded to dismiss them from employment for unlawful absenteeism from work, after the employer recalled them to work, having revoked the retrenchment process after its approval by the Retrenchment Board. The Supreme Court made a very curious and painstaking reasoning that the employer had the final say and legal right to withdraw the retrenchment process after its approval by the Retrenchment Board, mainly because such withdrawal of the retrenchment process by the employer was noble and in keeping with the main objective and thrust of the Labour Act to prevent retrenchments. This position about preventing retrenchments was eloquently elucidated by the previous Supreme Court decision in the case of **Continental Fashions (Pvt) Ltd v Mupfuriri and Ors 1997 (2) ZLR 405 (S) at p 407F and pp 412-413A.** One may contend that the

Supreme Court allowed the employer to beak the bottom of the bottle to have a second bite of the cherry or typically to bake its cake and eat it by foisting a compulsory retrenchment process on its employees in terms of section 12C of the Labour Act, getting the written approval of the Retrenchment Board to retrench and only to renege on paying the retrenchment package and use such default in paying a retrenchment package as a flimsy or spurious excuse to revoke or cancel the retrenchment process last minute. Such a scenario placed the affected employees in an unenviable or invidious situation like being caught between a rock and hard place of either turning back like Lot's wife who stared back at the notorious Sodom and Gomorrah in the bible (**Genesis 19**) or simply moving forward with life. There is no legal provision in the Labour Act which says an employer can be allowed to withdraw a retrenchment of an employee after its approval by the Retrenchment Board and as such the Supreme Court reasoning seem to have been anchored on creative legal reasoning or patching of legal cracks akin to legal engineering or some form of magical or mystical application of the law. One may only venture to say that the approval of the retrenchment process by the Retrenchment Board as a government statutory legal authority is a point of no return which cuts both ways on the employer and employee. The Supreme Court ought to have considered the fact that the employees did not voluntarily or willy-nilly absent themselves from work but the employer had used and discarded them by way of retrenchment and to avoid giving the employer a legal headache, they had moved on with their lives. It was an ambush for the employer to recall them back to work after retrenching them. There is need for retrenchment legislation to be amended to close the employer's unilateral unlimited discretion to withdraw a retrenchment process without the consent of the affected employee, after the approval of such a retrenchment process by the Retrenchment Board so that unscrupulous employers refrain from embarking on typical experimental or testing of the waters retrenchments, to the prejudice of the affected employees. Sometimes, a retrenchment process may a cause a psychological trauma to the affected employee such that it will be asocial injustice and violation of equity principles of fairness, which is like adding insult to injury or rubbing salt deep into a fresh wound for an employer to do a retrenchment process and suddenly try to reverse it at the eleventh hour after the affected employee has accepted that fate of retrenchment.

The employer is the master of retrenchment (*dominus litis*) such that principles of fairness require that an employer's interests of reversing a retrenchment process after approval by the Retrenchment Board to avoid paying the effected employees their retrenchment packages moneys and benefits be balanced with the need to have finality and closure to legal processes by releasing the retrenched employee from the harsh clutches or grinding jaws of the employer. Suffice to mention that the Freda Rebecca case was decided under the old section 12C of the Labour Act which was later repealed and substituted by new sections 12C and 12CC of the Labour Act as read with Retrenchment Regulations, S.I. 191 of 2024, which have not yet been legally tested whether or not they give legal room to the employer to withdraw a retrenchment process and recall the retrenched employees, after approval of such retrenchment process by the Retrenchment Board.

WAS AN EMPLOYER LEGALLY ALLOWED TO PAY AN EMPLOYEE THE OLD MINIMUM RETRENCHMNENT PACKAGE AFTER THE REPEAL AND SUBSTITUTION OF THE OLD SECTION 12C OF THE LABOUR ACT WITH NEW SECTIONS 12C AND 12CC WHICH

DID NOT SPECIFY THE MINIMUM PACKAGE BEFORE THAT LEGAL GAP WAS CLOSED BY S.I. 191 OF 2024?

In the case of **Netcare (Pvt) Ltd v Rumbidzai Zinyowera LC/H/438/24,** the employer retrenched an employee and paid her the old minimum retrenchment package of one month's salary for every year served as an employee. The Labour Court held that it was lawful for an employer to pay the old minimum retrenchment package in the absence of an agreed retrenchment package with the affected employee, apparently/ostensibly on the legal basis that the legislature's initial omission to insert a minimum retrenchment package before on 14 July 2023 when it passed the new section 12C of the Labour Act under Labour Amendment Act No. 11 of 203, and it later did so on 6 December 2024 via S.I. 191 of 2024 by pegging the new minimum retrenchment package at one month's salary for every year served, did not legally bar or preclude an employer from paying the old minimum retrenchment package. The legal reasoning by the Labour Court cannot be faulted because, in the absence of an agreed retrenchment package between an employer and employee and in the absence of statutory minimum retrenchment package during the window or dark/void period from 14 July 2023 to 5 December 2024, the default position was that an employer was under no legal compulsion to pay any fixed retrenchment package and hence to protect an employee from getting nothing as a retrenchment package in the absence of legal formula for the calculation or computation of the minimum retrenchment package, it was legally fair and generous for the employer to pay the affected employee at the least the old minimum retrenchment package, since half a loaf is better than nothing.

In the **Netcare case** above(*supra*), the Labour Court also ruled that if an employer fully complies with the legal provisions of section 12C of the Labour Act and pays the retrenched employee the statutory minimum retrenchment package, a Labour Officer or Designated Agent does not have any jurisdiction over such a retrenchment dispute, because the legislature did not avail such jurisdiction.

IS ACCEPTANCE OF A RETRENCHMENT PACKAGE A LEGAL WAIVER FROM CLAIMING AN ADDITIONAL RETRENCHMENT PACKAGE UNDER THE NEW LAW?

The good news under the new retrenchment laws in terms of sections 12C and 12CC of the Labour Act as read with the Labour (Retrenchment) Regulations S.I. 191 of 2003, is that acceptance of payment of a lower retrenchment package by an employee is no longer a legal barrier or blockage against such employee claiming more or additional retrenchment package if such employee can discharge the onus to prove that the employer has the financial capacity to pay an enhanced retrenchment package as per the legal provisions of section 12C of the Labour Act. This is a welcome legal relief to those employees who can prove that their employers have the capacity or muscle or stamina to pay more retrenchment package, under the legal principle he/she who alleges must prove. It is trite law that he who alleges must prove his/her allegation, See **ZIMASCO (Pvt) Ltd v Casper Tsvangirai and Others SC 12/20, Circle Tracking v Mahachi SC 4/07, Goliath v Member of the Eexecutive Council for Health Eastern Cape 2015 (2) SA 97 (SCA), Delta Beverages (Pvt) Ltd v Murandu SC 38/15, Ex Constable Matseketsa v The Commissioner General of Police and Anor HH 479/18, Book v Davidson 1988 (1) ZLR 365 (S), ZUPCO v Pakhorse Services (Pvt) Ltd SC 13/17.**

In arbitration proceedings, arbitrator is confined to the terms of reference referred to him or her by a labour officer and has no legal mandate to go beyond that which has been referred for arbitration as captured in the terms of reference as per the Supreme Court case of **Inter-Agric (Pvt) Ltd v Mudavanhu SC 9/15**

Under the old retrenchment law, an employee's acceptance of a retrenchment package paid by the employer was like digging his/her own grave and hammering a final nail on its coffin, in that such an employee was legally estopped or barred from claiming any additional retrenchment package, based on the old classical common law principles of waiver an acquiescence. These legal principles to the legal effect that accepting a lower retrenchment package marked the end of the legal road or a legal dead end for the affected employee under the old school principles of he/she who consents to an injury cannot be heard to complain (*volenti non fit injuria)* were set out in the cases of **Chidziva and Others v Zimbabwe Iron and Steel Company Limited 1997 (2) ZLR 368 (S), Vundla and Another v Innscor and Anor SC 14/22, Intercontinental Holdings (Pvt) Ltd v Nechitima HH 59/10, Old Mutual Shared Services (Pvt) Ltd v Christmas Mazarire & Retrenchment Board SC 91/23, Shumba v Commercial Bank of Zimbabwe Limited HC 5115/2002.** The old law about waiver of a legal right by an employee from claiming more retrenchment package after the payment of a retrenchment package by the employer on the basis of the old legal "horse"' doctrine of waiver, is now stale and inapplicable law with effect from 14 July 2023 following the enactment of the new sections 12C and 12CC of the Labour Act via Labour Amendment Act No. 11 of 2023.

PRINCIPLE OF LAST IN FIRST OUT (LIFO) AND FIRST IN LAST OUT(FILO) AS SELECTION CRITERIA FOR RETRENCHMENT

Zimbabwe retrenchment labour law does not give any specific criteria for the selection of any employees earmarked for retrenchment as something engraved in stone or concrete. In the absence of a specific legal criteria, the employer has a wider discretion to choose which employee to retrench. Notwithstanding the absence of legal section formula or criteria for choosing any employee to be retrenched, employers are encouraged or exhorted to utilise some progressive international best practices like First In Last Out (FILO) and Last In First Out (LIFO), as some fair criteria for selection of any employees to be retrenched.

REGISTRATION OF A RETRENCHMENT PACKAGE APPROVED BY THE RETRENCHMENT BOARD FOR LEGAL ENFORCEMENT

The legislature brought a huge relief via section 12C and 12CC of the Labour Act by legally ensuring that a retrenchment package approved by the Retrenchment Board is legally registrable and enforceable via either the Magistrates Court or High Court, whichever is applicable, depending on the monetary jurisdictional limit. Under the old retrenchment law, it was not legally possible to register a retrenchment package agreement for purposes of enforcement. The old legal position was set out by the Supreme Court in the case of **Hwange**

Colliery Company Limited v Makute and Anor 2016 (2) ZLR 37 (S), to the effect that an agreed retrenchment package agreement is not an arbitral award capable of registration.

SUMMATION

The Retrenchment procedures have been made convenient for the employer party to facilitate retrenchment rather frustrate it. The South African example G of a minimum wage has been useful and if employees feel that their retrenchment has not been done correctly in South Africa they then approach the Commission for Conciliation, Mediation and Arbitration (CCMA) . In Zimbabwe the employees can approach the Labour Court where they feel there has been injustice to their case. If there is no agreement, the employer can still proceed to retrench following by giving notice to employees and paying the stipulated or statutory payment package. It is important that these procedures be understood and followed in order to improve work relations. Ultimately, the handling of the work situation especially concerning the termination of employees or retrenchment of employees influences the conflict levels in any organization so that morale of the workforce is maintained leading to more harmonious work relations between the parties.

SOME LEGAL OVERVIEW COMMENTARY ABOUT THE VARIOUS PROVISIONS OF LABOUR AMENDMENT ACT, 2023 ENACTED /PASSED AS LAW ON 14 JULY 2023

1. **Section 1 of Labour Amendment Act, 2023**

This legal provision gives the shortened name of the new legislation as Labour Amendment Act, 2023 for ease of citation.

2. **Section 2 of Labour Amendment Act 2023**

The definition of violence and harassment at work has been broadened and widened to make the workplace safe from any form of violence and harassment like sexual harassment, for both male and female employees. The expansive definition of harassment and violence is a good amendment which harmonises the Labour Act with labour rights in terms of section 65 of the Constitution of Zimbabwe Amendment (No. 20) Act, 2013, International Labour Organisation (ILO) Conventions and Convention on the Elimination of any form of Discrimination Against Women (CEDAW). The harmonisation of the Labour Act with the Constitution of Zimbabwe was legally necessary and imperative because national constitution is the highest or mother law of the land as stated in section 2 (1) of the Constitution of Zimbabwe "***This Constitution is the supreme law of Zimbabwe and any law, practice, custom, custom or conduct inconsistent with it is invalid to the extent of the inconsistency."***

3. **Section 3 of Labour Amendment Act, 2023**

This legal provision repealed and re-enacted section 4A of the Labour Act [Chapter 28:01] clarifying what constitutes forced labour and what does not constitute forced labour. The essentials of forced labour are clarified and differentiated from lawful labour like labour as a form of punishment by a competent criminal court of law for a crime or necessary labour

during times of emergency. Suffice to mention that ILO Convention No. 29 of 1930 expressly prohibits forced labour.

4. **Section 4 of Labour Amendment Act, 2023**

In terms of this amendment, section 5 of the Labour Act is amended to provide for equal remuneration for male and female employees as part of harmonisation of the Labour Act with section 65(1) and (6) of the Constitution of Zimbabwe, equal benefit and protection of the law anti-discrimination provisions in terms of section 56 (1), (2) and (3) of the Constitution of Zimbabwe and Equal Remuneration ILO Convention No. 100 of 1951. This is a good and progressive amendment.

5. **Section 5 of Labour Amendment Act, 2023**

Section 6 of the Labour Act was amended to make violence and harassment of an employee at work both a criminal offence punishable by up to 10 years in jail and also an unfair labour practice. This is a laudable amendment good for peace, harmony and tranquillity at the workplace protecting victims of harassment and violence from any perpetrator or villain.

6. **Section 6 of Labour Amendment Act, 2023**

This is a good legal provision which widens the definition of unfair labour practice by the employer in terms of section 8 of the Labour Act to encompass violence and harassment in compliance with Violence and Harassment ILO Convention 190.

7. **Section 7 of Labour Amendment Act, 2023**

This is a good amendment to section 11 of the Labour Act which prohibits employment of young persons by imposing 10 years' jail on any offender. This legal provision gives effect to two fundamental ILO Conventions against child labour namely, Minimum Age Convention No. 138 and Worst Forms of Child Labour Convention No. 182.

8. **Section 8 of Labour Amendment Act, 2023**

This is a mixed bag legal provision which repealed the old section 12 (4a) of the Labour Act and re-enacted a new section 12 (4a) of the same Labour Act giving legal parameters or circumstances in terms of which an employee or employer can lawfully terminate a contract of employment. An employee is given a legal right to terminate a contract of employment via two scenarios, namely by either resignation or retirement. On the other hand, an employer is given the legal right to terminate a contract of employment via three scenarios namely, a written mutual agreement with an employee, disciplinary inquiry in terms of an applicable registered employment code of conduct or some other manner agreed in advance by the employer and employee concerned. The phrase some other manner agreed in advance between an employer and employee concerned is unclear and open to potential abuse by some employers who may take advantage of its vague, nebulous and open ended manner to insert or invoke arbitrary summary dismissal or termination of an employee on notice without even conducting a disciplinary hearing. Employees must be on the lookout to make sure that their written contracts with employers do not afford or give an employer unlimited discretion to terminate a contract of employment willy-nilly or at will without following due process of

law. Summary dismissal of an employee or termination on notice renders employment codes of conduct and retrenchment process a mockery or useless stooge or scarecrow typical of a lifeless and harmless statue. ILO Convention 158 requires fair termination of a contract of employment for a just cause based on the employee's conduct after a fair hearing or the operational requirements of the employer based on retrenchment meaning that summary dismissal and termination on notice by an employer are illegal methods of termination of an employee's contract of employment. This chequered history of labour law in Zimbabwe has it on record that once upon a time, after the delivery of the Supreme Court judgment in Don Nyamande and Another v Zuva Petroleum on 17 July 2015 dealing with the common law right of an employer to terminate a contract of employment on notice, some labour carnage or genocide took place in terms of which some employers abruptly and indiscriminately terminated contracts of employment for employees on notice in terms of the common law. The common law ghost of termination of contract of employment on notice wreaked havoc like the demon of legion recorded in the bible in Luke 8: 26-39 and Mark 5 :1-20 until it was exorcised by Jesus Christ and drowned with some pigs in the sea. By the same token, the common law termination of a contract of employment on notice was also watered down by Labour Amendment Act, 2015.

9. **Section 9 of Labour Amendment Act, 2023**

This is a good legal provision which repealed the old section 12C of the Labour Act and replaced it with a new section 12C which protects employees against unjustified retrenchments. An employer must prove the justification for a retrenchment before an employment council or retrenchment board. The retrenchment law has been tightened to afford employees job security and prevent indiscriminate retrenchments. Also the minimum retrenchment package is no longer pegged in the law so as to prevent a situation under the old law where some employers who could afford to pay more than the minimum retrenchment package took advantage of the law by ending up treating the minimum retrenchment package as the maximum payable package.

10. **Section 10 of Labour Amendment Act, 2023**

The legislature introduced a new section 12C and 12CC of the Labour Act which punishes some bad employers who stage-manage a retrenchment process by running down a business recklessly, with gross negligence on intention to defraud by creating personal liability of business owners or principals. The employment council or retrenchment board is given extensive investigative powers to unearth the reasons for any business collapse and punish any employer or business owner who causes a business failure leading to unnecessary retrenchment of employees and unjustified job losses.

11. **Section 11 of Labour Amendment Act, 2023**

This is a good amendment which repealed some provisions of section 18 of the Labour Act which limited maternity leave for female employees in terms of one-year employment qualifying period for paid maternity leave and maximum number of three times paid maternity leave with one employer. This amendment harmonises section 18 of the Labour Act on maternity leave with section 65 (7) of the Constitution of Zimbabwe which affords female

employees unlimited paid maternity leave right for at least 3 months. Also this amendment is in sync with ILO Maternity Leave Convention 103 for the protection of female employees. However, to prevent some potential hidden or subtle discrimination of young female employees of potential child bearing age or who have not reached menopause by some employers who may not want to pay maternity leave, government is urged to seriously consider introducing some maternity leave fund either via Zimbabwe Manpower Development Fund (ZIMDEF) or National Social Security Authority (NSSA).

12. **Section 12 of Labour Amendment Act, 2023**

This is a good amendment by introducing the new section 18A of the Labour Act giving legal protection to employees employed on hourly work by giving them flexibility to be employed elsewhere failing which the employer must pay them minimum wages in terms of the applicable collective bargaining agreement. Also employees employed for hourly work are given the same legal protection in terms of the minimum conditions of employment and protection contained in the applicable collective bargaining agreements.

13. **Section 13 of Labour Amendment Act, 2023**

The line or responsible Minister for an employer which is a statutory corporation, statutory body or entity wholly or predominantly controlled by the State is given equal footing in terms of works council collective bargaining agreement. This may be an advantage that employees now have direct access to the government principal for negotiations but it may also be a disadvantage where employees and even some employer representatives may feel intimidated by the presence of the politically powerful Minister in works council negotiations. There is need for any collective bargaining process to comply with ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise, ILO Convention No. 154 on Promotion of Collective Bargaining and ILO Convention No. 98 on Right to Organise and Collective Bargaining.

14. **Section 14 of Labour Amendment Act, 2023**

A good amendment to section 25A of the Labour Act introducing paid educational leave as an item for consideration in collective bargaining agreements at works council level for the promotion of human capital or staff development via learning.

15. **Section 15 of Labour Amendment Act, 2023**

This amendment to section 28 of the Labour Act creates a potential room for abuse of power by the responsible authority or powers that be to deter powerful trade unions and employment associations from getting registered by setting excessive amounts of money as requirement for registration, thereby violating section 58 of the Constitution of Zimbabwe on freedom of association and labour rights in terms of section 65 of the same Constitution.

16. **Section 16 of Labour Amendment Act, 2023**

A good amendment to requiring the Registrar of Labour to give reasons for his/her decision in application for registration in terms of section 33 of the Labour Act, in compliance with section 68 right to administrative justice as well as the Administrative Justice Act [Chapter 10:28].

17. **Section 17 of Labour Amendment Act, 2023**

A good amendment to section 34 of the Labour Act promote transparency and good governance of trade unions and employer's associations seeking registration to have a written constitution and clear structures to avoid operating like underground or secret organisations or societies. Trade unions and employer's associations must be accountable and above board in their operations because the collect money from the public as subscriptions.

18. **Section 18 of Labour Amendment Act, 2023**

The new section 34A of the Labour Act giving powers to the Registrar of Labour to impose a duty to provide information on the part of a registered trade union or employers organisation is a positive amendment for promoting good governance of such organisations if used properly. However, it may also be a double-edged negative amendment if it is abused or improperly used to unlawfully interfere with powerful registered trade unions or employers organisations as a way of trying to neutralise them.

19. **Section 19 of Labour Amendment Act, 2023**

This new legal provision repealed the old section 45 of the Labour Act and re-enacted a new section 45 which require the Registrar to comply with principles of natural justice like right to be heard and the law in relation dealing with variation, suspension or rescission of registration of trade unions or employers organisations. This measured approach helps prevent a heat of the moment or spur of the moment decision by the Registrar by requiring the Registrar to make wide consultations to arrive at an informed decision.

20. **Section 20 of Labour Amendment Act, 2023**

This amendment to section 51 of the Labour Act relating to supervision of election of officers of registered trade unions and employers organisations must be used sparingly and with great caution so that the Registrar does not unlawfully interfere or meddle with the internal affairs of a registered trade union or employers association by pitching camp with election losers or seeking to impose unwanted or unpopular candidates on trade unions or employers associations.

21. **Section 21 of Labour Amendment Act, 2023**

This amendment to section 54 of the Labour Act is positive to avoid unnecessary interference by authorities in collection of union dues by trade unions.

22. **Section 22 of Labour Amendment Act, 2023**

Also this repeal of section 55 of the Labour Act is a good amendment by removing the Minister's power to regulate collection of union dues so that trade unions can enjoy their independence, autonomy and constitutional right to freedom of association.

23. **Section 23 of Labour Amendment Act, 2023**

This positive amendment to section 56 of the Labour Act creates a seamless and similar relationship between a voluntary employment council and statutory employment council to ensure the proper regulation of employment councils and also the universal coverage of employment councils to all employers and employees in the applicable industry or sector. This

will promote collective bargaining process and enforcement of minimum conditions of employment for the protection of employees from exploitation at the workplace. Also the amendment requires the constitution of an employment council to accommodate new members from either a trade union or employers association based on proportional representation or if the new member is not eligible to get voting rights due to low membership threshold, that new member gets an observer status. This approach seeks to prevent privatisation and abuse of employment councils by a few treating it like a personal fiefdom or "chinhu chedu"mentality.

24. **Section 24 of Labour Amendment Act, 2023**

This is another positive amendment to section 58 of the Labour Act giving legal framework for the constitution of employment councils to make legal provision for the admission of new parties to an employment council as required by legislation in terms of section 56 of the Labour Act.

25. **Section 25 of Labour Amendment Act, 2023**

A good amendment to section 63 of the Labour Act via new section 63 (3b) and (3c) giving a labour officer jurisdiction where a designated agent after the expiry of thirty days without a designated agent redressing any dispute or unfair labour practice. The purpose of this legal provision is to ensure fast access to justice by any person who refers a labour dispute or unfair labour practice matter to a designated agent. Fast access to justice is jealously protected in terms of section 2A(1)(f) of the Labour Act and section 69 of the Constitution of Zimbabwe.

26. **Section 26 of Labour Amendment Act, 2023**

A good amendment to section 74 of the Labour Act providing for negotiation of conditions of paid educational leave at employment council for staff or human capital development and advancement. Also the same legal provision gives responsible line or responsible Minister for an employer which is a statutory corporation, statutory body or entity wholly or predominantly controlled by the State equal footing in terms of collective bargaining process at employment council, something that may work either in favour of employees or against them depending on how the Minister will flex his/her power which may actually be a veto power.

27. **Section 27 of Labour Amendment Act, 2023**

This amendment to section 79 of the Labour Act dealing with submission of collective bargaining agreements for approval or registration must not be abused by the responsible authority to illegally, unfairly and illegitimately undermine the outcome of collective bargaining process by employers and employees.

28. **Section 28 of Labour Amendment Act, 2023**

Also, this amendment to section 81 of the Labour Act empowering the Minister to amend a registered collective bargaining agreement must be progressively used and applied to promote

social justice and democracy at the workplace as required by section 2A of the Labour Act and not in a retrogressive manner to impoverish the employees or unfairly overburden employers.

29. **Section 29 of Labour Amendment Act, 2023**

This is highly commendable and progressive good amendment to section 82 of the Labour Act emphasising the binding nature of registered collective bargaining agreements to all employers and employees to which it applies and removing attempts by some employers to avoid or evade equitable minimum conditions of employment set out in collective bargaining agreements. An employer is free to participate in a collective bargaining agreement and any refusal or boycott of the collective bargaining process is not a valid legal defence, immunity or excuse for a defaulting employer to be legally bound by the operations of a registered collective barraging agreement for the applicable sector or industry.

30. **Section 30 of Labour Amendment Act, 2023**

This is a good amendment to section 93 of the Labour Act bringing back alternative dispute resolution (ADR) in the form of conciliation by a labour officer as well as voluntary and compulsory arbitration of labour disputes. Also this amendment introduces another progressive insertion of enforcement mechanisms for a certificate of settlement in terms of section 93 (2) of the Labour Act by giving it legal effect of a civil judgment of an appropriate court thereby making it executable via a writ of execution. The old Labour Act did not provide for enforcement and execution of a certificate of settlement.

31. **Section 31 of Labour Amendment Act, 2023**

This is a good legal provision amending section 101 of the Labour Act giving a labour officer appeal jurisdiction at the instance of either an employer or employee party where a disciplinary process has been finalised in terms of the applicable employment code of conduct. This amendment restores and reasserts the jurisdiction of a labour officer in completed disciplinary proceedings which had been scrapped by some various Supreme Court judgments from 2019 to 2022. Also it is now a legal requirement for employers and employees to review their employment codes of conduct every five years in line with current legal developments so that such codes of conduct are not archaic or old fashioned. Any failure by an employer and employee to revise an employment code of conduct every five years results in that code of conduct being automatically deemed deregistered by operation of the law after the lapse of three (3) months grace period after the expiry of the pegged five years. If an employer's registered code of conduct is deemed deregistered, in terms of section 12B (2) of the Labour Act, that employer shall be required by the law to use the model code or National Code of Conduct S.I. 15 of 2006 as a legal alternative where there is no registered code of conduct.

32. **Section 32 of Labour Amendment Act, 2023**

This dragnet amendment imposing harsh and drastic penalties for an unlawful collective job action or strike is problematic and negative as it discourages employees from resorting to strike and yet without the right to strike the right to collective bargaining is empty collective begging.

33. **Section 33 of Labour Amendment Act, 2023**

This repeal of section 111 of the Labour Act is a welcome legal development.

34. **Section 34 of Labour Amendment Act, 2023**

This amendment to section 112 of the Labour Act solidifying criminal penalties and other forms of punishment for a strike creates a hostile environment for workers discouraging thee exercise of the right to strike in violation of a cocktail of fundamental labour rights provided for in terms of section 65 of the Constitution of Zimbabwe and ILO Conventions 87, 98 and 154 protecting employees' freedom of association, right to organise and right to collective bargaining among other protected legal rights.

35. **Section 35 of Labour Amendment Act, 2023**

This is a good amendment to section 120 of the Labour Act giving legal room for the appointment of a provisional administrator by the Minister while awaiting determination of Labour Court legal process, to assume interim legal protection of the funds, property or records of an employment council to avert risk of destruction or dissipation pending the appointment of a substantive administrator. However, it must be used lawfully and objectively to prevent any illegalities, abuse of power or authority.

36. **Section 36 of Labour Amendment Act, 2023**

This is an amendment which introduces section 128 of the Labour Act transitional provisions stating that a labour officer's unregistered draft ruling as at 14 July 2023 when Labour Amendment Act, 2023 was passed into law becomes a ruling or judgment by a labour officer registrable with an appropriate court for purposes of enforcement and also that any amount of money stated in that ruling as foreign currency must be converted to equivalent Zimbabwean local currency at the prevailing rate. The problem with this amendment is that it gives only the employer party the right to appeal to the Labour Court within 30 days of the notice of registration but it does not give an employee a similar right of appeal, thereby making it potentially unconstitutional for violating an employee's right to a fair hearing and access to justice in terms of section 69 of the Constitution of Zimbabwe and right to equal benefit and protection of the law in terms of section 56 (1) of the Constitution of Zimbabwe. Notice of registration of a labour officer's ruling or judgement may just mean the lodging or filing of an application for registration of such ruling or judgment with an appropriate court for purposes of enforcement, without waiting for the actual registration of such labour officer's ruling or judgment. Another problem with the new section 128 of the Labour Act is that it seems like it does not provide for the registration and enforcement of a labour officer's ruling or judgment which is not sounding in money e.g one for reinstatement or cessation or stoppage of unfair labour practices. This means that there is still a gap or lacuna in the law in that there are no clear-cut provisions for enforcement of a ruling or judgment by a labour officer not sounding in money.

37. **Section 37 of Labour Amendment Act, 2023**

This amendment has some positive changes to our labour law by reducing the number of notice days to go on strike in terms of section 104 of the Labour Act from 14 days to 7 days. 14 days was too long a period of notice to on strike. Also this amendment seeks to promote

the decentralisation of employment councils and confining jurisdiction of designated agents to districts or provinces to ensure that members of the public have fast access to justice.

Section 2 of the Labour Act was amended by Labour Amendment 2023, by the insertion of the following definitions; gender-based violence and harassment means

> ***violence and harassment directed at persons because of their sex or gender, or affecting persons of a particular sex or gender disproportionately, and includes sexual harassment;***
>
> ***"violence and harassment" in the context of section 6(3) and section 8 refers to a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment;".***

This move is in line with the international laws, to which Zimbabwe is party to, for example, it resonates well with CEDAW. Zimbabwe signed the CEDAW without any reservations in 1991 and ratification took place in 1997. In its General recommendation 19, the CEDAW Committee explained that gender-based violence "includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty."[4] The definition of gender-based violence adopted by the CEDAW Committee reflects the power dynamics and disparities that arise from social, cultural and religious practices presenting women as inferior to men. Sexual harassment at work has its genesis in the Bible as exemplified in the book of Genesis where a domestic worker by the name Joseph was a victim of sexual harassment by his boss Portiphar's wife in the book of **Genesis 39**.

It is commendable that the labour amendment define gender based violence, in line with Zimbabwe's international obligations, in order to fortify women and men against all forms of violence in the workplace. Gender based violence is a form of discrimination against male and female workers and thus is a violation of the human rights.

However, the rule of law dictates that criminal offences must be clearly defined so that people know exactly what they can and cannot do. This offence certainly does not meet that test. A further point is that the amendment does not impose criminal liability on an employer who

[4] CEDAW, General Recommendation No. 19: Violence against Women, UN Doc. A/47/38 1992 para 6. See also CEDAW Committee, General Recommendation No. 35: Gender-based violence against women, updating General Recommendation No. 19, CEDAW/C/GC/35 (2017).

does nothing to stop violence or harassment taking place. Employers should have a duty to stop it, and the duty should be enforced by a criminal sanction.

Amendment of section 4A of Cap. 28:01

Previously, the labour amendment No. 5 of 2015 amended section 2 of the labour act, to read the following;

"forced labour" means any work or services which a person is required to perform against his or her will under the threat of some form of punishment;

In essence, this definition lacked clarity and incapable of enforcement. This could open flood gates for disputes, since there was no distinction as to which conduct amounts to forced labour and compulsory labour. This was in violation of the principles of the rule of law that ***Laws must be Certain*** *[i.e. clear and definite]*: ***It must be possible for people to establish relatively easily the content of the law and the extent of their rights and duties under it.***

However, the labour Amendment Act's provisions, brings to light the fact that some labour related issues, cannot be classified as forced labour. This is done by giving an unambiguous description of what does not constitute to be forced labour. This provides clarity for the effective prohibition of forced labour, in compliance with Section 55 of the Constitution and Conventions 29 and 105 of the ILO.

Section 55 of the constitution provides as follows;

> *55.* ***Freedom from forced or compulsory labour***
>
> *No person may be made to perform forced or compulsory labour.*

Forced Labour Convention, 1930 (No. 29)

Zimbabwe ratified this convention, on **27 August 1998** and such ratification testifies to the Zimbabwe's intention to be bound by such international instrument.

This fundamental convention prohibits all forms of forced or compulsory labour, which is defined as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." Exceptions are provided for work required by compulsory military service, normal civic obligations, as a consequence of a conviction in a court of law (provided that the work or service in question is carried out under the supervision and control of a public authority and that the person carrying it out is not hired to or placed at the disposal of private individuals, companies or associations), in cases of emergency, and for minor communal services performed by the members of a community in the direct interest of the community. The convention also requires that the illegal extraction of forced or compulsory labour be punishable as a penal offence, and that ratifying states ensure that the relevant penalties imposed by law are adequate and strictly enforced.

Therefore, the legislature designed the new amendment to suit our labour laws and aligning labour laws with section 55 of the constitution, in particular, while at the same time harmonising it with the International labour standards.

Amendment of section 5 of Cap. 28:01

Section 5 of the Labour Act deals with the extension of unfair labour practice. For this purpose, section 2a of has been amended to read;

"(2a) Every employer shall pay equal remuneration to male and female employees for work to which equal value is attributed without discrimination on the grounds of sex or gender."

This shows that the labour amendment also provides for protection to employees against discrimination by entrenching the principle of equal pay for work of equal value. The Constitution, in Section 65 (6), provides that "women and men have the right to equal remuneration for equal work". This is because, provisions in the Labour Act provide a restrictive conceptual understanding of the principle of equal pay for work of equal value. This is also aligning with I.L.O Convention 100 on Equal Remuneration Convention, 1951 (No. 100).

Amendment of section 6 of Cap. 28:01

Section 6 of the labour act has been amended by the insertion or addition of section 3, 4 and 5. the inserted sections reads;

"(3) No person shall directly or indirectly act in a manner that amounts to violence and harassment towards another person at the workplace including any action in the course of, linked with or arising out of work—(a) in the workplace, including public and private spaces where they area place of work;(b) in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities;(c) during work-related trips, travel, training, events or workplace organised social activities;(d) through work-related communications, including those enabled by information and communication technologies;(e) in employer-provided accommodation; and (f) when commuting to and from work.(4) Any person who contravenes subsection (3) shall be guilty of an offence and liable to a fine not exceeding level 12 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment. (5) Notwithstanding anything to the contrary in an employment code or the conditions of service for the employee concerned, any employee who is found after due enquiry by the employer to have engaged on a balance of probabilities in any of the acts for which the employee may be charged for an offence under subsection (4)shall be justifiable grounds for dismissal for that employee whether that employee has been prosecuted or not."

The above addition is the extension of the definition as provided for by the inserted definition of violence and harassment towards another person at the workplace. The legislature found it noble for the provisions for violence and harassment to cover matters that happen outside the workplace premises. In its wisdom, the legislature made the provisions to extent to areas outside workplace environment. This is a commendable and welcome reform n that the perpetrators of violence and harassment towards others to rebut allegations of violence based on the location in which the violence or harassment occurs.

Again, the legislature amended this provision to enable the protection to equally cover everyone, without discrimination as to gender, hence promoting fair labour practices. The legislature deliberately prohibits violence and harassment targeted to any gender by the wise incorporation of the words **'another person'** as used in the amended section 3. This was designed to offer equal protection to all, regardless of gender. Therefore, this promotes equality in the workplace, since all are covered by the provisions of the section.

Moreover, the new section seeks to cover all forms of violence and harassment in the workplace, though the acts may be done directly or indirectly. An assessment of this provision leads to the conclusion that this law seeks to also extent liability to those who may work with the employees indirectly and directly. For example, this applies to labour brokers.

Of most importance in this amendment is the criminalisation of the unfair labour practice and its effects to extent to other parties to the employment contract. Again, on this aspect, the legislature went on to put a jail sentence that can be imposed on the perpetrators of violence. The law makes it clear that anyone who violates this law may be liable to imprisonment, for a period not exceeding ten years or fine. This provision is deterrent in nature, to would-be offenders. Hence, a step in the safe direction.

Amendment of section 12 of Cap. 28:01

the amendment of this section came with mixed feelings, especially among the employers, in the sense that most employers prefer fixed terms of contract of employment, which allowed the employer- employee relationship to terminate on notice. On the party of employees, this seem to be favourable to them in that it offers some employment security to them and that it helps them to plan their affairs, in accordance with the duration of their contracts of employment.

Emphasis should be put on this point, since the repealed section 4a was a thorn in the flesh to the employees and employers, owing to its ambiguous structure and meaning.

To take the reader back, the repealed section 4a reads as follows;

> ***(4a) No employer shall terminate a contract of employment on notice unless—***
>
> ***(a)the termination is in terms of an employment code or, in the absence of an employment code, in terms of the model code made under section 101(9); or***
>
> ***(b)the employer and employee mutually agree in writing to the termination of the contract; or***
>
> ***(c)the employee was engaged for a period of fixed duration or for the performance of some specific service; or***
>
> ***(d)pursuant to retrenchment, in accordance with section 12C.***

The provisions of the above section seem to be intelligibly drafted, but the problem arises much when the employer wishes to terminate on notice, basing the termination on subparagraph c, above. The problem is that, many employers were of the view that, when parties are engaged in a fixed term of contract of employment, they are entitled to terminate

such contract on notice, at any time they feel to do so, in absence of a breach. This was not fair and amounts to unfair labour practice. This is not fair in the sense that employers, would resort to premature termination of contracts of employment, since the law was perceived to be in the employers' favour, in terms of subparagraph c above. For the past few years the courts were inundated with various cases in which damages for premature termination were sought. At times it would embarrass employers when they were made to pay damages, calculated as the unexpired period. It is argued, in this write up, that this was the wrong interpretation of the law, in the face of the international labour laws, Labour amendment of 2015 and Zuva case.

The **Termination of Employment Convention, 1982 (No. 158)**, on the issue of termination of contract of employment provides as follows;

DIVISION A. JUSTIFICATION FOR TERMINATION

Article 4

The employment of a worker shall not be terminated, unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.

Termination of Employment Convention, 1982 is an International Labour Organization Convention. Its purpose is to coordinate minimum levels of job security in the laws of ILO member states. As such, the legislator sought to bring about, the long and overdue job security, in its quest to abide by this Convention as well as to reverse the effects of the Zuva Case. This culminated into amendment no 17 of 2015, which brought about section 12 4a.

Zuva Case.

The brief facts of this case , as narrated by **CHIDYAUSIKU CJ** (as then he was), are as follows;

> The appellants were employed by BP Shell as supply and logistics manager and finance manager. BP Shell sold its services as a going concern to Zuva Petroleum, the respondent. A transfer of undertaking was done in terms of s 16 of the Labour Act [*Chapter 28:01]* (hereinafter referred to as "the Act") and an agreement of sale concluded. The appellants were transferred to the new undertaking without derogation from the terms and conditions of employment that they enjoyed when they were under BP Shell.
>
> On 21 November 2011 the respondent offered its employees, who included the appellants, a voluntary retrenchment package which was declined. On 15 December 2011 the respondent served each of its employees, including the appellants, with a compulsory notice of intention to retrench. The appellants and the respondent could not agree on the retrenchment terms. Having failed to agree on the terms of retrenchment, the parties referred the dispute to the Retrenchment Board. On 16 May 2012 the Ministry of Labour and Social Services directed the parties to carry out further retrenchment

negotiations for another twenty-one days. On 18 May 2012, and before the expiry of the twenty-one days, the respondent wrote letters to the appellants, terminating their contracts of employment on notice, as was provided for in the contracts of employment signed by both parties, with effect from 1 June 2012.

The respondent paid the appellants cash *in lieu* of notice and thus terminated the employment relationship. The appellants approached a labour officer, contending that their employment contracts had been unlawfully terminated. The labour officer failed to resolve the matter and referred it to compulsory arbitration. The arbitrator concluded that the termination of the contracts of employment was unlawful because the appellants had not been dismissed in terms of a code of conduct.

The respondent appealed to the Labour Court. The Labour Court allowed the appeal. In its judgment the Labour Court had this to say:

> "In my view, therefore, the submission that section 12B came to do away with the possibility of terminating a contract of employment on notice is a misunderstanding of the law as it stands. In any event, the provisions of section 12(4) of the Act are clear and allow no ambiguity as also the provisions of section 12B. None of the sections have the effect of doing away with the termination of a contract of employment on notice."

In essence, the Labour Court came to the conclusion that neither s 12B nor s 12(4) of the Act abolished the employer's right to terminate employment on notice. I respectfully agree with this conclusion. It was contended for the appellants that s 12B of the Act abolished the employer's common law right to dismiss an employee on notice.

On the other hand, the respondent argued that the common law right to dismiss an employee on notice has not been abolished by s 12B of the Act and is extant…

The critical issue that falls for determination in this matter was therefore what meaning should be ascribed to sections 12B and 12(4) of the Act. In particular, whether section 12B of the Act, on a proper reading of that section, abolishes the employer's common law right to terminate employment on notice.

The court decided that the named sections does not do away with the employers right to terminate a contract, on notice.

WRONG INTERPRETATIONS AND THE EFFECTS OF THE ZUVA CASE.

The effects of the judgment have spread like wildfire. Many other companies issued notices terminating thousands of contracts of employment for employees during both working days and weekends, citing this judgment.

The Supreme court noted that, once upon a time both the employer and the employee had a common law right to terminate an employment relationship on notice. That common law right in respect of both the employer and the employee can only be limited, abolished or regulated by an Act of Parliament or a statutory instrument that is clearly *intra vires* an Act of Parliament.

This did not mean that employers could terminate any contract of employment on notice, for no valid reason. The essence of the Zuva judgment was to show that, in contracts of employment, parties may agree to termination of employment on notice, for no valid reason. In such a relationship, the employer retains the common law right to terminate a contract of employment on notice, in terms of what had been previously agreed and not necessarily basing such termination, on a cause against the employee. for no cause.

Labour Amendment 5 of 2015

Section 4 of the Labour amendment 5 of 2015 brought about the introduction of the old section 12 (4a) of the labour Act. The amendment sought to do away with all the misconceptions that were created by the effects of Zuva Case, above. The result was the introduction of the vague provisions of the repealed section 4a. This is because, in terms of section 12 (4a) (c), the words;

the employee was engaged for a period of fixed duration or for the performance of some specific service; or some

The above provision is vague, in the sense that it appears as if it allows employers to terminate contracts of employment, on notice and for no apparent reason. This allowed some employers to prematurely terminate contracts of employment basing on the above provision. The result was a surge, in disputes on the allegations of unfair dismissal as well as the quantification of damages involved.

Amendment of section 12 of Cap. 28:01

The labour amendment 2023 amended the notorious section 12 4a by the insertion of the following;

> ***"(4a) A contract of employment may be terminated only, on the part of an employee, by his or her resignation or retirement, and in the following cases on the part of an employer—***
>
> ***(a) by mutual agreement in writing;***
>
> ***(b) for the breach of an express or implied term of contract, upon such breach being verified after due inquiry under an applicable employment***

code or in any other manner agreed in advance by the employer and employee concerned."

The above section is commendable, because it removes all impediments that mired the proper interpretation of the law, in relation to dismissals. A contract of employment can now be terminated by an employee, by his or her resignation or retirement. This means that this right only applies and enjoyable by employees. To interpret this, either way, would lead to absurdity.

An employment contract can also be terminated by mutual agreement. Once the parties append their signatures to the mutual termination agreement, in sync with the legal principle known as the *caveat subscriptor* rule (the person signing beware), both parties are legally bound by the mutual termination agreement. Thus, it is vital for the employer and employee to know that the moment they sign a mutual termination agreement, they are legally bound by such a contract. Also it is necessary that the mutual termination agreement be signed by the employer and employee and not some other third parties, agents or proxies, otherwise such a mutual termination agreement can be legally contested.

The last scenario, is the one that seem to be common among employees and employers. This is where an employee is alleged to have violated some provisions of the contract. The terms and conditions may be express or implied. Once the employer alleges that there has been a breach, investigations should be conducted so that a disciplinary hearing may follow. If, on balance of probabilities, the employee is found to be guilty, it is in the discretion of the employer to either dismiss the employee or not.

12C Retrenchment and compensation for loss of employment on

Retrenchment.

There have been some ambiguities regarding Zimbabwe's laws in retrenchment of employees. The new retrenchment laws seek to bring some labour equity to protect employees from unfair retrenchments by some employers. It seeks to protect employees from unfair labour practices arising from retrenchment by employers.

Before this amendment, it was clear that the employees suffer the most than the employers. In other words, the law in relation to retrenchment was a thorn in flesh, since it did not offer sufficient protection, on the party of employees. To begin with, section 12C obliged the employer to write to the retrenchment board alleging his or incapacity to pay the minimum package, per the law. The employer was mandated to write to the retrenchment board and the board was expected to respond in fourteen days. If there was no response within such a period, the application would be deemed granted. The board required some form of proof, on the party of the employee, in order to exempt the employer. The result was that many employees would not be compensated adequately for the loss of employment, at the behest of the employer. The retrenchment board could also ask the employer to pay the minimum retrenchment package through instalments. The law was also silent as to what happens when the employer defaulted.

NOTABLE CHANGES MADE TO SECTION 12C ON RETRENCHMENT.

The new amendment is commendable, in its attempt to further the protection of the employees on retrenchment. To start with, the legislature began by showing its displeasure of the negligent/ dishonest employer who allege incapacitation, where such incapacitation is self-inflicted. Again this law was also made to employers who had contemplated retrenchment way before the actual date of retrenchment. This gives employers chance to plan their affairs on time. This is shown in the following manner;

> ***"capacity to pay", in relation to an assessment of an employer's***
>
> ***capacity to pay a minimum or an enhanced retrenchment***
>
> ***package, shall not be deemed to be affected by any action***
>
> ***of the employer done in contemplation of retrenchment that***
>
> ***diminishes or apparently diminishes his or her capacity to***
>
> ***pay a minimum or an enhanced retrenchment package, and***
>
> ***includes any action done at any time up to twelve months***
>
> ***before the retrenchment***

Again, the legislature made it clear that the law on retrenchment applies to all would be successors to the entity as employers. This removes ambiguity, in cases where there is deliberate change of ownership. Thus, for the purposes of retrenchment section 12C includes any person, entity or trust that is a successor to the employer, whether domiciled in Zimbabwe or not.

Moreover, of importance is section 12c (2) (b), because it gives the aggrieved employees to make representations to the Retrenchment Board, in case where the employer alleges incapacity. The section reads, in relevant part as;

> (b) if the employees concerned or their representatives, having
>
> alleged that the employer has the capacity to pay an enhanced
>
> retrenchment package, and having satisfied the Retrenchment
>
> Board to that effect, the enhanced retrenchment package
>
> shall be payable with effect from the notification of the
>
> Retrenchment Board's decision.

The above is a welcome development in that it enables the employees with first-hand information, due to their familiarisation with the workplace. This is a step in the positive direction because, as it was previously, the employer could only communicate with the retrenchment board and make his presentations, which could affect the affected employees, without affording, the employees with a chance to be heard. This move goes hand in glove with the principles of natural justice, which is the right to be heard.

Again, the new amendment also offers protection on the party of employees, in the sense that it opens doors for negotiations between an employer and employee. Previously, employers could just make paltry payments to the employees, without any form of real negotiations. If such employees accept such payments, he or she is legally barred from raising a compliant on the sufficiency of the amount paid, through the doctrine of waiver. The law on waiver is stated in Chidziva and Ors *v* Zimbabwe & Steel Co. Ltd 1997 (2) ZLR 368 (SC), when quoting Mutual Life Ins Co. of New York *v* Ingle 1910 TPD 1910 TPD 540 the court held that:

> ***"when a person entitled to a right knows that it is being infringed, and by his acquiescence leads the person infringing it to think that he has abandoned it, then he would under certain circumstances be debarred from asserting it"***

Dumbutshena CJ in Barclays Bank of Zimbabwe Ltd v Binga Products (PVT) LTD 1985 (3) SA 1041 (ZS) at 1049 B-E says-

"I seek, however, to highlight the principle of waiver set out by Lord DENNING MR at 140a-c where he said:

"The principle of waiver is simply this, if one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it. Then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so; see Plasticmoda Societa Per Azioni v Davidsons (Manchester) Ltd [1952] I Lloyds Rep 527.

However, a party relying on waiver has the onus to show that the other party had full knowledge of its rights and abandoned such rights expressly or impliedly. See. **Barclays Bank of Zimbabwe v Binga Products 1984 (2) ZLR 26 (SC).** However, in most cases, injustices were done to employees, who were not alive to the law that governs retrenchment. In most instances, employees, with no legal background, would receive amounts from their employers, without any word from the employer and once the employer uses the money, for his or her benefit, he could not complain further. Therefore, as it stood there was no hope of justice, for those crying foul.

Moreover, in terms of the amended section 12C (6), If it is alleged by any employees that any agreed retrenchment package or minimum retrenchment package has not been paid within the time or times stipulated or agreed, such employee must first make an application on affidavit to the Retrenchment board. From that point, the retrenchment board will inform the employer by presenting the employees case, before the employer, who is in turn expected to make his representations in rebuttal to the allegations of non-compliance. This seem to be fair, to both, employers and employees, in the sense that it gives all parties a room to further their cases or with no room for ambush. This was brought as a way of safe guarding justice, in the workplace for both parties. In cases where there are no representations from the employer or if the Retrenchment board is satisfied that there was no compliance, on the part of the employer, the Board may proceed to issue non-compliance certificate against the employer and its contents will be binding to all parties.

In addition, in terms of subparagraph 7 of section 12C, employees are empowered to approach the Labour Court for enforcement of the retrenchment package which can also be obtained by default judgment. There is no doubt that this law favours and extends the employees who lost their employment as compensation of the loss of employment. upon obtaining such order, the employees should submit a copy of the order for registration in the magistrates' court, for the order to have effect or to have it carry the weight of civil judgments.

Again, protection of the employers who are genuinely incapacitated to pay the minimum retrenchment may also apply to the retrenchment board, for exemption, in terms of subparagraph 9 of Section 12C. The employment council or the Retrenchment Board shall

consider the application and make its determination within thirty days of

the date of receipt of the application and, before making its determination,

the employment council or the retrenchment board shall call a hearing of

the parties. This development is commendable because it offers the parties to have another chance to make representations.

In terms of section 12C (11), if the employment council or the Retrenchment Board fails

to make a determination within thirty days as specified in subsection, or if any party is aggrieved by any determination of the employment council or the Retrenchment Board, the aggrieved party may appeal to the Labour Court within twenty-one days of the expiry of the said period of thirty days or of the date of the determination. An analysis of the above shows another step in the right direction by the legislature, due to fact that the law now allows parties to appeal to the labour court for redress. This is in line with the principle that justice should not only be done, but seen to be done.

Again, the law went on to criminalise and attempts to coerce employers who wishes to retrench, without giving notice. This is done by a sanction of fine, followed by imprisonment as provided for, in terms of section 12C (12). Undoubtedly, this is aimed at fortifying the position of lay employees who know nothing or little about the law. As has been shown above, some employers could take advantage of such employees, so that the employees are left in a difficult situation. In addition, the legislature removes ambiguity that attaches the issue of imprisonment above by clearly stating that liability would attach to any member of the governing body of a corporate employer. This development seems to offer employees adequate remedy, since this involves the piercing of the corporate veil, for the purposes of criminal liability. In *Cape Pacific Ltd* v *Lubner Controlling Investment (Pty) Ltd and Others* 1993 (2) SA 784 (C) the court held as follows,

"The general principle underlying this aspect of the law of lifting the veil is that, when the corporation is the mere ego or business conduit of a person, it may be disregarded. This rule has been adopted by the courts in those cases where the

idea of the corporate entity has been used as a subterfuge and to observe it would work an injustice."

12CC Non-payment of retrenchment package due to fraudulent, reckless or grossly negligent conduct by employer.

In terms of section 12CC, if an employer alleges partial or total incapacity to pay the minimum retrenchment package and it emerges that there are indications prompting a reasonable suspicion that the employer deliberately undervalued the assets of the business or if it appears that the employer dealt, recklessly or with gross negligence. The retrenchment board after having invited the employer, to make representations, may issue a provisional statement, showing its belief in the allegations. The board should also issue such statement to interested parties, who in turn applies to the labour court seeking general declaration confirming the statement. The employer is also given a chance to rebut the allegations. Again the provisional statement holder may also apply seeking a specific declaration, to the labour court to the effect that any one or more in relation to the employer are held responsible and liable, without limitation of liability for the total amount of the minimum retrenchment package, on the basis of joint or several liability. This is a welcome development, in the sense that the employees are not left without a remedy, after having been retrenched.

MINIMUM RETRENCHMENT PACKAGE IN TERMS OF STATUTORY INSTRUMENT 191 OF 2024

Section 5 of Statutory Instrument 191 of 2024 aptly provides for a minimum retrenchment package as follows:

" ***Unless better terms are negotiated and agreed between the employer and employee or employees concerned or their representatives, a minimum retrenchment package of one month's salary or wages for every year 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 as compensation for loss of employment".***

The legal meaning of the above instructive provisions of **section 5** of **Statutory Instrument 191** of **2024** can be summarised as follows:

1. **Employer and employee parties or their representatives are allowed to negotiate for better or higher terms of a retrenchment package other than the minimum retrenchment package.**

2. **If an employer and employee are unable to agree on a higher retrenchment package, by operation of the law, an employer is legally obliged or compelled to pay an employee a minimum retrenchment package of one month's salary or wages for every year of service as an employee or the equivalent, lesser proportion of (one month's salary or wages for a lesser period of service as compensation for loss of employment via retrenchment.**

Suffice to mention that the new legally operational minimum retrenchment package of one month's salary or wages for every year served as an employee in terms of section 5 of S.I. 191 of 2024 is a double amount of the previous and now repealed old section 12C of the Labour Act as amended by Labour Amendment Act No. 5 of 2015, in terms of which the minimum retrenchment package was pegged as one month's salary or wages for every two years of service, translating to two weeks salary or wages for every year served as an employee.

FOUR (4) TYPES OF RETRENCHMENT PACKAGES

There are now **four (4) types** of **retrenchment packages** in terms of the retrenchment law in Zimbabwe and these are as follows:

(a) **Minimum retrenchment package as provided for in terms of section 5 of S.I. 191 of 2024 as read with section 12C (2) (a) of the Labour Act:** this is a statutory retrenchment package which is a fall back legal position where an employer and employee are unable to agree on either an agreed retrenchment package or enhanced retrenchment package.

(b) **Agreed retrenchment package as provided for in terms of section 12C (3)** of the **Labour Act as read with section 2 of S.I. 191 of 2024:** this a retrenchment package which arise out of negotiations and agreement between the employer and employee.

(c) **Enhanced retrenchment package is a package pegged by the Retrenchment Board as provided for in terms of section 12C (2) of the Labour Act as read with section 2 of S.I. 191 of 2024:** This a retrenchment package payable where there is proof that the employer has the financial capacity to pay more than the minimum retrenchment package. The concerned employees must prove the employer's financial capacity to pay an enhanced retrenchment

package before an employment council or Retrenchment Board, where there is no employment council.

(d) **Exemption retrenchment package (not less than 25 % of the minimum retrenchment package)-** In terms of section 12C (9) of the Labour Act, an employer who proves financial incapacity to pay the minimum retrenchment package is given leeway to apply to an employment council for that industry or where no employment council exist, to the Retrenchment Board, to be exempted from paying the minimum retrenchment package and be allowed to pay part of the minimum retrenchment package. However, such application for exemption from paying the minimum retrenchment package shall not allow an employer to pay the affected employee less than 25 % of the total minimum retrenchment package.

LEGAL DATE OF COMMENCEMENT OF MINIMUM RETRENCHMENT PACKAGE IN TERMS OF STATUTORY INSTRUMENT 191 OF 2024 PASSED AS LEGISLATION ON 6 DECEMBER 2024

The date of commencement of the minimum retrenchment package birthed as law by S.I. 191 of 2024 is 6 December 2024, being the date of gazetting of that law in the Government Gazette. This law does not have a retrospective application, meaning that it does not apply for the period before 6 December 2024. Any pending or unfinished retrenchment cases that had not been finalised as at 6 December 2024 are now subject to the application of the minimum retrenchment package in terms of S.I. 191 of 2024. Retrenchment cases that we finalised by employer and employee parties before 6 December 2024 are not covered S.I. 191 of 2024, meaning that this new retrenchment legislation does not apply backwards for the period before 6 December 2024. This legislation is different from Labour Amendment Act No. 5 of 2015 which was passed law in August 2015 but the legislature enacted it to retrospectively apply from 17 July 2015 to regulate and mitigate against the common law termination on notice. The date 17 July 2015 is the monumental date when the Supreme Court of Zimbabwe delivered the famous judgment about the old and now repealed[5] common law termination notice of employment on notice by

[5] Section 12(4a) of the Labour Act as amended by Labour Amendment Act No. 11 of 2023 seems to have repealed an employer's common law right to terminate a contract of employment on notice and later as provided for in terms of the now repealed old section 12(4a) of the Labour Act as amended by Labour Amendment Act No. 11 of 2015. There is no decided case by the Supreme Court which has the final legal

the employer for a permanent contract of employment in the famous **Nyamande and Another v Zuva Petroleum SC 43/2015**. Section 12 (4a) ((b) of the Labour Act as amended by Labour Amendment Act No. 11 of 2023 gives employees some job security as it does not expressly provide for termination of a contract of employment on notice among the three (3) legal options available to an employer to terminate a contract of employment namely mutual termination, termination for a fault/misconduct after due inquiry in terms of an applicable employment code of conduct or some other manner agreed in advance between the employer and employee. Also section b12(4a)(a) of the Labour Act as amended, gives an employee two ways of terminating a contract of employment either by resignation or retirement.

ESTABLISHMENT OF THE RETRENCHMENT BOARD IN TERMS OF S.I. 191 OF 2024

Section 3 of S.I. 191 of 2024 creates a Retrenchment Board which is tripartite in nature in that it is constituted by government representatives, representatives from organised labour (umbrella trade unions like Zimbabwe Federation of Trade Unions, Zimbabwe Confederation of Public Sector Trade Unions and Zimbabwe Congress of Trade Unions e.t.c) and representatives from organised business (Employers Confederation of Zimbabwe e.t.c). The **Retrenchment Board** is at **the heart or nerve centre** of **retrenchment process** and has legal jurisdiction to enforce the application of notice of intention to retrench in terms of section 12C of the Labour Act and all three types of retrenchment packages namely minimum retrenchment package, agreed retrenchment package and enhanced retrenchment package. The same Retrenchment Board is also provided for in terms of section 12C and 12CC of the Labour Act. The Retrenchment Board is the highest legal authority in relation to retrenchment matters above the works council or employment council but below the Labour Court. Five members of the Retrenchment Board constitute a quorum in terms of section 3 (4) of S.I. 191 of 2024. Decisions of the Retrenchment Board are by simple majority vote at a meeting where there is a quorum in terms of section 3 (5) of S.I. 191 of 2024, thereby making its decision making process flexible and robust by not insisting on an absolute

authority in non-constitutional civil matters about whether the new section 12(4a) of the Labour Act as amended by Labour Amendment Act No. 11 of 2023 give an employer some legal right to terminate a fixed term contract of employment on notice.

majority. Government chooses a Chairperson of the Retrenchment Board from the list of its members assigned to the Retrenchment Board in terms of section 3 (1) (a) of S.I. 191 of 2024. In terms of section 3 (3) of S.I. 191 of 2024, if the government appointed Chairperson of the Retrenchment Board is absent from a meeting, members present are given legal authority to nominate one of their numbers to preside as interim Chairperson and that stand-in/stop-gap Chairperson is not restricted to a government representative. In terms of section 3 (6) of S.I. 191 of 2024, in the event of an equality of votes, the Chairperson of the Retrenchment Board is given a casting vote in addition to a deliberative vote so as to tilt or break the deadlock.

FUNCTIONS OF THE RETRENCHMENT BOARD

In terms of section 4 of S.I. 191 of 2024, the chief functions of the Retrenchment Board are as follows:

(a) to consider and resolve matters related to retrenchment referred to it in terms of section 12C, 12CC and 12D of the Labour Act [Chapter 28:01]; and

(b) to recommend solutions and policies relating to retrenchment.

The above two (2) main functions of the Retrenchment Board are meant to improve the application of social justice in respect of retrenchment issues and anti-retrenchment measures, solutions and policies. The Retrenchment Board is a given preventive and curative wider prophylaxis powers to deal with retrenchment disputes and also to come up with remedies and policies that can prevent or cure retrenchment. This is a commendable move to ensure that retrenchment matters are constantly monitored with the aim of improving both the practical and theoretical foundations of retrenchment balancing the competing interests of both employers and employees. The Retrenchment Board is not like a boarding master wielding a big stick for a trouble child but it is given both a carrot and stick to deal with retrenchment issues in Zimbabwe for the mutual benefit of both employers and employees as well as common good of society.

ISSUANCE OF NOTICES AND FORMS: EMPLOYER'S LEGAL OBLIGATION FOR THE ISSUANCE OF PRESCRIBED NOTICE OF INTENTION TO RETRENCH:

RETRENCHMENT BOARD PRESCRIBED FORMS RELATING TO THE RETRENCHMENT PROCESS

In terms of section 6 (1) of S.I. 191 of 2024, an employer who wishes to retrench an employee has the legal obligation to comply with the authentic standard notice of intention to retrench procedure serving notice as prescribed in section 12C(3)(a)(ii) of the Labour Act and also the notification certificate shall be in form LRR1 (**notice of intention to retrench**). The purpose of section 6 (1) of S.I. 191 of 2024 is to ensure that an employer uses the correct notice of intention to retrench because that notice of intention to retrench is the first stage for a lawful retrenchment process. Any retrenchment that is purportedly done with the employer serving the employee, the Retrenchment Board and any other applicable parties like works council and employment council with a legally valid notice of intention to retrench as required by section 12C(3)(a)(i)-(ii) of the Labour Act is an unlawful retrenchment process which is a legal nullity/ null and void *ab initio*. There is no lawful retrenchment in the absence of an employer complying with the legal obligation to serve the Retrenchment Board with a legally valid notice of intention to retrench as required by section 12C(3)(a)(ii) of the Labour Act. There some employers who simply abandon employees under circumstances where such employees are legally entitled to their legal rights in terms of retrenchment law and thus the whole purpose of the legislature creating a legal obligation for an employer to serve the relevant parties with a valid notice of intention to retrench is to prevent disguised retrenchments, bogus retrenchments or abortive retrenchments where the affected employee earmarked for retrenchment ditched and left in the naked in the cold akin to “baby dumping”. In terms of section 12C (12) of the Labour Act, it is criminal offence punishable by jail or fine for an employer to purport to retrench an employee without giving the Retrenchment Board notice of intention to retrench in terms of section 12C(5) of the Labour Act. If an employer who is a corporate body breaches the legal duty to serve the Retrenchment Board with a legally valid notice of intention to retrench in terms of section 12C(5) of the Labour Act, the criminal penalty of imprisonment is imposed on any member of the governing board of that employer e.g board or directors or board of trustees or any other applicable board controlling that corporate employer.

It is also worth noting that in terms of section 6 (2) of S.I. 191 of 2024, within a period of fourteen (14) days as the maximum period, where an employee is retrenched, the Retrenchment Board is bestowed with a legal obligation to

issue an employer a notification certificate for retrenchment which shall be in Form LRR2 (**certificate of retrenchment**). In terms of section 6 (3) of S.I. 191 of 2024, when an employer faces allegations of non-compliance with payment of a retrenchment package in terms of section 12C (6) of the Labour Act and there is ample proof to convince the Retrenchment Board about the employer's non-compliance, the Retrenchment Board is empowered to issue a certificate of non-compliance in form LRR3 (**non-compliance certificate**). The main aim of using prescribed retrenchment forms like forms LRR1, LRR2 and LRR3 is to prevent fake retrenchments. It is important for employers to follow the correct retrenchment procedure and use the correct notice of intention to retrench and other relevant forms applicable the retrenchment process so that the retrenchment is fair and lawful.

RETRENCHMENT BOARD PROSECUTION FORM FOR VIOLATION OF RETRENCHMENT LAWS IN TERMS OF SECTION 12C (12) OF THE LABOUR ACT

S.I. 191 of 2024 also contains a Retrenchment Board prosecution form for prosecution of any employer or representative of the employer addressed to the Officer in Charge for Zimbabwe Republic Police for the violation of retrenchment laws in terms of section 12C (12) of the Labour Act. The liability for the criminal offence relating to violation of retrenchment laws in terms of section 12C(12) of the Labour Act is both by act or omission meaning that it covers both an illegal act or a failure to act in terms of the legal obligations applicable to retrenchment legal provisions pursuant to section 12C(12) of the Labour Act. The prosecution form also contains the name of the accused and also space for name and designation a Retrenchment Board Officer based at Head Office, Compensation House who completes the prosecution form. Also the prosecution form makes reference to an indictment form for the Retrenchment Board in terms of which the details of the retrenchment offence or offences are stated.

RETRENCHMENT BOARD INDICTMENT IN TERMS OF SECTION 12C (12) IN RESPECT OF VIOLATION OF RETRENCHMENT LAWS BY THE ACCUSED

According to the Oxford dictionary, an indictment is a formal charge or accusation for a serious crime. In Zimbabwe, according to the Criminal Procedure and Evidence Act, an indictment is used when an accused person is

arraigned for a criminal trial for a criminal offence before the High Court of Zimbabwe. According to Artificial Intelligence (AI), an indictment is also described as a formal accusation that a person has committed a crime, and the written statement that contains the charges against the accused. S.I. 191 of 2024 has now given the Retrenchment Board powers to issue prosecution and indictment forms for offences in relation to violations of retrenchment laws as The Retrenchment Board indictment form against an accused employer who violates retrenchment laws in terms of section 12C (12) of the Labour Act for the particulars of the employee(s) and employer parties' names, addresses and the list of retrenchment offences committed by the accused employer. One type of offence listed on that form is that the employer is accused of contravening section 12C (5) of the Labour Act by failing to give notice of retrenchment to the Retrenchment Board in accordance with section 12C (5) of the Labour Act. The indictment form is signed by an authorised official employed by the Ministry of Public Service, Labour and Social Welfare. Also the indictment form has space for stating whether or not the accused employer is a first offender which will be a factor in mitigation.

ROADMAP FOR RETRENCHMENT PROCESS AND APPLICATION FOR EXEMPTION FROM PAYING THE MINIMUM RETRENCHMENT PACKAGE AND APPLICATION FOR PAYMENT OF ENHANCED RETRENCHMENT PACKAGE

Please note that the retrenchment process for employees entail the following stages:

Stage 1

Serving of fourteen days' written notice of intention to retrench upon the works council, Retrenchment Board and affected employees in terms of **section 12C (3)(a)** of the Labour Act.

Stage 2

Present lack of capacity to pay the minimum retrenchment package by applying to the employment council or retrenchment board in terms of **section 12C (9) (b)** of the **Labour Act** for an exemption from paying the minimum retrenchment package providing supporting evidence of such financial incapacity. This application for exemption from paying the minimum

retrenchment package must also be served upon the affected employees or their representatives in terms of **section 12C (9)(c)** of the **Labour Act**. Please note here that the exemption from paying the minimum retrenchment package must not be less than 25 % of the total minimum retrenchment package.

Stage 3

In terms of **section 12C (10)** of the **Labour Act**, the employment council or Retrenchment Council is obliged by the law to consider the employer's application for exemption from paying a minimum retrenchment package and make a determination within thirty days of the date of receipt of the application, after calling for a hearing of the parties (employer and employee) before making a determination.

Stage 4

In terms of **section 12C (11)** of the **Labour Act,** if the employment council or the Retrenchment Board fails to make a determination within thirty days as specified in terms of section 12C(10) of the Labour Act, or if any party is aggrieved by any determination of the employment council or the Retrenchment Board, the aggrieved party has a legal option of appealing to the Labour Court within twenty-one days of the expiry of the period of thirty days after filing an application for exemption or if a determination is made and an aggrieved party wishes to challenge it, the legal option of an appeal is within twenty-one days after the expiry of thirty days from the date of filing of the application for exemption before either the employment council or the Retrenchment Board.

ENHANCED RETRENCHMENT PACKAGE WHICH IS MORE THAN THE MINIMUM RETRENCHMENT PACKAGE (AKIN TO THE OLIVER TWIST STORY ASKING FOR MORE)

Section 12C (13) of the **Labour Act** afford a trade union representing employees or an individual retrenchee or any retrenched employee clothed with any written legal authority or mandate of the majority of any group of retrenched employees the legal standing to have legal recourse to the Retrenchment Board in writing alleging that the employer has the financial capacity to pay any retrenched employee an enhanced retrenchment package. The application for an enhanced retrenchment package must be done within 60 days from the date of issuance of a notification certificate by the

Retrenchment Board in terms of **section 12C** (**5**) of the Labour Act. Any person alleging that the employer has the financial muscle to pay any retrenched employee more than the minimum retrenchment package bears the onus/ burden of proof to produce tangible particulars of proof that the employer has that financial muscle or stamina and also clearly stating or specifying the amount of the enhanced retrenchment package which the retrenched employee seeks. Financial transparency is very important on the part of any employer who undertakes a retrenchment process because if the employer conceals its financial capacity to pay any retrenched employee an amount which is more than the minimum retrenchment package, that employer can be exposed by any retrenched employee who can expose/unearth or unravel the employer's financial capacity which may lead to the opening of a can of worms or Pandora's box or stirring a hornet's nest. Zimbabwe Revenue Authority (ZIMRA) can also be triggered to investigate an employer who hides financial capacity to pay any retrenched employee an amount which is more than the minimum retrenchment package, pursuant to any retrenched employee or his/her trade union filing a case with the Retrenchment Board for payment of an enhanced retrenchment package, as skeletons will tumble or fall from the cupboard.

RETRENCHMENT BOARD SUBMISSIONS CHECKLIST

NOTICE OF INTENTION TO RETRENCH BOARD BEFORE START OF NEGOTIATION IN FORM LRR1

ATTACH: ANNEXURE 1: Titled name of employees to be retrenched tabulated as follows

Name of Employee	Gender	Basic Salary	Years in Service	Job Title	Contact Details

ANNEXURE 2: Titled reasons for retrenchment (downturn, redundant, technological advancement, restructuring, closure etc)

NEGOTIATE WITHIN 14 DAYS

WITHIN 14 DAYS, AFTER NEGOTIATIONS BRING:

1) COPY OF STAMPED NOTICE
2) APPLICATION FOR RETRENCHMENT CERTIFICATE (ADDRESSED TO THE RETRENCHMENT BOARD)
3) ANNEXURE 3 TABULATED AS FOLLOWS:

Name of Employee	Basic Salary	Years in Service	Job Title	Payment Period (within 60 days)	Effective Retrenchment Date

4) MEMORANDUM OF AGREEMENT BETWEEN EMPLOYER X 3 COPIES WITH ORIGINAL SIGNATURES FOR BOTH PARTIES (agreement of package which one month salary per every year served, enhanced package or negotiated package)
5) MINUTES OF MEETINGS HELD WITH THE EMPLOYEES NEGOTIATING THE PACKAGE

LESSONS ABOUT RETRENCHEMENT PACKAGES FROM SOME OTHER SOUTHERN AFRICA DEVELOPMENT COMMUNITY (SADC) COUNTRIES

Retrenchment or redundancy packages payable in some other African countries in the SADC region vary from one country to another.

SOUTH AFRICA

In South Africa, according to that country's labour laws, the minimum retrenchment package payable consists of one week's salary for every complete year served. This is referred to as severance pay. Beyond this minimum, employers may offer more generous packages based on their policies or collective bargaining agreements. Additional components might include notice pay, accrued leave pay and pro-rata bonuses and outplacement

contracts may also be included, depending on the employment contract and employer policies. Mandatory components of a more detailed retrenchment package breakdown are as follows:

Severance pay: This is made up of at least one week's pay for each completed year of service, as per the Basic Conditions of Employment Act (BCEA). Employers can offer more than the statutory minimum, but this is at their discretion or per contract agreement or collective bargaining agreement.

Notice pay: This is paid in place (*lieu*) of working the notice period, the amount varies based on the length of service. It is one week's notice for less than six months to one year, and four weeks for more than one year.

Accrued leave pay: The employee is legally entitled to full payment of any unused vacation leave days.

Potential additional components payable to an employee upon retrenchment are as follows:

Pro-rata annual bonus: Payment of a portion of the annual bonus based on the employee's length of service.

Pension and provident fund benefit: Options for how to handle retirement benefits, which are typically the same as if the employee had resigned.

Negotiations: Employees can negotiate a better package with their employer, potentially through their trade union or labour lawyer. Agreements reached during retrenchment consultation process can also determine the specific terms of the package.

Important considerations in any retrenchment process are as follows:

Taxation **:** Leave pay, notice pay and pro-rata bonuses are subject to regular income tax, while severance package benefits may have a certain tax-free threshold.

Unreasonable refusal of alternative employment: An employee who refuses a reasonable offer of alternative employment may forfeit their sevrrance pay.

Certificates of service: Employers should provide employees with a Certificate of Service upon retrenchment, as a token of appreciation for employment service rendered.

ZAMBIA

According to the labour laws of Zambia, the retrenchment severance package payable is a minimum rate of 2 months' salary for every year served. An employee is entitled to redundancy package at a minimum of two months' pay for each year served. This is in addition to any other contractual legal benefits which would have accrued to the affected employee. The detailed breakdown of the package is made below as follows:

Minimum retrenchment package: The Employment Code Act mandates that an employer, upon terminating an employee's contract due to redundancy, must provide a minimum redundancy of two months' basic pay for every year of service.

Other entitlements: The retrenchment package also includes any other benefits the employee is legally or contractually entitled to, such as accumulated vacation leave days, outstanding dues, or any other benefits outlined in their employment contract.

Negotiated terms: While the minimum retrenchment package is established and pegged by operation of the law, employers and employees can negotiate better terms for the retrenchment package. This can include additional payments, benefits, or other forms of support.

BOTSWANA

In accordance with the laws of Botswana, a retrenchment package generally includes severance pay, accrued leave pay, and potentially notice pay depending on the length of service. The minimum retrenchment package is one month's salary for every year of service, However, the employer must also pay the employee the amount specified in their employment contract or any other relevant policy, if that amount is greater. A more detailed breakdown is as follows:

Minimum: One month's salary for every year of service.

Negotiation: Employers and employees can negotiate better terms than minimum.

Calculation : For the first five years, severance is one day's basic wage per month worked. For each additional year, it is two days' basic wage per month worked.

Eligibility: Employees must have worked at least 60 months (5 years) to be eligible for severance pay.

Accrued Leave Pay: The employer must pay out an amount equal to the employee's accrued leave, or time off, that has not yet been taken.

MALAWI

In Malawi, the calculation of a retrenchment package, or a severance pay, is determined by the employee's length of service, with the minimum being one month for every year of service. The new regulations, enacted in 2024 provide a more generous payout than previous rules, which used to be one month's salary for every two years of service. The calibrated breakdown of a retrenchment package calculation or computation is specifically as follows:

1-5 years: Employees are entitled to two weeks' wages for each year of employment.

11 + years of service: Employees are entitled to four weeks' wages for each year of employment.

Additional payments: In addition to severance pay, the employer is also legally obligated to provide the employee with a final payment of all accrued wages and benefits due to the employee. This includes payment in lieu of notice if the employee has not been provided with adequate notice of termination. Additionally, the employer must ensure the employee receives their final pay within seven days of the termination of their employment contract.

MOZAMBIQUE

In Mozambique, according to its labour laws, the calculation of a retrenchment package depends on the employee's salary relative to the national minimum wage. For salaries between 11 and 16 times the minimum wage, employees receive 10 days' salary for each year of service. Salaries exceeding 16 times the minimum wage result in 3 days' salary for each year of

service In addition, severance pay is typically 45 days of wages for each year of work. A more detailed breakdown of the retrenchment package is as follows:

Salary up to 7 times the minimum wage: 30 days' pay for each year of service.

Salary between 8 and 10 times the minimum wage:

15 days' pay for each year of service.

Salary between 11 and 16 times the minimum wage: 10 days' pay for each year of service.

Salary more than 16 times the minimum wage: 3 days' pay for each year of service.

Additional considerations:

Notice period : A standard notice period of 30 days is required for terminations after the probationary period.

Severance pay: Employees are also entitled to compensation based on the nature of the termination, which can be up to 30 days' worth of pay for each year of service.

Probationary period: *D*uring the probationary period, a one-week notice is required for termination.

CONCLUSION

The retrenchment law in terms of S.I. 191 of 2024, apart from specifying the minimum retrenchment package, is set to have an impact on the retrenchment legal processes in Zimbabwe for guidance to government, employers and employees. Time will tell the results that will come out of this latest retrenchment legislation. There is room for social partners to engage towards the continuous improvement of our retrenchment legislation from time to time, borrowing leaf or taking lessons/cue from retrenchment payments applicable to other fellow African countries in the SADC region, for cross-pollination of labour law ideas.