



# **The Zimbabwe Electronic Law Journal**

Commentary on Contemporary Legal Issues

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# **Amendments to the Zimbabwean Labour Act [*Chapter 28:01*] and their implications on the employment relationship: A review of some critical sections of the Labour Amendment Act No. 5 of 2015<sup>1</sup>**

**By Caleb Muccheche<sup>2</sup>**

## **Introduction**

The Zimbabwean Labour Act was recently amended following what the Herald newspaper edition of 18 July 2015 described as a shock labour ruling. This was pursuant to the Supreme Court judgment in *Don Nyamande & Anor v Zuva Petroleum (Pvt) Ltd* delivered on 17 July 2015 asserting an employer's common law right to unilaterally terminate a contract of employment on notice. The new section 12 (4a) of the Labour Act makes for interesting reading. Its mandatory wording allows for termination on notice in four instances, namely; where it is done in terms of either an employment code or the model code made under section 101(9) of the Labour Act; or the employer and employee mutually agree in writing to the termination of the contract; or the employee was engaged for a period of fixed duration or for the performance of some specific service; or pursuant to retrenchment, in accordance with section 12C. In all the aforesaid four scenarios, an employee whose contract of employment has been terminated is legally entitled to compensation for loss of employment as stipulated in terms of the new section 12C of the Labour Act. Among others, there is a raging debate mainly on the possible interpretation(s) to be ascribed to section 12(4a) of the Labour Act. This essay seeks to explore some of the likely interpretations and their impact on the employment relationship.

## **Reincarnation of the employer's common law right to terminate a contract of employment on notice as a statutory right in terms of the Labour Act**

The demise of the employer's common law right to terminate a contract on notice was short lived as the same right was resurrected by parliament as a statutory right in terms of the new section 12(4a) of the Labour Act albeit with some modifications. Soon after the Supreme Court pronounced the employer's common law right to terminate a contract of employment on notice and its consequent legion effect which led to mass arbitrary dismissal of employees, the legislature made a spirited effort to exorcise that common law ghost by way of an amendment to the Labour Act. The amendment now provides an employer with a statutory right to terminate a contract of employment on notice in terms of the model code (national code of conduct, Statutory Instrument 15 of 2006), by mutual agreement with the employee and pursuant to an employment code of conduct.

The employment code contemplated by section 12(4a) of the Labour Act is the one governed by section 101 of the Labour Act. It may therefore be a NEC Code or a code made for a particular undertaking. The section 101 envisages either. What this therefore means is that the right to terminate a contract of employment on notice in terms of the common law has been abolished by the latest amendments to the Labour Act. Termination on notice is now regulated by statute and only permissible under the circumstances provided for in terms of section 12(4a) of the Labour Amendment Act No 5 of 2015. The parties to an employment contract have been given the room to contract either including it or to contract out of it. The difference with the pre amendment era is

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<sup>1</sup> Paper presented at Great Zimbabwe University, Masvingo on 29 September 2015

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that under the old regime, the employer was only obliged to pay for the notice period where it required the employee to leave immediately while under the new regime, the employer has to pay a retrenchment package stated under section 12C (2) for any termination of employment as provided for in terms of section 12(4a) of the Labour Act. Thus it can be argued that the new labour legislation has eroded job security for employees and introduced flexible termination of a contract of employment by the employer.

### **Whether employment codes of conduct or the model code enshrine an employer's right to terminate a contract of employment on notice**

For one to know whether an employment code of conduct registered in terms of section 101 of the Labour Act as read with the Labour Relations (Employment Codes of Conduct) Regulations, SI 379 OF 1990 allow termination of employment on notice by the employer, it is important to closely look at the provisions of the applicable employment code of conduct. If the concerned employment code of conduct provides for termination on notice by the employer, then an employer can resort to termination on notice. On the other hand, if the employment code of conduct applicable to the concerned employer or industry does not provide for termination of employment on notice by the employer, this means that legally an employer cannot terminate a contract of employment on notice. The rationale for allowing termination of employment on notice by an employer if provided for in terms of an employment code of conduct is anchored on the fact that employment codes of conduct are bipartite statutory contracts negotiated and agreed upon between employers and employees to regulate their various conditions of employment including, but not limited to misconduct proceedings, grievance handling procedures, termination of employment, hours of work and rates of remuneration.

Thus if employers and employees, in the exercise of their autonomy and acting through their representative organs either at the works council or employment council, agree on an employment code of conduct conferring an employer with a right to terminate an employee's contract of employment on notice, then that legal provision is enforceable between the parties. If the applicable employment code of conduct between a given employer and employee provides for compensation in the event of an employer terminating an employee's contract on notice, the compensation stipulated within that employment code is what the employer should pay to the affected employees and not the minimum package provided for in terms of the new section 12C of the Act unless the employer successfully applies for an exemption from paying such a compensation package to the applicable authority.

Conversely, where the employment code of conduct simply gives an employer the right to terminate a contract of employment on notice without specifying the compensation package payable to the affected employee(s), by operation of law, the employer is automatically legally obliged to pay the employee(s) the compensation package provided for in terms of the new section 12C of the Act unless the employer has been granted an exemption from paying the minimum package by the applicable authority. In both scenarios given above, the employer should pay the affected employee(s) not less than the minimum package as compensation for loss of employment by means of termination on notice through an employment code unless granted an exemption by the applicable authority.

In its current form, the model code, SI 15 OF 2006, does not have any legal provision allowing termination of a contract of employment on notice as the lawful methods of termination of employment contained in section 5 of that legal instrument excludes termination on notice by an employer.

## **Exposure of employees under the termination on notice legal regime**

Labour law was created to aid the employee in his relationship against the employer. Its thrust is to curtail excesses by the employer which flow from the unequal bargaining power between the two parties. Among others, the employer's right to terminate on notice has been left for the parties to agree on. The legislation inexplicably assumes that the two parties' bargaining powers are the same. Nothing could be further from the truth. Labour can never be equal to capital in the sphere of bargaining power. Capital will always have the bigger say in the relationship should it go unregulated. As such, the amendment did not address the real cause which created the problem which the legislature sought to rectify by the amendment. In making the amended section 12 retrospective in its application, the legislature acknowledged that the employer was wielding too much power in the employment relationship which enabled it to insert clauses which allowed employers to terminate on notice. In order to address this problem, the legislature needed to arrest this power. What is important is not the retrenchment package created under 12C (2). Job security is the most important thing.

## **Exposure of employers under the statutory termination on notice: possibility of paying an employee fired for misconduct like theft or fraud**

The wording of section 12(4a) of the Labour Act now leaves a lot to be desired as it may potentially be interpreted to mean that an employer who charges an employee for an act of misconduct like theft or fraud, proceeds to conduct a disciplinary hearing and finds the employee guilty and proceeds to dismiss such employee from employment, is legally obliged to compensate the errant employee. This becomes the case if one applies a literal rule of interpretation being the ordinary grammatical meaning of the words used in terms of section 12(4a) as read with section 12C of the new Labour Act. The literal rule is always the first port of call in statutory interpretation but it can be departed from if it leads to an absurdity.

The new labour law seems to compel employers to pay employees dismissed for misconduct and/or thieving employees compensation in terms of section 12C post termination for misconduct. This line of interpretation may be rejected by courts of law and other labour tribunals as it may potentially lead to a glaring absurdity which was not contemplated by the legislature. Under the old labour law, an employer was not legally obliged to pay a dismissed employee any compensation apart from any applicable normal terminal benefits provided in terms of section 13 of the Labour Act. The only circumstance where an employer would be legally compelled to pay a dismissed employee some compensation is where an arbitrator or court of law would have made a finding that the concerned employee was unfairly dismissed and as an alternative to the remedy of reinstatement, the employer would be given the option of compensating that employee by paying damages in lieu of reinstatement.

## **Probable demise of damages in lieu of reinstatement as compensation for unfair dismissal**

Under the old law, an employee who was unfairly dismissed was entitled to damages in lieu of reinstatement as monetary compensation for premature job loss. In the case of an unfair dismissal of an employee who was employed on a fixed term contract of employment, damages for loss of employment were calculated by awarding the affected employee monetary compensation for the unexpired period of his contract of employment less any mitigation. On the other hand, in the case of an employee on an open ended contract of employment, damages in lieu of reinstatement payable to an unfairly dismissed employee were calculated in the form of monetary compensation

constituted by salaries and benefits due to the concerned employee from the date of unfair dismissal to the date the employee secured alternative employment or was reasonably expected to get alternative employment less mitigation.

One may interpret the new section 12(4a) (a) of the Labour Act to mean that where an employee's contract of employment is terminated by an employer through a disciplinary process either in terms of an employment code or the model code, the employer should pay the affected employee the minimum compensation stipulated in terms of section 12C of the Labour Act in full and final settlement or pay that compensation over and above the ordinarily previously payable damages in lieu of reinstatement.

The first option means that the legal formula for the compensation for premature loss of employment via unfair dismissal or otherwise has now been settled by the legislature through the provision of a minimum package. The latter option which results in an unfairly dismissed employee getting both the traditional damages in lieu of reinstatement and the minimum compensation provided for in terms of the new section 12C of the Labour Act is likely to be frowned upon as double dipping. If the interpretation that section 12C now caters for damages in lieu of reinstatement, this literally means that the legislature has proverbially killed two birds with one stone by inserting a legal formula for compensation for both retrenchment and unfair dismissal.

### **Unlocking the minimum retrenchment package in terms of the new section 12c of the Labour Act**

It is commendable that the Labour amendment Act has introduced certainty to the retrenchment process by stipulating the minimum retrenchment package payable to employees in the event of a retrenchment proper or termination on notice. Previously, the retrenchment process was like murky waters for both employers and employees as there was no legal formula for calculating the retrenchment package. This state of affairs led to some employers and employees getting stuck in an unfinished retrenchment process as parties haggled over the retrenchment package. An employer who wishes to retrench any employee in Zimbabwe now knows the minimum cost in advance just like in the case of South Africa where the retrenchment package of two weeks for every year served is provided for in their Labour Relations Act. In the past it was hard if not impossible for employers to realistically budget for the retrenchment process.

However from the perspective of employees, the minimum retrenchment package granted to the one whose contract is terminated either via a normal retrenchment or on notice is meager compared to the retrenchment packages which used to be paid to employees before the minimum statutory retrenchment package was unveiled. For instance, under the minimum package, employers are no longer legally compelled to pay what they used to. Such as relocation allowance, destabilisation allowance, tools of trade, motor vehicles at book value and several other benefits which employees used to earn on retrenchment. Individual employers can however choose to pay their respective employees more than the minimum retrenchment package prescribed in the Act.

### **Minimum retrenchment package likely to be the maximum in reality**

Be that as it may, it is highly likely that in practice, a number of employers who choose to terminate a contract of employment on notice for retrenchment purposes or otherwise, will opt to pay the minimum package and nothing more. In reality, the minimum retrenchment package gives a higher financial benefit to those employees who have been in employment for a long time whereas those who have been employed for a short duration are susceptible to get paltry 'crumbs'

packages. The newer workers are left without protection as their jobs are not secure and if they get terminated on notice, they will not get anything meaningful out of the minimum retrenchment package.

What this effectively means is that the newer employees have been muzzled. They can easily be victimized by employers, be forced out of employment and not get anything out of it. The laws proscribing constructive dismissals also are negated because the employer has been given an easier way out. If it does not want an employee for whatever reason, the employer can just terminate where the code provides for the same, pay a trivial amount, and the matter ends there.

### **Employers' option to pick and choose on whether to terminate on notice or dismiss employees through disciplinary proceedings**

The other important thing to note is that where the relevant code allows for termination on notice, the employers are likely to discipline the long serving employees in order to ensure that they do not have to pay a huge minimum retrenchment package and terminate the newer employees on notice because the minimum retrenchment package will be very small. Another point to note is that the right to terminate on notice is usually unqualified. What this therefore means is that there is a large disparity between an employee who is unlawfully dismissed after disciplinary proceedings and the one whose contract is terminated on notice. The former is entitled to damages in lieu of reinstatement<sup>3</sup> while the other one is entitled to the minimum retrenchment package, generally speaking.

It does not require much knowledge to figure out that damages in lieu of reinstatement are more likely to be more than the minimum retrenchment package especially taking into account the nature of the Zimbabwean job market. One should be conscious of the fact that both employees would have lost their employment for no reason yet the remedies they are entitled to leave them in very different circumstances. This is so because in unfair dismissals, the calculation of damages has no relation to the period the employee had been in employment. It only seeks to adequately compensate an employee for the premature loss of a job. In this regard, reference can be made to employees who are on contracts without a limit of time. Any loss of a job before the scheduled retirement is premature. In termination on notice cases, in relation to employees on contracts without limit of time, the job loss is also premature but the employee will likely get far less than an unfairly dismissed employee. This disparity lends itself to abuse on the part of the employers.

### **Statutory right to termination on notice an open option to employers**

The employer's statutory right to terminate a contract of employment on notice also leaves employees in a precarious position. As long as the employer's right to terminate on notice remains extant, one may as well say goodbye to trade unionism and the championing of the workers interests at the workplace as this may lead to the invocation of the right by the employer against any employee who may be perceived to cause problems, however bona fide the employee may be. The section 12 (4a) does not give any guideline on where it would be proper to terminate on notice and this means that employers have been given clearance to terminate a contract of employment on notice at any time. The employer has been given leeway for potential abuse of the right to terminate a contract on notice. When a provision in a contract or employment code

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<sup>3</sup> Of course reinstatement is the primary remedy but the advertence to damages in lieu of reinstatement is only for the purposes of making a more direct analogy.

lends itself to abuse, there is probably something wrong with the provision to start with. There is need to plug such loopholes.

### **An employers' right to terminate a contract of employment on notice potentially violates section 65 of the Constitution of Zimbabwe and International Labour Organization (ILO) Convention 158**

Furthermore, an employers' right to terminate a contract of employment on notice appears to be a negation of the labour rights enshrined in terms of section 65 of the Constitution of Zimbabwe which among others underscore the right to fair labour practices and the right to just and equitable conditions of employment. In the same vein, an employer's right to terminate a contract of employment on notice runs foul of the International Labour Organization (ILO) Convention 158 which provides that an employee's contract of employment should not be terminated without a valid cause related to the employee's conduct, capacity or operational requirements of the employer.

The argument that both employers and employees should equally enjoy the right to terminate a contract of employment is misconceived and premised on a fallacy that employers and employees are equal. Theoretically employers and employees are equal but practically they are unequal because an employee is invariably economically dependent on the employer. The employer owns the treasury purse and if an employee fails to toe the employer's line, such an employee can be condemned to hunger and abject poverty. Also an employer cannot complain of being subjected to forced labour and hence deserving of an exit route in the form of termination on notice. It is only an employee who can suffer from forced labour and hence an employee is allowed to terminate a contract of employment on notice through resignation.

### **Termination on notice: one size fits all for managerial and non managerial employees akin to a hangman noose for death sentence**

It also worth noting that termination on notice is a one size fits all as it can be applied from top to the bottom in the echelons of the employment relationship. Termination on notice is akin to a hangman noose for the death penalty which can be lethal to both the chief executive officer and environmental technician (cleaner) in any given workplace. Both managerial and non managerial employees are equally prone to have their contracts of employment on notice. If one is not a shareholder in any company or organization, one must rest assured that termination on notice can be applied at any time by the real employer who calls the shots at that workplace. If you are a manager, your mask as pseudo employer will be removed the moment the genuine employer who controls the business decides to show you the door by means of termination on notice.

### **Special employees who are immune from termination on notice by the employer**

The only categories of employees who are immune from termination on notice by the employer are judges of the Labour Court, High Court, Supreme Court and Constitutional Court and Prosecutor General as they are a special category of employees who enjoy a security of tenure in terms of the Constitution of Zimbabwe Amendment No. 20 of 2013. All other employees who do not enjoy job security in terms of the Constitution of Zimbabwe are legally naked as they can have their contracts terminated on notice by employers. With respect, the disparity occasioned by the insulation of a certain layer of employees from termination on notice via the Constitution and the lack of protection of the rest of the other employees is a manifest violation of equality before the law and unjustified discrimination which is an affront to section 56 of the Constitution of Zimbabwe.

## **Unpacking the minimum retrenchment package**

There is another problem under section 12 (4a) as read with section 12C (2). An employer is now mandated to pay a minimum retrenchment package even where the termination of the employment contract is terminated by effluxion of time or where the termination is mutual. The other salient point is that forms of termination under section 12(4a) are now the same as retrenchment because all require the payment of the minimum retrenchment package. All these forms of termination are effectively retrenchments. I wonder which employer would go the retrenchment route considering the fact that it will be liable to pay the retrenchment package anyway<sup>4</sup> unless the thrust is to make utilization of section 12C (3) of the Act. Retrenchment is usually a long and sometimes costly exercise. Instead of retrenching therefore, the employer may simply terminate on notice<sup>5</sup> rather than go through arduous retrenchment processes. The sections 12 (4a) and 12C (2) therefore almost render the whole thrust of retrenchment irrelevant. In other words, the employer who terminates for no cause, i.e. on notice, faces the same obligation as an employer who terminates for genuine operational reasons.<sup>6</sup> The wording of the section does not give an incentive to an employer to shun termination on notice. It is actually more efficient to terminate on notice than to go the retrenchment route.

## **Limitation of employees eligible to a minimum retrenchment package pursuant to termination on notice**

Sight should not be lost of the fact that the minimum retrenchment package under 12C (2) applies to employees on contracts without limit of time only. All other employees would still be governed by the section 12 (4) and this amendment does nothing to redress the ills brought about by the effects of the *Zuva Petroleum* judgment. One would have thought that the employer who terminates a fixed term contract on notice ought to be made to buy the contract out but this is not the case. The employer can just terminate the fixed term contract and consequences would visit it. Sight should not be lost that employment contract is simply that a contract, and parties must be made to adhere to it.

## **Powers of labour officers to make binding rulings and potential abuse**

Labour officers have been given new sweeping powers under the new section 93 (5)(c) of the Labour Act. One startling feature is that the labour officers no longer have the power to refer disputes of right to compulsory arbitration. They are now entitled to make a ruling on disputes of right which ruling ought to be confirmed by the Labour Court, at the instance of the labour officer. There is no right of appeal against such a ruling. This is so because unlike the old section 97 of the Labour Act, the section 92E does not avail a right of appeal. The right to appeal against the exercise of power under section 93 (5) is not provided for elsewhere in the Act.

The party against whom the ruling is made is therefore only entitled to challenge the confirmation of such a ruling before the labour court. It would appear, however, that the obligation to comply with the ruling only arises after confirmation. Therefore, the right of appeal is not really necessary considering the fact the party against whom the ruling is made can still oppose its confirmation. However, it seems the one in whose favour the ruling is made is at a disadvantage. Without this right of appeal, it is difficult to see how the party can seek a variation of the ruling so that it satisfies them. It appears once the order is made, the party in whose favour it is made is put in an untenable

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<sup>4</sup> Unless the termination is disciplinary and has been made in terms of the law.

<sup>5</sup> Where this is allowed under the relevant employment code

<sup>6</sup> Retrenchment

position should he wish to have it varied so as to be more favourable. The section does not seem to allow the party in whose favour the award is made the right to intervene in the confirmation process. This is particularly important considering the fact there is no time line within which the application for confirmation must be made. What this means therefore is that a party may have to apply to a court for a *mandamus* to have the labour officer make the application. This makes the whole concept of speedy justice under section 2A meaningless.

### **Challenges with the new powers of labour officers**

Where such ruling is confirmed and the party against whom the ruling operates does not comply with it, the labour officer may submit the order for registration to either the High Court or the Magistrates Court depending on the terms of the order. The labour officer has ceased to be the umpire in the dispute and is not actively involved in the dispute. The problem is that the labour officer may pitch camp with either of the parties and pull out all the stops to ensure that its ruling is confirmed and that it is registered after that. This state of affairs leaves a bitter taste in the mouth. The dispute must be between parties and the labour officer must only be an umpire. Once this quasi-judicial officer is allowed to actively participate in the dispute between the parties, problems are bound to ensue. It is not inconceivable for many applications for review to be made challenging the conduct of labour officers exercising their powers under section 93 (5), (5a) and (5b). This provision makes a mockery of the adversarial system of litigation which otherwise underpins the Zimbabwean legal system. The legislature seemingly forgot that a dispute or unfair labour practice occurs between the parties to an employment contract. It is they that should settle their scores.

### **Powers of labour officers to register their own rulings and challenges thereof**

An important aspect which arises is that lawyers have been taken out of the equation. This is very significant. Suppose the victorious party in the labour officer's ruling is not entirely happy with the terms of the ruling. It does not appear obvious that he will be entitled to seek the variation of the order since he is not the one who makes the application for confirmation. The confirmation of the ruling is by way of a Labour Court order. The successful party<sup>7</sup> derives some right from the confirmation but the right to enforce that right is made subject to the whims of the Labour Officer. This is not acceptable. What would happen should the Labour Officer fail to follow the procedures for registration? The procedures in the High Court for example require that a litigant be knowledgeable because the procedures sometimes catch even the legal practitioners off balance. The fate of the successful party is left in the hands of the labour officer who may be unable to follow the registration processes correctly. The next question would relate to whether the labour officer can instruct lawyers to attend to the registration. If not, what happens when this labour officer cannot understand the registration process? If the labour officer can instruct lawyers, at whose expense will this be? If it is at the successful party's expense, why not just allow them to attend to the registration process and instruct lawyers of their choice should they wish to do so.

### **Mandatory powers of labour officers and counter productivity**

Another aspect relates to subsection 93 (5b) being worded in the peremptory. It mandates an officer to go and register the order. This section does not leave room for the employer and the employee to negotiate a payment plan or just negotiate on how the liability would be disposed of. It leaves no room for the parties to further negotiate in order to preserve relations. The section

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<sup>7</sup> That is where the ruling is confirmed

does not relate to what would happen after the registration is granted in the High Court. Whose responsibility would it be to attend to the execution? Who activates the execution process? Is it the labour officer? Is it the litigant? This remains a grey area. The wording of the subsection (5a) is also peremptory. It does not give the parties the room to settle their dispute without the need of the involvement of the Labour Act.

The powers bestowed on labour officers can potentially be counterproductive to efficient dispute resolution due to the bureaucracy and red tape usually associated with the civil service. Also, some corrupt labour officers are likely to abuse the new powers bestowed upon them under the new labour law and engage in such vices like corruption and taking of bribes e.g. the case of Great Zimbabwe University where the *Masvingo Mirror* newspaper of 2014 reported that a Masvingo former labour officer solicited for bribes from the Great Zimbabwe University Vice Chancellor Professor R Zvobgo resulting in a trap being set for him and his subsequent conviction by the criminal court.

Now that labour officers have been handed back the powers they used to enjoy in terms of the now repealed Labour Regulations, Statutory Instrument 371 of 1985, there is a high possibility that corruption will take its toll in labour matters. It is difficult if not impossible to get a clean fish from a sewage pond. Although not all labour officers will engage in corruption, the temptation and probability of some labour officers diving into and swimming in the sea of corruption is very high.

It is retrogressive for the legislature to smuggle provisions of the old SI 371 of 1985 via the backdoor by giving labour officers powers to make binding decisions in labour matters. This obsession with state corporatism in terms of which the state acting through its labour officers seeks to make binding decisions in labour matters is very primitive. After all, the State is potentially conflicted in that it is also an employer for the civil service employees and for its labour officers to wear the garb of neutral adjudicators in labour disputes is difficult to swallow. The powers given to labour officers to make rulings are likely to be abused. These powers should be scrapped and labour officers should not make binding rulings or decisions. The legislature missed the mark by investing labour officers with undeserved powers to make binding rulings between parties.

The role of arbitrators in matters concerning disputes of right has been done away with because the labour officer now no longer has the power to refer such disputes to compulsory arbitration. The old 93 (5)(c) which allowed the reference to compulsory arbitration has been eliminated. The provisions of section 98 are now limited in their application.

It may be strongly argued that government breached the tripartite agreement with employers and employees (labour and business) by awarding itself powers to make rulings through labour officers and super-imposing such decisions on the other two parties to the tripartite negotiating forum. It is a mockery of the dispute resolution system for government appointed labour officers to make binding rulings on the parties to a labour dispute as they now play the dual and mutually exclusive role of conciliation and adjudication. The issue of conflict of interest will follow labour officers like an avenging spirit even if cosmetically they can pretend to be neutral. Justice should not only be done but it must manifestly appear to be done.

It is respectfully submitted that the adjudicatory powers given to labour officers is manifestly a monument of injustice in the labour dispute resolution system in Zimbabwe. This backward development of according labour officers powers to make binding rulings is likely to fuel industrial unrest and it is a recipe for labour disharmony.

Instead of correcting some valid criticisms which had been aired against independent arbitrators, government unwisely decided to solve the problem by creating yet another and far worse problem. Government should play a neutral role in dispute resolution but, under the new labour law, government is now heavily compromised as it wears both the hat of a regulator and adjudicator akin to being a judge and a prosecutor. This state of affairs is an untenable recipe for disaster in the employment relationship.

### **Dealing with casualization of labour and fixed term contracts of employment**

The new section 12 (3a) is an attempt to deal with the 'casualisation of labour' concept that has been doing the rounds. The provisions seek to deem certain contracts to be ones without limit of time where such is fixed by the relevant NEC of the Minister. Employers have been in the habit of employing people on fixed term contracts repeatedly over long periods of time. This is a welcome development as the employers had been abusing their right to fix durations of contracts under section 12 of the Labour Act. This provision also takes care of some of the problems employees faced because of judgments like *UZ UCSF Collaborative Research Programme in Women's Health v Shamuyarira*<sup>8</sup> and *Magodora v Care International*.<sup>9</sup> Under this line of cases, the repeated renewal of contracts was said not to give rise to further renewals where the contracts specifically said so. Under the new regime however, regardless of what the contracts say, contracts without limit of time may be deemed by use of 12 (3a). In other words, the subsection imports a statutory condition into an employment contract for the benefit of the employees. It is not lost on me that the cases above related to 12B (3) (b) but the underlying problem has always been the repeated renewal of employment contracts over a long period of time.

The central issue is that of fixed term contracts. While at this, there are English authorities which hold that a contract which is terminable at the employer's instance on notice can never be a fixed term contract because the term can be cut short by termination. The point here is that where the employer terminates on notice for employees on fixed term contracts and allows the employee to work in the notice period, the employee will walk out with nothing and their term of employment is anything but fixed.

### **Curbing abuse of employment council funds by giving Registrar of Labour oversight powers in the financial affairs of employment councils**

The new section 63A of the Labour Act is a very progressive provision as it seeks to cut out the rot which was evident in some employment councils characterized by the abuse of employment council funds with impunity. Some employment councils had become a looting ground for some unscrupulous employer and employee representatives who colluded and illegally helped themselves from funds of employment councils in a typical scot free unauthorized borrowing. The absence of stringent financial rules aided and abetted the financial mess in which some employment councils found themselves. This provision will go a long way to curb the rampant abuse by culprits who siphon employment council moneys, and to hold them accountable. The guilty will always be afraid but they should face the full wrath of the law.

### **Investigation of trade unions and employers organizations by the minister**

In terms of the new section 120 of the Labour Act, the Minister is granted far reaching powers to investigate trade unions for vices. At face value, it is commendable if the powers are used to curb

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<sup>8</sup>SC 10/10

<sup>9</sup>SC 24/14

abuses at trade unions e.g. abuse of members' funds. There are some trade unions and employers' organizations which are run like a personal fiefdom by a cabal and the Minister is justified to investigate such trade unions to stop any abuses. However, there is a potential of the abuse of the very powers by the Minister as an extension of government to stifle radical trade unionism and that is retrogressive. If the Minister oversteps his/her mandate, it is possible for the affected party to take legal recourse for redress.

### **Review powers of the Labour Court**

The introduction of section 92E makes no difference because the grounds for review detailed thereunder are already implicitly available under section 89 (1)(d1). The elaboration of review powers of the Labour Court can therefore be described as superfluous. In reality, the Labour Court's powers and jurisdiction have not been widened and remain very limited.

### **Conclusion**

The Labour Amendment Act No. 5 of 2015 is a halfhearted approach to the protection of employees against arbitrary dismissal by employers. Instead of expressly abolishing an employer's common law prerogative to terminate a contract of employment on notice, the legislature simply cosmetically changed the same common law right to become a statutory right in a typical smearing of lipstick on a frog. Effectively, employees are still at the whim and caprice of some unscrupulous employers who can abuse the statutory right to terminate a contract on notice. The concept of job security in Zimbabwe has been destroyed and employees should brace up for tough times ahead unless the labour legislation is urgently amended to address the shortcomings highlighted in this paper.