FAIR LABOUR STANDARDS ELEVATED TO CONSTITUTIONAL RIGHTS: A NEW APPROACH IN ZIMBABWEAN LABOUR MATTERS.

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Introduction

Labour rights, like any other socio-economic rights, have been statutory rights since the enactment of the Labour Relations Act of 1985. The Constitution of Zimbabwe 2013 brought in another dimension that incorporates the second and third generation rights into the Bill of Rights. This paper seeks to argue that s 65 (1) of the Constitution of Zimbabwe introduces a new approach in determination of labour matters as it entitles direct access to the Constitutional Court through which alleged violations of labour standards may be addressed and, secondly, fairness is the central factor in determination of alleged violations and practices. This paper concludes by arguing that the Supreme Court decision in the case of *Nyamande & Another v Zuva Petroleum (Pvt) Ltd*[2] (the *Zuva* case), among others, is incorrect as it exalts common law over clear constitutional rights. It further concludes that the Supreme Court leapt to the protection of the employer when that protection could still have been attained without the court entangling itself in judicial activism.

The meaning of section 65(1) of the Constitution of Zimbabwe

Section 65(1) of the Constitution of Zimbabwe provides as follows:

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

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[2] *Nyamande and Another v Zuva Petroleum (Pvt) Ltd* SC -43-15

This section is basically three in one. The section may be expanded as follows:

a. right to fair labour practices and standards,

b. right to safe practices and standards,

c. right to be paid a fair and reasonable wage.

This paper will focus on part (a): the right to fair labour practices and standards. What is clear and apparent is that the right does not define fair labour practices and standards. The right is pluralistic in nature; it appears one right yet is a convolution of rights. The concept of fair labour practice is alien to common law but is an invention of the International Labour Organization (ILO).[3] There are a number of ILO Conventions that set out various labour standards and minimum practices that are acceptable under the ILO family.[4] International labour standards are legal instruments drawn up by the ILO's constituents, setting out basic principles and rights at work.[5] The international labour standards are therefore either conventions, which are legally binding international treaties that may be ratified by member states, or recommendations that are non-binding agreements.[6] What is apparent from this definition is that standards are a creation of ILO.[7] Hence the referral to standards under municipal law should derive its definition from the ILO definitions.

Zimbabwe employs the transformation doctrine as a way of domesticating international instruments. In section 327 (2) of the Constitution of Zimbabwe, an international instrument needs to be signed and ratified first for it to be binding. In addition, after the ratification, parliament should then by an Act of parliament incorporate the convention or treaty into municipal law. Hence, in this instance, the definition of what is a standard or practice can be

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[3] Xavier Beaudonnet (ed) *International Labour Law and Domestic Law*, ILO, Switzerland, 2010

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

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

[6] Ibid

[7] ILO, *Constitution of the International Labour Organisation*, ILO Switzerland, Geneva, 2009

adopted from the ILO literature since Zimbabwe has already ratified and signed a number of international labour standards as will be discussed. Section 326 (1) of the Constitution of Zimbabwe provides reference to the international customary law in interpreting treaties and conventions and provides that customary international law is part of the Zimbabwean law unless it is inconsistent with the Constitution and Acts of parliament. However, when interpreting a statute or the Constitution of Zimbabwe the rule is that the Constitution or statute must be interpreted in such a manner that is consistent with international customary law or convention or treaty.[8]

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

a. right to fair dismissal,
b. right to maternity leave,
c. right to vacation leave,
d. right to fair conditions and terms of employment,
e. right to organize
f. right to join trade union of choice etc.[9]

The Zimbabwean Labour Act [*Chapter 28.01*] does set a number of fair practices and standards. Section 6, s7, s8, s9 and s10 of the Labour Act (28:01) lists unfair labour practices and standards.

However, particular to the purpose of this paper is s12B of the Labour Act where it is provided that an employee has a right not to be unfairly dismissed. It is submitted that this provision

[8] Sections 326 and 327 of the Constitution of Zimbabwe.
[9] See ILO, *Rules of the Game, A brief introduction to International Labour Standards*, ILO, Revised Edition, Switzerland, 2009, in general.

is a fair labour practice and standard. Thus, when interpreting the provisions of s65 (1) of the Constitution of Zimbabwe, there should be inclusion of the right to fair dismissal. In dealing with cases of fair labour standards as set in the Labour Act the courts will be essentially be dealing with matters raising constitutional issues. In the case of *NEHAWU v University of Cape Town (NEHAWU)* the court ruled that because the Labour Relations Act 66 of 1995 gave content to the rights in respect of labour relations in s 23 of the constitution, its interpretation application "*in application compliance with the constitution*" are constitutional issues.

The court in NEHAWU further held that the right to fair labour standards and practices in s 23(1) of the Labour Relations Act 66 of 1995 is applicable to both the workers and employers. Rautenbach argues that the focus of s23 (1) of South African Labour Relations Act is to ensure that the relationship between the worker and the employer is fair to both.[10] He says the right not to be unfairly dismissed is essential to the right to fair labour practices.[11]

The Supreme Court of Zimbabwe (SCZ) seems to have adopted an opposite approach in dealing with matters of unfair dismissal. Its standard is clearly a common law approach as opposed to ILO jurisprudence yet the common law does not define what unfair dismissal constitutes. The approach by the Zimbabwean Supreme Court seems to be conservative as it is based on the concept of lawfulness and not fairness.

There is a difference between the two concepts of fairness and lawfulness. A termination maybe within the parameters of the law but yet not fair. Lawfulness is confined to what the rules of law say yet fairness referred to in s12B of the Labour Act (28.01) extends beyond what the rules of law enunciate. Fairness also includes the aspect of equity and morality to some extent unlike law that may be law despite its moral content.[12] Hence, the correct

[10] I M Rautenbach, *Overview of Constitutional Court Decisions on the Bill of Rights-2002*, TSAR 2003 p182
[11] Ibid
[12] Lovemore Madhuku, *Introduction to Law In Zimbabwe,* Harare, Weaver Press, 2010

interpretation of the provisions of sections 65(1) of the Constitution of Zimbabwe as read with s12B of the Labour Act [Chapter 28.01] requires dismissal not only to be lawful but fair. Hence the penalty to terminate ought not only to be lawful but fair.

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

The South African Constitutional Court ruled that the *Sidumo* case raised constitutional issues especially in view of the fact that the Labour Relations Act was enacted to give effect to the rights contained in ss 23 and 33 of the South African Constitution.[13] Further, the court noted that the issues pertaining to the determination of the powers and functions of the Labour Court canvassed in the Sidumo case are essentially constitutional issues.[14]

The South African Constitutional Court (SCC) in disposing the *Sidumo* case ruled that, although s23 (1) of the South African Constitution affords fair labour practices to both the employer

[13] See p 50 of the *Sidumo* judgment.
[14] See para 51 ibid.

and the employee alike, to the employees it affords security of employment.[15] The Court held that a primary purpose of the LRA is to give effect to the fundamental rights conferred by s23 of the South African Constitution. The provisions of s1 of LRA are similar to the provisions of s2A of the Labour Act [*Chapter 28.01*]. Hence the application and interpretation of the provisions is the same. The SCC further ruled that s185 of the LRA provides that every employee has the right not to be unfairly dismissed and subjected to unfair labour practices. [16]It ruled that the onus is on the employer to prove that the dismissal is fair.[17] The reasoning in the Zimbabwean Zuva case, however, is contrary to the SCC reasoning in the *Sidumo* case.

Right to terminate on notice under section 65 (1) of the Constitution of Zimbabwe

The SCC ruled further that the Commissioner first examines whether the decision to dismiss was fair or reasonable and that such a decision should be made in light of the rule breached. The SCC ruled that the Commissioner was an independent adjudicator who considers the competing interests of the employer and the employee. The court noted that when interpreting s145 of LRA they ought to do so in a manner that is compatible with the values of reasonableness and fair dealing that an open and democratic society demands.[18]

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

This paper argues that the approach by the SCZ exalted the common law right of termination on notice over a constitutional right, and incorrectly so. The case ignored the new legal

[15] See para 55ibid.
[16] See para 58 ibid.
[17] See para 58 ibid.
[18] See para 158 of the *Sidumo* judgment.

terrain set by the Constitution of Zimbabwe 2013. What is clear is that the discretion of the employer to dismiss in terms of s 65 of the Constitution of Zimbabwe is subjected to the test of fairness. The SCZ seems to deviate from jurisprudence that clearly originates from ILO conventions on labour. The *Zuva* case buttresses the above view on termination.

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

The Supreme Court further ruled that it is also a well-established principle of statutory interpretation that a statute cannot effect an alteration of the common law without saying so explicitly. The court did find that in s12B of the Labour Act [*Chapter 28:01*] there expressly or impliedly was no abolition of the employer's common law right to terminate an employment relationship by way of notices. The court ruled that section 12B deals with dismissal and the procedures to be followed in those instances where an employment relationship is to be terminated by way of dismissal following misconduct proceedings. The court made a finding that termination on notice is another method of dismissal similar to other methods like retrenchment etc.

It is argued that the termination on notice is contrary to the provisions of S65 (1) of the Constitution of Zimbabwe through exalting the common law right over a constitutional right. This is so if termination on notice is looked in the context of ILO jurisprudence, or as a component of right to fair labour practice and standards.

Termination on notice is dismissal

John Grogan argues that there is significant development on the law of dismissal[19] which, as Grogan puts it, has gone outside the framework of the statute to the Constitutional framework.[20] Grogan argues that s 23 of the South African Constitution affords everyone the right to fair labour standards.[21] In addition, Grogan argues that in the case of *Old Mutual Life Assurance Company SA Ltd v Gumbi* 2007 28 ILJ 1499 the Supreme Court of Appeal recognized, as an implied term of every contract of employment, a right to be terminated fairly. Grogan defines dismissal anchored on section 186(1) of the LRA.[22]

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

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

[19] John Grogan, *Dismissal*, Juta (2010) p9
[20] John Grogan, ibid p10
[21] ibid p10
[22] ibid p10

f. An employee terminated a contract of employment without notice because the new employer, after a transfer of the business, lowered the conditions and terms of employment.

The provisions of s186 (1) LRA buttress the argument that dismissal includes terminating on notice or without notice. In other words dismissal is not confined to misconduct hearings as the Supreme Court implied. The term dismissal is not a common law principle. Grogan argues that the word dismissal does not occur in the language of the common law.[23] Hence s 12B (1) of the Labour Act that provides the right not to be unfairly dismissed is not to be interpreted from a common law position. There are two key aspects in s12B (1) of the Labour Act, namely, the concept of fairness and lawfulness.

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

First, the right to terminate on notice without compensation does not pass the test of fairness under ILO Convention (C150).[24] Convention 158 governs termination and the concept of fair termination is enshrined in this convention. Even though Zimbabwe has not signed and ratified the Convention, Convention 158 has great persuasive value and the courts can rely on it based on s326 of the Constitution of Zimbabwe. In other words, the Supreme Court should have followed the decisions of the courts of other jurisdictions where the definition of fairness in termination have been pronounced. Hence the employees in the *Zuva* case terminated on notice without compensation were terminated unfairly.[25]

[23] Ibid 13

[24] Termination of Employment Convention, 1982

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

The second aspect was for the Supreme Court to inquire whether terminating on notice without compensation is a fair labour practice or standard. In other words, the court ought to have proceeded to measure the termination on notice against set standards or practices on termination particularly as the countries that follow ILO jurisprudence are member states, like Zimbabwe.

What is clear and apparent is that there is no standard or practice that classifies termination on notice without compensation as a fair standard.[26]

Conclusion

The Constitution of Zimbabwe, particularly s 65 (1), provides a new approach to labour matters but what remains for any Zimbabwean court is to adopt an approach that helps for citizenry to enjoy their rights in full. In any event, the Constitution of Zimbabwe 2013 requires a purposive and broad interpretation rather than a narrow interpretation that unduly constricts the rights. It is hoped that in the near future the Supreme Court will expand on the right to fair labour practices and practices as provided for in s 65 (1) of the Constitution of Zimbabwe.

(2002) UNISA.

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