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*Minister of Home Affairs v Allan* 1986 (1) ZLR 263 (S)

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Unreported Judgements:

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*S* v *Mpa* HH-469-14

*Mungate* v *City of Harare & Ors* HH-328-16

*Appeal cases*

*S v Jones* S-154-94

*Newlands Farm (Pvt) Ltd v Matanda Bros* S-100-91

Legislation:

*Acts*

Domestic Violence Act [*Chapter 5:16*] (The Chapter number is placed in square brackets and is italicised.)

*Subsidiary legislation*

Road Traffic (Safety-belt) Regulations, 1987 (SI 147/1987)   
(SI is the abbreviation for Statutory Instrument.)

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*Books*

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Armstrong, A “Consent in Rape Cases in Zimbabwe” in 1986 Vol 4 *Zimbabwe Law*

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Nyandiya-Bundy, S “Child Sexual Abuse in Zimbabwe” in 1994 Vol 6 No 2 *Legal*

*Forum* 5.

EDITORIAL

The *University of Zimbabwe Law Journal* is the successor to the *Zimbabwe Law Review* and is published by the Faculty of Law at the University of Zimbabwe. It carries peer-reviewed articles, book reviews and case notes on any significant legal matters on Zimbabwean and International Law. In the process, the *University of Zimbabwe Law* *Journal* intends to contribute towards an indigenous Zimbabwean jurisprudence.

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The current edition (Volume 2, No. 1, 2019) has 10 articles, 2 book reviews, an editorial on legal information and 5 case notes. It has been published through the generous funding of the University of Zimbabwe through the University of Zimbabwe Publications.

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THE CONSTITUTIONAL COURT OF ZIMBABWE’S   
UNCONSTITUTIONAL APPROACH OF APPLYING RULES OF *LOCUS STANDI*

BY JUSTICE ALFRED MAVEDZENGE1

(in loving memory of the late Blasio Zivengwa Mavedzenge)

ABSTRACT

*This paper examines the rationality and legality of the rule of locus* *standi introduced by the Constitutional Court of Zimbabwe to the* *effect that no litigant is allowed to act in more than one capacity of* *locus standi in one matter. This rule was initially suggested in Mudzuru* *v Minister of Justice and was crystallised in Samuel Sipepa Nkomo v* *Minister of Local Government. When evaluated against the provisions* *of section 46 and section 85 of the Constitution, this rule is* *inconsistent with the liberal approach to determining locus standi* *and is therefore ultra vires the Constitution. At a conceptual level,* *this rule is untenable and irrational as it is contradictory to the* *theoretical foundations upon which the constitutional idea of judicial* *review is based. It is also inconsistent with the trajectory set by the* *same Court in its very first case of Jealous Mawarire v Robert Mugabe.*

*Keywords: Constitution, locus standi, constitutional court, human* *dignity, ultra vires*

INTRODUCTION

Zimbabwe adopted a new Constitution in May 2013 which introduces and guarantees a range of progressive democratic principles, values and rights. These values and principles include constitutional supremacy (as opposed to parliamentary sovereignty),2 the rule of

1 Justice Alfred Mavedzenge holds a PhD in Constitutional Law from the University   
of Cape Town. He is a Researcher at the Democratic Governance and Rights   
Unit of the University of Cape Town’s Law Faculty and an associate at Maja and   
Associates Commercial Law Chambers

2 See section 2 (1) and 3 (1) (a) of the Constitution of Zimbabwe, 2013

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law,3 separation of power,4 transparency, justice, accountability and responsiveness.5 A range of civil, political and socio-economic rights are guaranteed in Chapter Four of the Constitution.6 The intention is to ensure that the exercise of public power and conduct of private persons in Zimbabwe conforms and gives effect to these principles, values and fundamental rights.

In order to ensure the enforcement of fundamental rights, the Constitution provides for certain mechanisms which include the right to approach a court of law to seek remedies against violations or potential violations of specific rights that are enshrined in Chapter Four of the Constitution. This right is encapsulated in s 85 (1) of the Constitution. However, as is the case with most constitutional rights, it is not an absolute right.7 It is qualified to ensure that the courts entertain only those cases that entail “real, earnest and vital controversy” amongst litigants and not mere “hypothetical cases, or cases that are only of academic interest.”8 In order to distinguish between ‘hypothetical’ and ‘real’ cases, the Constitution provides for what are known as rules of *locus standi* which are basically rules that regulate the application of the right to approach a court of law or the right to bring an action before a court of law.9 These rules are set out in s 85 (1) of the Constitution as follows:

Any of the following persons, namely-

(a) any person acting in their own interests; (b). any person   
acting on behalf of another person who cannot act for   
themselves; (c) any person acting as a member, or in the   
interests, of a group or class of persons; (d) any person acting in   
the public interest; (e) any association acting in the interests of   
its members;

3 Ibid, section 3 (1)(b)

4 Ibid, section 3 (2) (e)

5 Ibid, section 3 (2) (g)

6 Also called the Declaration of Rights

7 It is not listed as one of the rights that cannot be limited. See s 86 of the

Constitution of Zimbabwe, 2013

8 This is a *dictum* of Brandeis J in *Ashwander* v *Tennessee Valley Authority* 297

US 288 (1936). For similar views, also see *Ferreira v Levin* 1996 (1) SA 984 (CC);   
1996 (1) BCLR 1 at para 165. Also see Iain Currie and Johan De Waal *The Bill of*   
*Rights Handbook* 6 ed, *Juta and Company* 2013 at p. 72.

9 See Justice Alfred Mavedzenge and Douglas Coltart, A Constitutional Law Guide   
towards understanding Zimbabwe’s Social, Economic and Cultural Human Rights,   
*International Commission of Jurists* 2014 at p. 16

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is entitled to approach a court, alleging that a fundamental   
right or freedom enshrined in this Chapter has been, is being or   
is likely to be infringed, and the court may grant appropriate   
relief, including a declaration of rights and an award of   
compensation.

The significance of these rules cannot be gainsaid. They define capacities in which a person can bring an action or petition before the court, which is the *locus standi* or standing. If a litigant is unable to demonstrate that he or she fits in any of these capacities, then his or her case may not be heard by the court. Therefore, these rules are so important that they determine who can bring an action before the court for the vindication of constitutional rights.

Furthermore, these rules are also critical in the sense that they have a direct bearing on the right to access appropriate relief. This right is guaranteed in section 85 (1) which stipulates that any person who acts in the capacities or *locus standi* described above is entitled to appropriate relief if his or her petition succeeds in court. For a relief to be ‘appropriate’, it has to meet certain attributes.10 One of these is that the relief must be effective in the sense that it must adequately vindicate the right(s) in question.11 For the court to give such a relief, it must be convinced that the applicant’ case merits such kind of a relief in the first place. It is inevitable that, as part of this assessment, the court will consider the appropriateness of the relief sought in relation to the *locus standi* upon which the applicant founded his or her petition. Put differently, the court will inquire into the following question: Is the relief sought appropriate for an action brought on the basis of the particular *locus standi* invoked by applicant? Usually, for a petition brought by litigants acting in their own personal interest, the appropriate remedy would be a personal relief12 rather than a public interest relief or a relief which affects the public.

Thus, rules governing *locus standi* do not determine only who can bring a petition before the court but they also determine the substantive nature of relief which a litigant can get from the court. It is therefore very important to critically engage with questions

10 For some of these, see *Fose* v *Minister of Safety and Security* 1997 (3) SA 786   
(CC) at para 19

11 See Mavedzenge and Coltart supra Note 9 at p. 15

12 Relief which attaches to the litigant personally, as opposed to attaching to

other persons who are not party to the case.

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pertaining to how courts interpret these rules. In this paper, I examine the approach that has been taken by the Constitutional Court of Zimbabwe in applying s 85 (1) of the Constitution particularly on whether or not a litigant can act in more than one capacity (*locus* *standi*) in the same proceedings or in the same application. Decisions of the Constitutional Court are binding on all other courts13 and therefore, it is critical to engage with these decisions as they will affect litigants in other courts.

THE CONSTITUTIONAL COURT’S APPROACH IN APPLYING RULES OF *LOCUS STANDI*

The Constitutional Court seems to have suggested a curious application of the rules of *locus standi*, to the effect that a litigant cannot act in more than one capacity in a single matter. This proposition is encapsulated in *Mudzuru* v *Minister of Justice and Parliamentary* *Affairs*14 (*Mudzuru case*) where the learned Deputy Chief Justice Luke Malaba (as he then was) said:

What is in issue is the capacity in which the applicants act in   
claiming the right to approach the court on the allegations they   
have made. In claiming *locus standi* under s 85(1) of the   
Constitution, a person should act in one capacity in approaching   
a court and not act in two or more capacities in one proceeding.   
[My own emphasis]15

Although one could argue that by using the phrase “should act”, the learned Deputy Chief Justice was making a suggestion rather than laying out a rule regarding how provisions relating to *locus standi* should be applied, this seems to have crystallized into a rule when one takes into account the subsequent judgments made by the same Court. For instance, in *Samuel Sipepa Nkomo* v *Minister of Local* *Government, Rural and Urban Development*16 (*Samuel Sipepa Nkomo* *case)*, the learned Ziyambi JCC said:

In so far as the applicant alleges an infringement of his   
fundamental right enshrined in Chapter 4 of the Constitution,   
he may, in the absence of the rules referred to in s 85(3), be   
permitted to access this Court directly. On this basis he has,   
*prima facie*, the *locus standi* to bring his application in terms of

13 See section 167 (1) (a) of the Constitution of Zimbabwe, 2013 14 [2015] ZWCC

15 Ibid at p. 8

16 CCZ 06-16 at para 8

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s 85 (1) (a). But he cannot, as he has sought to do, act in his own   
interest as well as the public interest. This point was emphasized   
in *Loveness Mudzuru & Anor* *v* *Minister of Justice, Legal &*   
*Parliamentary Affairs N.O & 2 Ors* where Malaba DCJ, delivering   
the judgment of the Court, held that an applicant should confine   
himself to one of the capacities set out in s 85 (1). [My own   
emphasis]

Unlike the DCJ in the *Mudzuru case*, who uses the word “should” act in one capacity, Ziyambi JCC (with the concurrence of eight other judges) in *Samuel Sipepa Nkomo case*, uses the word “cannot” act in more than one capacity and she references the *Mudzuru case* in arriving at this interpretation. Thus, when one reads Ziyambi JCC’s judgment in *Samuel Sipepa Nkomo case*, it seems that the Constitutional Court has now laid it out as a rule that a litigant cannot claim more than one ground of *locus standi* in a single application. For instance, according to this approach (as suggested by the Constitutional Court) a litigant in a single proceeding cannot simultaneously claim to act in her own interest and in the public interest.

Through this paper, I question the rationality of this approach and contest its constitutionality. I take the position that, with respect, the Constitutional Court’s approach is wrong, irrational, unreasonable and unconstitutional. I advance my argument in two parts. First, I deploy the rules of constitutional interpretation in order to buttress my position. However, I refuse to restrict this discussion to a mere technical or legalistic review of how the Constitutional Court’s interpretation is *ultra-vires* s 85 (1) of the Constitution and certain values enshrined therein.17 To do so would be to miss the point entirely because the Constitutional Court’s interpretation is a tell-tale sign revealing the bench’s deep, underlying philosophical view of its own role in protecting the Constitution. For that reason, in the second part of the paper I discuss the theoretical and conceptual underpinnings of judicial review in order to show that the Constitutional Court interpretation of s 85 (1) of the Constitution is philosophically at variance with the spirit, purport and object of the Constitution which the Court is required to protect. First, I deal with the rules of constitutional interpretation.

17 Such as the rule of law and constitutional supremacy.

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RULES OF CONSTITUTIONAL INTERPRETATION

Section 85 (1) of the Constitution is located within Chapter Four of the Constitution, which is the Declaration of Rights. Therefore, when interpreting how the rules of *locus standi* set out in s 85 should be applied, the Court must revert to section 46 (1) of the Constitution which provides that:

When interpreting this Chapter, a court, tribunal, forum or body—

a) must give full effect to the rights and freedoms enshrined   
in this Chapter;

b) must promote the values and principles that underlie a   
democratic society based on openness, justice, human   
dignity, equality and freedom, and in particular, the values   
and principles set out in section 3;

c) must take into account international law and all treaties   
and conventions to which Zimbabwe is a party;

d) must pay due regard to all the provisions of this   
Constitution, in particular the principles and objectives   
set out in Chapter 2; and

e) may consider relevant foreign law;

Therefore, the rules of *locus standi* must be interpreted and applied

in a manner that ensures that: the rights enshrined in the Declaration of Rights are given full effect,18 the constitutional values (including those enshrined in s 3) and relevant international law standards are implemented.19 The import of these rules of interpretation is that the right to approach the court must be interpreted generously but without distorting the grammar used in framing that right.20 The first

18 *Mawere v Registrar General* (2015) ZWCC 04 at para 20, where the court adopted   
the ruling of the Supreme Court in *Rattigan v Chief Immigration Officer* 1994   
(2) ZLR 54 (S) at 57 F–H where Gubbay CJ (as he then was) said: *“*[When   
interpreting constitutional rights] what is to be avoided is the imparting of a   
narrow, artificial, rigid and pedantic interpretation; to be preferred is one [an   
interpretation] which serves the interests of the Constitution and best carries   
out its objects and promotes its purpose. All relevant provisions are to be   
considered as a whole and where rights and freedoms are conferred on persons,   
derogations therefrom, as far as the language permits, should be narrowly and   
strictly construed.”

19 See supra note 15, *Mudzuru case* at para 25–26

20 See supra note 18, *Mawere* case at para 20 where the Constitutional Court of

Zimbabwe reproduced Kentridge AJ’s ruling in *State v Zuma* 1995 (2) SA 642   
(CC) to caution that: “[When interpreting constitutional rights] it cannot be

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aspect to consider then is the grammatical construction of the right.21 Section 85 (1) of the Constitution stipulates that any of the persons mentioned therein have the right to petition the court seeking protection of the right(s) guaranteed for them in Chapter Four of the Constitution. There is nothing in the grammatical construction of section 85 which shows that litigants are prohibited from acting in more than one capacity in a single proceeding. Thus, the scope of the right to approach the court is grammatically cast widely and therefore, is capable of a broad and purposive interpretation which takes within its sweep a range of relevant constitutional values and international law norms and standards.

The purpose of the rules of *locus standi* is to ensure that the right to approach the court is fully facilitated22 in order to bring about effective enforcement of constitutional rights.23 Therefore, when interpreting and applying these rules, the court must seek to promote this purpose. A rule which prohibits applicants from acting in more than one capacity in a single matter is inconsistent with this constitutional goal. It has the effect of restricting an applicant from securing relief that is appropriate.

A relief is appropriate if it prescribes for the applicant remedies which best secure his or her rights while, at the same time, it protects the Constitution.24 Under certain circumstances, a litigant may have to found her application on more than one capacity of *locus standi* in order to claim a relief that is effective for the protection of the

too strongly stressed that the Constitution does not mean whatever we might   
wish it to mean. We must heed Lord Wilberforce’s reminder that even a   
Constitution is a legal instrument, the language of which must be respected...I   
would say that a Constitution embodying fundamental principles should as far   
as its language permits be given a broad construction.”

21 See Zimbabwe Electoral Commission v Commissioner General, ZRP (2014) ZWCC   
3 at para 8. Also see L Du Plessis Re-Interpretation of Statutes Butterworths   
2002 p 96 and See GM Cockram Interpretation of Statutes 3 ed, Juta and Co   
1987 at p 36

22 See 85 (3) of the Constitution of Zimbabwe, 2013

23 See L Chiduza and PN Makiwane ‘Strengthening Locus Standi in Human Rights

Litigation in Zimbabwe: An Analysis of the Provisions in the New Zimbabwean   
Constitution’ in *PER/PELJ* 2016(19) at p 13

24 See G Musila ‘The Right to an effective remedy under the African Charter on   
Human and Peoples’ Rights’ in 2006 Vol 6 *African Human Rights Law Journal* at   
p 446. Also see *Jawara* v *The Gambia* (2000) *AHRLR* 107 (ACHPR 2000) at para   
32. Also see *Fose case*, supra note 10.

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Constitution and or vindication of her fundamental rights. For instance, Mrs X (an accused human rights activist) has been denied bail and is being held at Matapi police cells where the living standards are inhuman and degrading. Mrs X often gets arrested for engaging in public protests. She wants to bring an application to the Constitutional Court seeking an order which: (a) declares that the conditions at Matapi cells violate the right to human dignity and no accused person should be detained there until government fixes those conditions and, (b) that she be moved to cells with humane living conditions. It is necessary that Mrs X claim both (a) and (b) as part of the relief because she needs to be moved from Matapi cells in order to protect her right to human dignity which is being violated. Furthermore, as an activist who often participates in protests, she also needs to be assured that she will not be condemned to Matapi cells, should she be arrested again before government fixes the living conditions there. In order to claim a relief which declares the holding cells to be inhuman and unfit to hold any arrested person and that she is removed from there, Mrs X would have to approach the court acting both in her own interest and in the interest of the public. A relief which declares the cells to be inhumane and prohibits the state from detaining any accused person in those cells until they are fixed, is a public interest relief which Mrs X can only claim if she approaches the court on the basis of s 85 (1) (d) of the Constitution of Zimbabwe. On the other hand, Mrs X can only seek an order which compels the state to immediately move her from Matapi cells if she approaches the court on the basis of section 85 (1) (a) of the Constitution. Thus, Mrs X has to invoke both section 85 (1) (a) and (d) in order to get the appropriate relief which will see her being moved from Matapi cells while, at the same time, a guarantee that she will not he condemned to the same cells should she be arrested again before government fixes those cells.

Furthermore, a relief which would result in Mrs X being moved to better cells without the court condemning the inhuman cells as unfit for detention of any other person would not be an effective remedy. Such a remedy would temporarily protect Mrs X’s rights but it leaves the Constitution vulnerable as other people may have their rights violated by being detained in the same cells. There are numerous examples where a litigant would have to invoke more than one ground of *locus standi* in order to seek an effective relief.25 As would be the

25 For instance, a parent who is threatened with arbitrary evictions has to act both in his own interest and in the interest of other persons — his children. A

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case in Mrs X’s situation, a rule which restricts litigants to choosing one ground of *locus standi* may constrain them from seeking effective relief, thereby undermining the effective protection of human rights and the Constitution. Such a rule undermines the purpose of the right to approach the court and is therefore *ultra vires* s 85 (3) (a),26 which requires rules of procedure to fully facilitate the right to approach the court and the right to effective remedies.27

This rule is also contrary to the cardinal values upon which the Constitution is based. These values include justice and respect for the rule of law28 — values which demand that persons must have access to effective remedies in order to enforce the law-including their constitutional rights. As the Icelandic Human Rights Centre rightly observes:

Under the rule of law [and also constitutional supremacy],   
effective remedies, effectiveness of justice, notably in providing   
effective recourse to anyone who alleges that her or his rights   
have been violated, is essential. Without such recourse, justice   
is of little use.29

The unconstitutionality of this rule becomes even more apparent when one applies s 46 (1) (c)30 which requires provisions in the Declaration of Rights31 to be interpreted in a manner that is consistent with the relevant international law standards and principles. These are encapsulated in article 2 (2) of the International Covenant on Civil and Political Rights (ICCPR) which stipulates that:

Where not already provided for by existing legislative or other   
measures, each State Party to the present Covenant undertakes   
to take the necessary steps, in accordance with its constitutional

patient who is hospitalised in a clinic where the rights of patients are being   
violated may have to act in his own interest as well as that of other patients   
(who are in the same clinic) who are incapacitated to approach the court, yet   
their rights are equally in danger.

26 Of the Constitution of Zimbabwe, 2013

27 See section 85 (1) and (3) (a) of the Constitution of Zimbabwe, 2013

28 See section 3 (1) and (2) (g) of the Constitution of Zimbabwe, 2013

29 See <http://www.humanrights.is/en/human-rights-education-project/>

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30 Of the Constitution of Zimbabwe, 2013

31 Of which the rules of *locus standi* are part of the Declaration of Rights

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processes and with the provisions of the present Covenant, to   
adopt such laws or other measures as may be necessary to give   
effect to the rights recognized in the present Covenant. [and]…   
(3) Each State Party to the present Covenant undertakes: (a)

to ensure that any person whose rights or freedoms as   
herein recognized are violated shall have an effective   
remedy…

The above provision has been interpreted as follows by the Human Rights Committee:

Article 2, paragraph 3, requires that in addition to effective   
protection of Covenant rights States Parties must ensure that   
individuals also have accessible and effective remedies to   
vindicate those rights. Such remedies should be appropriately   
adapted so as to take account of the special vulnerability of   
certain categories of person, including in particular children.   
The Committee attaches importance to States Parties’   
establishing appropriate judicial and administrative mechanisms   
for addressing claims of rights violations under domestic law.32

Rules of court procedure are part of the judicial mechanisms (contemplated in article 2 of the ICCPR) for addressing allegations of rights violations. As is mentioned by the Human Rights Committee above, these rules of procedure must ensure that persons not only get their cases heard by the court but they also get remedies that effectively address the alleged violations or threats of violation. As I demonstrated above, a rule which prohibits a litigant from invoking more than one grounds of *locus standi* undermines the litigant’s ability to claim effective remedies and therefore, such a rule falls foul of Zimbabwe’s international legal obligations- especially those arising from article 2 of the ICCPR.

By virtue of s 46 (1) (e) of the Constitution, courts may consider comparative foreign jurisprudence when interpreting provisions in the Zimbabwean Declaration of Rights. As I have argued elsewhere,33 the Zimbabwean jurisprudence on the interpretation of certain constitutional provisions and principles is still shaping up and,

32 See United Nations Human Rights Committee (HRC) General Comment no. 31   
[80] ‘The Nature of the General Legal Obligation Imposed on States Parties to   
the Covenant’ 26 May 2004, para 15

33 Mavedzenge and Coltart supra note 9 at p. 21. Also see Justice Mavedzenge   
‘Accessing the National Voters’ Roll through the Right of Access to Information   
In Zimbabwe’ in 2017 Vol 1 *Zimbabwe Rule of Law Journal* at p.4

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therefore, courts should be keen to be persuaded by approaches taken by sister courts in jurisdictions which share contextual similarities with the Zimbabwean Constitution.

South Africa is one such comparative jurisdiction. The rules of *locus* *standi* in s 85 (1) of the Constitution of Zimbabwe mirror s 7(4)(b) of the Constitution of the 1993 Constitution of South Africa.34 After its landmark decision in *Ferreira v Levin*,35 where it held that these rules contemplate a liberal approach to *locus standi*,36 the Constitutional Court of South Africa has gone on to allow litigants to invoke more than one *locus standi* in a single application. For instance, in *Albutt v* *Centre for the Study of Violence and Reconciliation,37* the Constitutional Court was confronted with an application which involved a number of Non-Governmental Organisations (NGOs) as litigants. Chief Justice Ngcobo had this to say about their *locus standi*:

The NGOs have standing on at least two grounds. First, they are   
litigating in the public interest under section 38(d) of the   
Constitution. The NGOs contend that the exclusion of victims   
from participation in the special dispensation process violates   
the Constitution, in particular, the rule of law. They submit that,   
as civic organizations concerned with victims of political

34 Which provided as follows: “(a) When an infringement of or threat to any right   
entrenched in this Chapter is alleged, any person referred to in paragraph (b)   
shall be entitled to apply to a competent court of law for appropriate relief,   
which may include a declaration of rights ... (b) The relief referred to in   
paragraph (a) may be sought by (i) a person acting in his or her own interest;   
(ii) an association acting in the interest of its members; (iii) a person acting on   
behalf of another person who is not in a position to seek such relief in his or   
her own name; (iv) a person acting as a member of or in the interest of a group   
or class of persons; or (v) a person acting in the public interest.”

35 Supra note 6

36 For instance, in *Ferreira v Levin*, Chaskalson P said: “Whilst it is important

that this Court should not be required to deal with abstract or hypothetical   
issues, and should devote its scarce resources to issues that are properly before   
it, I can see no good reason for adopting a narrow approach to the issue of   
standing in constitutional cases. On the contrary, it is my view that we should   
rather adopt a broad approach to standing. This would be consistent with the   
mandate given to this Court to uphold the Constitution and would serve to   
ensure that constitutional rights enjoy the full measure of the protection to   
which they are entitled.Such an approach would also be consistent in my view   
with the provisions of section 7(4) of the Constitution on which counsel for the   
Respondents based his argument.” [My own emphasis]

37 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC)

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violence, they have an interest in ensuring compliance with the   
Constitution and the rule of law. Second, they are litigating in   
the interest of the victims under section 38(c). The victims whose   
interests the NGOs represent were unable to seek relief   
themselves because they were unaware that applications for   
pardons affecting them were being considered.38

Thus, the Constitutional Court interpreted s 38 of the South African Constitution (which is similar to s 85 of the Constitution of Zimbabwe), to mean that a litigant can approach the Court on the basis of more than one ground of *locus standi*. In *Kruger v President of the Republic* *of South Africa*39 *—* where the applicant was an attorney who was challenging the validity of certain regulations — the Court accepted to hear the matter on the basis that the applicant had approached the Court in both his personal capacity and in the interest of the public (members of the legal profession), whose work was similarly affected by the regulations. A similar approach was taken by the South African Supreme Court of Appeal in *Democratic Alliance and Others v* *Acting National Director of Public Prosecutions & Ors*40 where the Court held that the political parties who were applicants in the matter were properly before the Court on the basis that they were acting both in public interest and in the interest of their membership who were keen to see the Constitution being upheld by the President when appointing the National Director of Public Prosecutions.

Kenya is another jurisdiction that is comparable to Zimbabwe. Article 22 of the Constitution of Kenya41 is analogous to s 85 (1) of the Constitution of Zimbabwe. The Court of Appeal in Kenya interpreted article 22 to imply that a litigant may rely on more than one ground

38 Ibid at para 33-34

39 2009 (1) SA 417 (CC); 2009 (3) BCLR 268 (CC) at para 25

40 2012 (3) SA 486 (SCA); 2012 (6) BCLR 613 (SCA) at para 44-45

41 It provides as follows: “(1) Every person has the right to institute court

proceedings claiming that a right or fundamental freedom in the Bill of Rights   
has been denied, violated or infringed, or is threatened. (2) In addition to a   
person acting in their own interest, court proceedings under clause (1) may be   
instituted by– (*a*) a person acting on behalf of another person who cannot act   
in their own name; (*b*) a person acting as a member of, or in the interest of, a   
group or class of persons; (*c*) a person acting in the public interest; or (*d*) an   
association acting in the interest of one or more of its members. (3) The Chief   
Justice shall make rules providing for the court proceedings referred to in this   
Article, which shall satisfy the criteria that– (*a*) the rights of standing provided   
for in clause (2) are fully facilitated;

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of *locus standi* in one proceeding. For instance, in *Randu Nzai Ruwa* v *The Secretary, Independent Electoral and Boundaries Commission,*42 the Court accepted to hear a case brought by litigants who were acting in their own personal interest as well as in the interests of the public. The Court of Appeal applied a similar approach in *Mumo Matemu* v *Trusted Society of Human Rights Alliance*43 by stating that:

It is our consideration that in filing the petition the 1st respondent   
[an NGO] was acting not only on behalf of its members and in   
accordance with its stated mandate, but also in the public   
interest, in view of the nature of the matter at hand. The 1st   
respondent, its members and the general public were entitled   
to participate in the proceedings relating to the decision-making   
process culminating in the impugned decision.

The reason why in these jurisdictions, the courts allow litigants to act in more than one capacity in a single application is precisely to honour the constitutional goal of affording individuals with wide and flexible locus standing, in order to allow them to seek relief that is effective for the protection of their rights and the Constitution.44

Finally, on this point, it is critical to consider the part of the preamble to the Constitution of Zimbabwe which declares that:

We the people of Zimbabwe…Reaffirming our commitment to   
upholding and defending fundamental rights and   
freedoms…Resolve by the tenets of this Constitution to commit   
ourselves to build a united, just and prosperous nation, founded   
on values of transparency, equality, freedom, fairness, honesty…

The vision and aspirations set out above can be achieved only if “the tenets of this Constitution” are interpreted and applied in a manner that advances social justice. The majority of citizens live below the poverty datum line45 and can rarely afford the costs of litigation. The propensity of the Constitutional Court (which I discuss elsewhere)46

42 Civil Appeal Number 9 of 2013 at p. 10

43 Civil Appeal Number 290 of 2012 at para 30

44 Supra note 23 Chiduza at pp.3-4

45 See United Nations Economic Commission for Africa Zimbabwe Country Profile

Report of 2018 at p. 19. Available at [https://www.uneca.org/sites/default/](https://www.uneca.org/sites/default/files/uploadeddocuments/CountryProfiles/2018/zimbabwe_cp_eng_2017.pdf)   
[files/uploadeddocuments/CountryProfiles/2018/zimbabwe\_cp\_eng\_2017.pdf](https://www.uneca.org/sites/default/files/uploadeddocuments/CountryProfiles/2018/zimbabwe_cp_eng_2017.pdf)   
[Accessed on 7 September 2018]

46 See Justice Mavedzenge ‘Punitive Costs and Deliberative Democracy’ (2018)   
accessible from <https://constitutionallythinking.wordpress.com/>

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to award punitive costs against losing litigants has a chilling effect of making citizens hesitate to petition the court. To achieve social justice in such a socio-economic context, certain economically privileged individuals who can afford to bring an application before the court must seek more than just a personal victory. In line with the aspirations expressed in the Constitution’s preamble, they must be free to seek the protection of the Constitution for their own personal benefit as well as for the benefit of those who may not have the money to file a petition in court. In that sense, the rules of *locus standi* cannot be applied restrictively. The broader aspirations of the Constitution, as captured in the preamble, require these rules to be applied in a manner that allow individuals who are committed to social justice and are financially privileged, to petition the court in their own interest but also in public interest, in order to utilize the law as a tool to achieve social change.

In this connection, the Constitutional Court’s approach of restricting litigants to choosing one ground or capacity of *locus standi* (in one application) is irrational, worrisome and problematic as it is anachronistic and *ultra vires* the spirit and object of s 85 of the Constitution. Clearly, s 85 (1) gives an applicant five grounds of *locus* *standi*. The litigant should be allowed to choose one or more grounds to stand on, as long as he or she can demonstrate that the application meets the requirements demanded by each ground of *locus standi*. Admittedly, there is need for the court to protect itself against being inundated with frivolous applications. However, that should not be done by stipulating a rule which has potential consequences that are as disastrous as undermining the ability of a litigant to claim effective relief. Such a rule is unreasonable, irrational and unconstitutional.

It is worthy to note that the Constitutional Court, in its very first case — *Jealous Mawarire v Robert Mugabe*47—underscored the proposition that s 81 (5) of the Constitution contemplates a liberal approach to determining *locus standi*. If it is accepted that these rules contemplate a liberal approach to determining *locus standi*, then it should be accepted that they also allow a litigant to act in more than one capacity in a single matter as long as there is a legitimate reason for doing so. Sister courts in comparative jurisdictions have been consistent on this subject, as I demonstrated above. It is therefore worrisome to note that on one hand, the Constitutional Court of Zimbabwe accepts

47 *Mawarire v Mugabe* [2013] ZWCC 1

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that s 85 of the Constitution is meant to provide litigants with a wide and flexible ground to stand on but, on the other hand it suggests that a litigant must be confined to choosing only one ground to stand on, and cannot invoke more than one ground of *locus standi* in a single application.

Having demonstrated that this rule is *ultra-vires* the interpretative principles enshrined in the Constitution, I now turn to showing that the rule is at variance with the conceptual foundations upon which the power of the Constitutional Court-to conduct judicial review-is founded.

*LOCUS STANDI* AND THE CONCEPTUAL FOUNDATIONS OF JUDICIAL REVIEW

Rules enacted by the court to regulate *locus standi* are in a way reflective of the court’s own attitude and perception towards its role in a constitutional democracy, particularly the power to review laws and government conduct. Where a court is ready to exercise its review powers in a robust manner, it applies the rules of *locus standi* liberally, of course subject to the Constitution and without opening floodgates for busy bodies to bring frivolous and vexatious motions or applications. As Lord Diplock rightly said in *Rex v Inland Revenue Commrs*48

This broadening of the rule of locus standi has been largely   
responsible for the development of public law, because it is   
only the availability of judicial remedy for enforcement which   
invests law with meaning and purpose or else the law would   
remain merely a paper parchment, a teasing illusion and a   
promise of unreality. It is only by liberalizing the rule of locus   
standi that it is possible to effectively police the corridors of   
powers and prevent violations of law.

Limiting *locus standi* may be one way of avoiding to hear and determine certain sensitive cases that are likely to be brought before the court by the citizens, especially in politically charged jurisdictions. Therefore, in order to do justice to a discussion of the rationality and constitutionality of the approach taken by the Constitutional Court,49 it is inevitable to pay attention to the philosophical hesitations which, potentially, the Court may have regarding the democratic legitimacy of its judicial review powers. Such an examination is necessary, especially given that Zimbabwe is a former English colony with a

48 [1981] 2 WLR 722 at p. 740.

49 In both *Mudzuru* (supra note 15) and *Samuel Sipepa Nkomo* (supra note 16).

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tradition of parliamentary sovereignty, as opposed to constitutional supremacy.

*1.1 Legitimacy of Judicial Review*

The trend in contemporary constitution making processes is to create an independent judiciary and give the courts extensive powers to review all aspects to do with the exercise of public and private power.50 Such powers are what are known as judiciary review powers and, as part of these powers the courts can review the constitutionality or legality of any legislation enacted by the legislative arms of government.51 They also have the power to review the legality of conduct by members or institutions of government.52 The essence of judicial review is that, if a law or conduct is found to be unconstitutional or unlawful by the court, then such a law or conduct should be declared to be invalid.53 This, at times, creates the perception that the judiciary wields the ultimate authority (and perhaps too much power) to pronounce on the validity of any decision made by the executive and the legislative arms of government. Consequently, a debate has been raging amongst scholars regarding the legitimacy of judicial review in a constitutional democracy such as the one envisaged under the Constitution of Zimbabwe.54 The question that has been asked in this debate is whether there is any democratically legitimate claim for judges to wield such power?

Considering that the Constitution of Zimbabwe unequivocally provides the judiciary with the power to review all laws and government

50 See for example the Constitutions of: Kenya (2010), South Africa (1996), Namibia   
and Tanzania

51 See section 167 (3) of the Constitution of Zimbabwe, 2013. The judiciary also   
has the power to review the validity of subordinate legislation such as regulations   
or statutory instruments.

52 Section 2 (1) and section 68 of the Constitution are amongst the primary sources   
of judicial review powers

53 To the extent that the law or conduct is inconsistent with the law or Constitution.   
See Ibid, section 2 (1)

54 Samuel Freeman captures this debate in his article “Constitutional Democracy   
and the Legitimacy of Judicial Review” in 1990 Vol. 9 No. 4 *Law and Philosophy*   
pp. 327-370. Also see Barry Friedman. “The Birth of an Academic Obsession:   
The History of the Counter Majoritarian Difficulty” in 2002 *Yale Law Review*   
*Journal* at p. 153. Also see Jeremy Waldron “A Right-based Critique of   
Constitutional Rights” in 1993 *Oxford Journal of Legal Studies* at pp. 18, 20-28   
and Ronald Dworkin, Taking Rights Seriously, *Harvard University Press* 1977 at   
p. 90-100 and p. 171-177.

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conduct,55 one would assume that there is no need to discuss the legitimacy of judicial review in Zimbabwe. One is tempted to assume that the judges themselves do not have doubts about the legitimacy of their review powers. I, however, argue that there still exists a need to discuss the concerns raised against the legitimacy of judicial review. My argument is based on the view that judicial review will not be conducted in an effective manner if there is no proper understanding of its legitimacy in a constitutional state. A litigant is likely to be confronted by restrictive rules on *locus standi*, if the court has hesitations about the legitimacy of its review powers.

Another reason why a discussion on the legitimacy of judicial review powers is relevant in Zimbabwe is that, as a former British colony, Zimbabwe has a long history of applying a Westminster system of government; which elevates parliamentary sovereignty and views judicial review with scepticism on grounds similar to those articulated by the ‘anti-judicial review’ scholars.56 The introduction of the Constitution of 2013 may be viewed as an attempt to completely break away from the parliamentary sovereignty tradition.57 This however, cannot succeed if there is no corresponding shift of judicial culture and philosophy, to view judicial review powers differently. Such a shift will not happen if the traditional and philosophical concerns regarding the legitimacy of judicial review are not addressed. Rather, what one is likely to see is the emergence of restrictive rules of procedure including those governing *locus standi*, which effectively shield the court from exercising its review powers.

Two main arguments have been advanced against the legitimacy of judicial review in a constitutional democracy. There is what I call the “democratic mandate argument”. This argument can be summed up as follows: Democracy is based on the fundamental principle that every person has the right to equal participation in decision making processes.58 In a representative democracy, citizens do not participate directly in decision making but, they delegate to their representatives (Legislature and Executive) the authority to make decisions on their

55 Supra note 52 and 53

56 For a discussion of the views expressed by these scholars, see Samuel Freeman

supra note 54. Also see Michael Walzer’s objections to judicial review in   
“Philosophy and Democracy” in 1981 Vol 9 *Political Theory* p. 379

57 Although it must be acknowledged that the former constitution attempted to   
do this albeit in a restrictive manner.

58 See Jeremy Waldron supra note 54 at p. 36

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behalf.59 Therefore, decisions should be made through the equal participation of the elected representatives. On the other hand, judges are few and unelected.60 By giving judges the power to review and invalidate decisions made by those who are elected to act as the people’s representatives, the concept of judicial review negates the fundamental principle of democracy because, the authority to make decisions is taken away from the elected representatives and is given to a few, unelected judges.61 For that reason, Thomas Jefferson forcefully criticised the concept of judicial review and characterised it as “*a very dangerous doctrine indeed, and one which would place* *us under the despotism of an oligarchy*.”62 According to Jefferson, *“The people themselves are the only safe depositories of government* [and this principle requires] *absolute acquiescence in the decisions* *of the majority — the vital principle of republics, from which there* *is no appeal but force.”*63 Thus, judicial review is perceived as an attempt to reverse the democratic principle that it is the people (through their elected representatives) who should make decisions.

The second argument is what I call the “democratic accountability argument” which can be summed up as follows: As the people’s representatives, the members of the Legislature and the Executive arms of government are accountable to the citizens who elected them and on whose behalf they make decisions.64 Therefore, the Executive and the Legislature must be allowed to make whatever decisions they want for it is them and not the judges who will account to the people for those decisions.65

59 For a detailed discussion on this, see Glen E. Thurow “Representative   
Democracy” in 1983 Vol 14 *St. Mary’s Law Journal* pp. 937-956

60 In Zimbabwe they are appointed by the President upon being recommended by   
the Judicial Services Commission. See section 180 of the Constitution of   
Zimbabwe, 2013

61 See Kirsty Mclean Constitutional Deference, Courts and Socio-Economic Rights   
in South Africa, *Pretoria University Law Press* 2009 at p. 65*.* Also see Ran   
Hirschl “Looking Sideways, Looking Backwards: Judicial Review vs Democracy   
in Comparative Perspective” in 2000 *University of Richmond Law Review* at p.   
415-421. Also see Jeremy Waldron, supra note 54 at p. 36

62 See Letter to William Jarvis in P. L. Ford (ed), The Writings of Thomas Jefferson*,*   
Vol. 10, pp. 160-61.

63 See Adrienne Koch and William Peden (eds), The Life and Selected Writings of   
Thomas Jefferson *New York: Random House* 1944 at p. 324.

64 See the discussion by Kirsty Mclean, supra note 61.   
65 Ibid

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The democratic mandate argument against the legitimacy of judiciary review has been addressed comprehensively by Samuel Freeman66 and I align myself with his views for the reasons that I will explain. Freeman67 argues that the legitimacy of judicial review hinges on what ought to be considered as the most appropriate conception of a constitutional democracy. Those who are opposed to the legitimacy of judicial review perceive constitutional democracy as rule by the majority.68 This is sometimes referred to as the procedural conception of democracy.69 However, I argue that constitutional democracy must be viewed as an extension of the theory of social contract. Put differently, I argue that the social contract theory rather than the procedural democracy theory is the most appropriate conceptual framework through which the democratic legitimacy of judicial review must be evaluated. In order to justify this claim, I must consider the work done by Thomas Hobbes, John Locke, Jean-Jacques Rousseau and John Rawls on the theory of the social contract. Although these four scholars had some differences70regarding their philosophical views on the idea of the social contract, they all reject the concept of “the divine right of kings”71 and, they suggest that the only justified authority is the authority that is generated out of agreements or covenants between people. On that basis, they suggest the theory of the social contract, as the idea that; in order to establish a civil society (meaning a peaceful and prosperous society), human beings must agree to live together under common laws encapsulated in a social contract.

66 Supra note 54

67 Supra note 54 at p. 331

68 See Samuel Freeman’s discussion, supra note 54

69 See Samuel Freeman, supra note 54 at p.332-336

70 For example, Thomas Hobbes advocated for the monarchy as the administrator

of the social contract, John Locke believed in the right of the people to revolt   
against the monarch if it fails to adhere to the terms of the social contract. On   
the other hand, Jean-Jacques Rousseau argued that the social contract in Locke’s   
conception sought to protect private property and therefore subordinated the   
poor to the authority of the property owners. He argued that the terms of the   
social contract must be changed so that the contract is based on the values of   
human equality and freedom. For a detailed discussion See David Gauthier   
“Hobbes’s Social Contract.”Xin 1988 *No\_s*XVol. 22 at p 71-82. Also see David   
Gauthier, “Why Contractarianism?” in 1991 *Vallentyne* p. 13-30 and Jean   
Hampton, XHobbes and the Social Contract Tradition, *Cambridge University*   
*Press* 1986

71 The idea of rule by man. See Ibid, David Gauthier, “Why Contractarianism?” in   
1991 *Vallentyne* p. 13-30

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According to Rousseau and Rawls, the social contract must be negotiated and entered into by free and equal persons and, it must set out certain basic values and principles which are necessary for purposes of guaranteeing human equality and freedom.72 Thus, the social contract theory is not only a rejection of the concept of the divine rule of kings. It is also a realisation of the inherent inadequacy of procedural democracy particularly that, it is possible that the majority can make decisions that undermine democratic values such as individual liberty and equality. For instance, the majority can decide to deprive the minority of their right to equal political participation. In order to address this concern, the theory of the social contract (at least as conceived by John Rawls) suggests that the people must negotiate and agree to a social contract which guarantees every individual with minimum rights and liberties, which cannot be undermined through laws and decisions made by the majority.

I argue, as Samuel Freeman does73, that a national constitution is a modern representation of the social contract. Freeman describes a national constitution as something that is established as:

[a] result of an agreement, whose purpose is to define and   
set up political institutions to determine laws and   
institutions that are necessary for the effective exercise   
of the equal basic rights that secure persons in the free   
pursuit of their good. The procedures best designed to   
realize this end meet the democratic requirements of   
justice.74

The people of Zimbabwe negotiated and through a referendum, agreed to establish a constitutional rule book which guarantees certain rights75, bestows obligations and entrenches certain values76 which are to be treated as the foundation of their society. One of these values is that Zimbabwe must be governed democratically and in accordance with established human rights norms and principles.77 Thus, the Constitution of Zimbabwe is a form of a social contract through which the people have agreed to be governed according to certain democratic values, principles and procedures. In this context,

72 Jean-Jacques Rousseau. *The Social Contract*X(1762) at p. 59 73 Supra note 54

74 Supra note 54 at p. 350

75 See Chapter Four of the Constitution of Zimbabwe, 2013   
76 See section 3 of the Constitution of Zimbabwe, 2013   
77 Ibid, subsection (1) (c)

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democracy cannot be viewed as limited to rule by the majority. It is not the right of the majority to do whatever they want. Rather it is the rule by the majority in accordance with certain procedures and substantive values that are articulated in the political constitution, which is the equivalent of a social contract. In that sense, the social contract theory can help us to evaluate and explain the legitimacy of judicial review in a constitutional democracy such as that envisaged under the Constitution of Zimbabwe.

As explained earlier, the social contract is underpinned by certain democratic values and principles which are meant to protect human freedom and equality. There must be a mechanism or institutions in place to interpret, protect and at times enforce these values and principles.78 As part of the social contract, the people establish institutions unto which they freely delegate the authority to perform this role. In the Constitution of Zimbabwe, the people have given the judiciary, the power to interpret, protect and enforce the terms of their social contract which is the rights, values, procedures and principles set out in the Constitution.79 Section 162 of the Constitution makes this point explicit where it declares that “*judicial authority* *derives from the people of Zimbabwe and is vested in the courts*”. As part of this judicial authority, the courts have the power to review and invalidate laws and conduct that is inconsistent with the terms of the social contract-the Constitution. The Constitutional Court of Zimbabwe in *re Prosecutor General of Zimbabwe on his Constitutional* *Independence and Protection from Direction and Control,*80 affirmed this position when Patel J held that the role of the court is to interpret the law and, when it does so, “*it fulfils its role under the separation* *of powers framework. When it [the court] interprets a certain law to* *compel someone to do something, it is not the court but the law that* *compels that person to do so*.”81 The legitimacy of judicial review therefore resides in the fundamental belief under the social contract theory that, there is need to establish an independent institution which will protect the values and principles of the social contract in between the periodic elections.

78 Samuel Freeman, supra note 54 at p. 357

79 This principle was also affirmed in *re Prosecutor General of Zimbabwe on his*

*Constitutional Independence and Protection from Direction and Control* [2017]   
ZWCC 13 2015at p. 9

80 Ibid, at p.10   
81 Ibid

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It could be counter-argued that the power to interpret and protect the values of the social contract should be exercised by the elected representatives of the people (the legislature and the executive) and not by the unelected judges.82 The response to that argument lies in the philosophical background of the doctrine of separation of powers which is the idea that: in order to protect the values underpinning the social contract (namely equality and individual freedom) the people through the social contract, must avoid delegating power to a single person or body.83 Rather, different functions and powers must be delegated to different branches of the government and there must be checks and balances to protect the people from possible abuse of the delegated power.84 For that reason, the modern social contract (the Constitution) delegates the power to make laws to the legislature, and the executive is delegated with the power to make and execute policies, while the judiciary is there to interpret the laws articulated in the social contract.85 In that sense, the people could not delegate to the legislature the power to interpret the very same laws that it makes.86 Such power is given to the judiciary as an effective mechanism of protecting the values of the social contract and, there lies the democratic legitimacy of judicial review in a constitutional democracy.

Judicial review is therefore democratically legitimate because such powers are given to the judiciary by the people through the Constitution, in order to protect the values and principles underlying democratic governance in a constitutional state.87 It is a form of insurance against majority decisions (and sometimes decisions made by powerful minorities) which undermine the very basis of democracy. This is the reason why, in the Zimbabwean context, the Constitution requires Courts to ensure that their rules of procedure adequately facilitate the right of individuals to approach the Court and access effective remedies against such decisions. It is against this background that we should examine if (at a conceptual level) the rule established by the Constitutional Court to restrict litigants to acting in once capacity in each matter makes any rational sense. It does not because,

82 See Michael Walzer’s objections to judicial review in “Philosophy and   
Democracy” in 1981 Vol 9 *Political Theory* p. 379

83 Supra note 62

84 See Samuel Freeman, supra note 54 at p. 353

85 Malherbe Rautenbach, Constitutional Law 4th edition, *Lexis Nexis* 2003 at p.

78

86 Samuel Freeman, supra note 54 at p. 336

87 Samuel Freeman makes a similar argument at p. 328, supra note 54

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the effect of such a rule (as I demonstrated above) is to prevent the citizens from accessing remedies which effectively protect and enforces the terms of their social contract.

2. CONCLUSION

The Constitutional Court’s rule which prohibits litigants from acting in more than one capacity in a single matter has a disproportionate effect of undermining a litigant’s access to effective remedies. The rule is inconsistent with the liberal approach to determining *locus* *standi* and is therefore *ultra vires* section 85 of the Constitution. At a conceptually level, this rule is untenable as it is contradictory to the theoretical foundations upon which the idea of judicial review is founded.

The emphatic views expressed by Chidyausiku CJ, Malaba DCJ in *Jealous Mawarire* v *Robert Mugabe* and by Patel JCC in *re Prosecutor* *General of Zimbabwe on his Constitutional Independence and* *Protection from Direction and Control*88 create the impression that the Constitutional Court appreciates its role as a vibrant interpreter and enforcer of the social contract-the Constitution. However, when the Court establishes unreasonably restrictive rules of *locus standi,* it brings to the fore the question whether that Court genuinely believes it has a legitimate mandate, derived from the people, to review (without fear or favour) the exercise of public power? This is a question which must be engaged with critically and on a continuous basis.

88 Supra note 80 at page 10 of his judgment where he emphatically declares that:   
*“Where a court interprets a law, it fulfils its role under the separation of*   
*powers framework. When it interprets a certain law to compel someone to do*   
*something, it is not the court but the law that compels that person to do so.*   
*This application is founded on the wrong premise that the applicant must not*   
*be compelled to abide by the law, whether by an order of mandamus or*   
*otherwise. That premise is fundamentally flawed and patently untenable .. .”*

PROTECTION FROM UNFAIR DISMISSAL AND THE REMEDY OF   
REINSTATEMENT UNDER ZIMBABWEAN LAW

MUNYARADZI GWISAI1

ABSTRACT

*This article looks at the remedy of reinstatement for unfair and* *unlawful dismissal and its central significance in the realisation of* *employees’ right to protection from unfair dismissal. The paper argues* *that the right to protection from unfair dismissal lies at the* *cornerstone of modern Zimbabwean labour law as was shown by the* *massive public outcry in the wake of the Supreme Court decision of* Nyamande and Anor v Zuva Petroleum (Pvt) Ltd SC 43-15*, which* *upheld the continued application of the common law “Notice Rule”* *of termination on notice by the employer. The paper argues that* *without an effective remedy to unfair dismissal, in the form of* *reinstatement, the right to protection from unfair dismissal will* *remain a mirage. The paper makes a survey of the history of* *reinstatement law starting with the traditional common law position* *which rejected the remedy outright and the modern common law* *one wherein the remedy has been recognised as a competent remedy.* *The paper then discusses the history of the remedy in statutes* *including the implications on the remedy of the new rights to* *protection from unfair dismissal and to fair labour standards under* *the Labour Act (No. 17 of 2002) and Constitution of Zimbabwe* *Amendment (No. 20) Act, 2013. It discusses the different approaches* *taken by courts and asserts that only the broad approach is consistent* *with the underlying principle of right to employment security* *recognised under the Labour Act and Constitution.*

INTRODUCTION

The right of employees to protection from unfair dismissal is a cornerstone of the labour law regime that underlies the Labour Amendment Act (No. 17 of 2002), which probably represents the most advanced labour legislative reform in the history of labour relations in Zimbabwe.

1 Munyaradzi Gwisai is a registered legal practitioner and lectures in Labour   
Law and Labour Relations, Faculty of Law, University of Zimbabwe, and Briggs   
Zano Working Peoples College.

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There are powerful constitutional and legislative basis for the right. Constitutionally the right is implicit in section 65 (1) of the Constitution which provides that every “*person has the right to fair and safe labour* *practices and standards...”* Expressly the right provided for in section 12B (1) of the Labour Act [*Chapter 28:01*]. This provides that *‘Every* *employee shall have the right not to be unfairly dismissed.’*

Subversion of theemployees’ right to protection from unfair dismissal and employment security has been a key feature of the current Zimbabwean labour relations system which is dominated by unitarist and neoliberal norms. This was amply demonstrated in the now notorious Supreme Court decision of *Nyamande and Anor v Zuva* *Petroleum (Pvt) Ltd*,2 which led to unprecedented job massacres and forced the State to legislatively reverse the effects of the decision by enactment of the Labour Amendment Act (No. 5 of 2015.) But as the *Zuva* decision showed, this has led to major controversies and serious legitimacy questions not only relating to labour law but the entire legal system. Commenting on this matter, MALABA CJ aptly observed:

The reaction to the Zuva judgment was a rush by employers...   
to terminate employment relationships on notice.... As large   
numbers of employees were left jobless and uncompensated   
for the years they had worked for their respective employers   
save for their salaries paid in lieu of notice, there was widespread   
public outcry... The actions of employers revealed a national   
crisis characterised by lack of protection for the employees who   
lost employment... Termination of sources of livelihood wrought   
severe financial hardships to households. That gave the   
Legislature the rational basis for the enactment of the legislation   
and for giving it retrospective effect.3

Thus the issue of employment security has become of profound importance on the Zimbabwe labour law landscape. Besides the area of the “notice rule” that was dealt with in the *Zuva* decision, another critical area of the law of fair dismissal is that pertaining to the remedies available for unfair dismissal. In particular the extent to which the law recognises the remedy of reinstatement for both wrongful and unfair dismissal. As with termination of the employment relationship on notice, this area has also been characterised by judicial conservatism and resistance to the clear direction of reform underlying

2 SC 43 – 15.

3 *Greatermans Stores (1979) (Pvt) Ltd t/a Thomas Meikles Stores and Anor vs*

*The Minister of Public Service, Labour and Social Welfare and Anor* CCZ 2 – 18.

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the Labour Act and the Constitution. For this reason it is an area that deserves a closer look to avoid future judicial tragedies as happened with the *Zuva* judgment.

In this article I trace the history of the remedy of reinstatement from a common law and legislative perspective and how the courts have treated the same as well as the implications of the right to protection from unfair dismissal by reference to the Labour Act and Constitution of Zimbabwe Amendment Act No. 20 of 2013 and applicable international law instruments. I argue that the import of the above raises radical implication on the remedy of reinstatement which the courts must now recognise.

REINSTATEMENT: UNDERSTANDING THE TERM

Generally the most effective remedy for wrongful dismissal or unfair dismissal is that of reinstatement. Yet traditionally this remedy has been unavailable under common law.

Reinstatement means “that the employee be replaced in her (his) post and remunerated.”4 The employee is restored in their old job so that she or he “can perform the work attaching to that post.”5 An order for reinstatement requires the employer to treat the employee in all respects as if she or he had not been dismissed. The employee is “put back into the job which he or she occupied, restored to the benefits they enjoyed and compensated for those lost in the interim.”6

It has been held that the term “reinstatement” simply means restoring the employee on the payroll.7 It does not mean giving the employee actual work to do, unless special circumstances exist such as where the employee’s remuneration depends on actual work being given or the advancement of their professional or artistic development.8

4 *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344 (S).   
5 *Bramdaw v Union Government* 1931 NPD 57 at 78; *Zvoma v Amalgamated*

*Motor Corporation (Pvt) Ltd* 1988 (1) ZLR 60 (H) at 74. In *Chegutu Municipality*   
*v Manyora* 1996 (1) ZLR 262 (S) at 265B it was held that, Òto reinstate a person   
means in effect to put a person again into his or her former job.Ó

6 S Deakin & G Morris, *Labour Law*, 4th ed (Hart Publishing, 2005) 518. In *Chiriseri*   
*& Anor v Plan International* S-56-02, *SANDURA JA*, held, Òwhere an order of   
reinstatement is retrospective in effect, the damages to be paid in lieu of   
reinstatement must include back pay and benefits.Ó

7 *Munhumutema v Tapambwa & Ors* 2010 (1) ZLR 509 (H) at 513E-G, per *MUTEMA*   
J; *Standard Chartered Bank Zimbabwe Ltd v Matsika* 1997 (2) ZLR 389 (S).

8 *Standard Chartered Bank Zimbabwe Ltd v Matsika* 1997 (2) ZLR 389 (S).

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To that extent reinstatement is equivalent to the remedy of specific performance under contract law. Specific performance is a well- established remedy for breach of contract, available at the preference of the innocent party, but subject to the discretion of the court. This was well put in *Farmers Co-operatives Society v Berry*:9

Prima facie every party to a binding agreement who is ready to   
carry out his own obligation under it has a right to demand from   
the other party, as far as is possible, a performance of his   
undertaking in terms of the contract.

Wrongful dismissal is when the employee is dismissed without notice or the employer is unable to substantiate the alleged misconduct leading to the dismissal.10

Unlawful dismissal is similar and applies when the worker is dismissed without due notice or the employer fails to show lawful cause for dispensing with the notice,11 such as when the employer is unable to substantiate the alleged misconduct. It may also be dismissal in contravention of statutory provisions.

Unfair dismissal relates to a mode of dismissal derived from statutes whereby dismissal may be unfair because there is no fair or valid reason for the dismissal, (substantive fairness).12 Dismissal may be unfair because the method used to effect the dismissal is not fair, (procedural fairness). The concept of fair dismissal is ultimately derived from international labour law norms.13 It is unknown to common law.14

Reinstatement is available under both common law and statute law. Statutes have adapted but also substantially modified the common law.

9 91912 AD 343. See also, *National Union of Textile Workers and Ors v Stag*   
*Packings (Pty) Ltd & Ors* 1982 (4) SA 151 (T); *Commercial Careers College*   
*(1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344; and *Mudukuti v FCM Motors (Pvt)*   
*Ltd* 2007 (1) ZLR 183 (H) at 194B-C.

10 S Deakin & G Morris, (2005) at 403.

11 J Grogan, *Workplace Law*, 10th ed, (Juta, 2009) 164.

12 *Chamwaita v Charhons (Pvt) Ltd* LC/H/215/2009 at p 6.

13 Initially under the Termination of Employment Recommendation, 1963 (R 119)

and subsequently the Termination of Employment at the Initiative of the   
Employer Convention, 1982 (C 158).

14 J Grogan (2009) citing *Fedlife Assurance Ltd v Wolfaardt* (2001) 22 ILJ 2407   
(SCA).

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REINSTATEMENT UNDER COMMON LAW

Two approaches to the issue of reinstatement are evident under the common law regime, the traditional and the modern position.

The traditional or classical position held that reinstatement was not available as a remedy for a wrongfully dismissed employee. The employee was restricted to damages.15 The only exception being for civil servants. The *locus classicus* for this position was the case of *Schierhout v Minister of Justice.*16 In *Commercial Careers College* *(Pvt) Ltd v Jarvis* 1989 (1) ZLR 304 (S) at 348 *GUBBAY* JA (as he then was) summarised the position thus:

Prior to the advent of the decision ... in National Union of Textile   
Workers & Ors v Stag Packings (Pty) Ltd & Ors 1982 (4) SA 151   
(T) it had become commonplace to assert that in the case of a   
common law employee who had been wrongfully dismissed no   
court of law could compel the employee to allow him to perform   
his duties; for to do so would amount to an order for specific   
performance of a contract for personal services of a continuing   
nature, a remedy not available to the employee, who was   
therefore restricted to a claim in damages.17

Under the classical position, reinstatement was not available, as a rule of law or legal principle. This was unlike in other contracts were the court “will as far as possible give effect to a plaintiff’s choice to claim specific performance,” subject to the discretion of the court.18

Several reasons were advanced for denying the remedy. Firstly that “such a contract is for personal services of a continuing nature and because of the close personal relationship between persons who have lost trust in each other, which makes it difficult for the court to provide constant supervision for the enforcement of its order”.19 Denial was

15 *National Union of Textile Workers & Ors v Stag Packings (Pty) Ltd & Ors* 1982   
(4) SA 151 (T)at 158H; *Myers v Abrahamson* 1952 (3) SA 121 at 123 – 125; See   
generally - A Rycroft and B Jordaan, *A Guide to South African Labour Law* 2nd   
ed, (Juta, 1992) 101 – 103; and R Christie (2006) 528.

16 1926 AD 99 at 107 (*INNES* CJ).

17 *ADAM* J had earlier on dealt comprehensively with the applicable case law in

*Zvoma v Amalgamated Motor Corporation (Pvt) Ltd* 1988 (1) ZLR 60 (H).   
18 *Haynes v Kings Williamstown Municipality*1951 (2) SA 371 (A) at 378 – 380,

cited in the *Zvoma* case at 72. Also *Farmers Co – operatives Society v Berry*   
1912 AD 343 at 350.

19 *Zvoma v Amalgamated Motor Corporation (Pvt) Ltd* *supra* at 69, citing *National*   
*Union of Textile Workers & Ors v Stag Packings (Pty) Ltd & Ors,*at 154; and   
*Schierhout v Minister of Justice* at 107 – 109.

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thus based on the “inadmissibility of compelling the employer to employ another whom it does not trust in a position which imports a close relationship”.

Secondly was the reason of absence of mutuality of remedies. No court could force an employee to work faithfully and diligently. Further it was unjust to compel the employer to reinstate an employee it no longer wanted, when the same remedy could not be effected against an employee who was in breach of her or his contract. The later would amount to forced labour or slavery which is prohibited under statutes and public policy considerations.

Finally was the argument that damages provided an adequate substitute for specific performance. After all the employee did not have a guarantee of employment for life for the contract could be terminated without any reason on tender of the due notice, the notice rule.20

The reason for the exception for civil servants was elaborated in *Schierhout v Minister of Justice* at 107. It is premised on the fact that the civil servant “contracts at his appointment that he will serve the State in accordance with statutes (and)... retains his position until duly removed or superannuated.” The civil servants’ employment tenure is protected by statutes and regulations which contain elaborate and entrenched provisions against arbitrary dismissal, which is what “differentiates the position of a civil servant from that of an ordinary employee.” The effect being that any dismissal not in compliance with statutes is a nullity. “So that what is done contrary to that prohibition of the law is not only of no effect, but must be regarded as never having been done.”

The above conclusion is further supported by the special nature of the relationship of civil servants and the State. It is not a relationship of a personal nature or a close personal relationship as of the ordinary employee.

The net effect is that under common law reinstatement is the automatic remedy for a wrongfully or unlawfully dismissed civil servant - *Chairman of the PSC v Marumahoko, PSC & Anor.*21

20 A Rycroft and B Jordaan, (1992) 101; S Deakin & G Morris, (2005) at 400, citing   
*Reda v Flag Ltd* [2002] ITLR 747 [Privy Council].

21 1991 (1) ZLR 27 (H).

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*Modern Common Law Position*

The classical position was subsequently rejected, hesitantly initially,22 but definitively in the decision of the full Transvaal bench in *National* *Union of Textile Workers and Ors v Stag Packings (Pty) Ltd & Ors.*23

The court described the position in *Schierhout v Minister of Justice* of denying reinstatement to the ordinary employee as “erroneous” with *DIJKHORST* J holding at 158H:

In my view the approach to the application of the discretion in   
respect of specific performance laid down in Haynes case is   
equally applicable to the case of the wrongful dismissal of an   
ordinary servant. This does not mean that the factors in   
Schierhout’s case, why in such a case an order for specific   
performance should generally speaking not be granted, should   
be disregarded. They are weighty indeed and in the normal case   
they might well be conclusive. But that is a far cry from saying   
that the court should therefore close its eyes to other material   
factors and refuse to evaluate them.

The above sentiments were endorsed by Zimbabwean courts, starting with *Zvoma v Amalgamated Motor Corporation (Pvt) Ltd,*24 but fully in *Commercial Careers College (Pvt) Ltd v Jarvis.*25 In the latter case the court endorsed the conclusion in *National Union of Textile Workers* affirming that there is “no legal principle for not ordering specific performance of an employment relationship”. The court stated that - “This bold decision has much to commend it and is to be welcomed.”

22 One of the first cases to cast doubt on the classical position was in *Myers v*   
*Abrahamson* 1952 (3) SA 121 at 123 – 125 where the court stated, Òl doubt   
whether the practice of the Court in allowing only the particular remedy of   
damages to the wrongfully dismissed employee can rightly be elevated to a   
rule of lawÉÓ *Stewart Writson (Pty) Ltd v Thorpe* 1977 (2) SA 943 (A) was more   
decisive and followed in subsequent decisions. See - *SACCAWU & Ors v Steers*   
*Fast Food* (1993) 2 LCD 125 (LAC); *Grinaker Electronic Holdings (Pty) Ltd t/a*   
*Grinel v EAWTUSA* (1991) 12 ILJ 1284 (LAC) and *Haworth & Associates CC v*   
*Mpanya & Ors* (1992) 13 ILJ 604 (LAC). This position subsequently received   
legislative endorsement under s 193(2) of the RA, 1995, which made it explicit   
that the reinstatement or re-employment is the primary remedy for unfair   
dismissal subject to some very narrowly tailored excerptions. See also Basson   
et. all (2002) 372.

23 1982 (4) SA 151 (T).

24 At 73-74. Also, *Art Corporation Ltd v Moyana* 1989 (1) ZLR 304 (S) at 313.   
25 1989 (1) ZLR 304 (S) at 314.

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*Restrictive Approach*

Although the courts changed their position of rejecting reinstatement as a principle, the hostility to the remedy continued. This was reflected in a line of cases that followed a restrictive approach in applying the remedy, and a broad one that applied it broadly as the primary remedy for wrongful dismissal.

The restrictive approach applies the remedy of reinstatement but limiting it to exceptional circumstances. For instance in the *Zvoma* case at 75 it was held that “...unless there is a clear and express statutory right of reinstatement, generally the considerations outlined in *Schierhout’s* case by INNES CJ would normally weigh heavily against the grant of specific performance.” In *Hama v NRZ* , the court held

Although reinstatement is clearly the primary remedy for unfair   
dismissal provided by law, very few successful applicants are   
awarded it. The usual remedy for successful applicants is   
compensation. Reinstatement is not the only or inevitable   
remedy for wrongful dismissal. It is a remedy.26

Similar positions are evident in other jurisdictions.27

*Broad Approach — Reinstatement as Principal Remedy*

Other courts have pursued a broad approach, which takes reinstatement as the primary remedy for wrongful dismissal and unfair dismissal. This is especially for “statutory” employees whose conditions of employment are protected by labour legislation including protection from unfair dismissal. The position of such employees can hardly be distinguished from that of civil servants given their level of protection from arbitrary dismissal. In cases of unfair dismissal reinstatement must be the primary remedy. The reasons for this were aptly captured by GUBBAY CJ in *Commercial Careers College (Pvt) Ltd v Jarvis*, *supra*:

Even if one were to favour the restrictive approach, which l do   
not, it is important to appreciate that in casu, the position of   
the employee is somewhat different from the ordinary employee,   
for the tenure of her employment is protected by legislature…   
Consequently it may be argued with some force that the   
employee falls into the same category as that of a public servant,   
making the principle discussed by INNES CJ … applicable.

26 1996 (1) ZLR 664 (S). See also,*United Bottlers v Kaduya* 2006 (2) ZLR 150 (S)   
*CHIDYAUSIKU* CJ.

27 *O’Laoire v Jackel International Ltd* [1990] ICR 197, 201, cited in Deakin &   
Morris (2005) 519.

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In the above matter the court decided to leave the question open, and holding that there were sufficient factors that indicated granting reinstatement at the discretion of the court, and in that case proceeded to order reinstatement.

The modern common law position has been affirmed in various decisions of the Zimbabwean courts. In *Art Corporation v Moyana*,28 the court held that, “the obvious remedy for unjustified (unfair) involuntary termination is re-employment, if the employee so wishes, otherwise compensation… reinstatement is clearly the primary remedy for unfair dismissal.”29 In *Olivine Industries (Pvt) Ltd v Nharara*30 it was held that where “an employee is found to have been wrongfully dismissed, reinstatement is normally ordered.”

The broad approach articulated by *GUBBAY* CJ in fact received legislative endorsement under s 29 of the Labour Amendment Act (No.7 of 2005) which placed the onus to prove that the employment relationship is no longer tenable, on the employer, including the possible imposition of punitive damages where reinstatement is not ordered. As argued below, the substituted s 89 (2) (c) (iii) LA makes reinstatement the first and primary remedy for unfair dismissal. This position is also affirmed in other jurisdictions which provide for fair dismissal legislation, notably South Africa and the United Kingdom.31

Reinstatement is therefore the first and primary remedy for wrongful or unlawful dismissal, unless the employee does not desire such remedy and subject to the court’s discretion. In appropriate circumstances the court or a determining authority may thus issue a straight order of reinstatement, as was done in *Commercial Careers College (Pvt)* *Ltd v Jarvis, supra.* In *Blanket Mine (Pvt) Ltd v Tlou* it was held:32

28 1989 (1) ZR 304 (S).

29 *Art Corporation v Moyana*, 1989 (1) ZR 304 (S); *Ruturi v Heritage Clothing*

*(Pvt) Ltd* 1994 (2) ZLR 374 (S).

30 2006 (1) ZLR 203(S) at 205G.

31 See J Grogan (2009) at 174 stating, ÒSection 193 (2) makes it clear that

reinstatement is the preferred remedy for unfairly dismissed employees, and   
that compensation should only be granted instead only when one or more of   
the exceptions mentioned in paragraphs (a) to (d).Ó S Deakin & G Morris (2005)   
518 equally state that under s 118 of ERA 1996, Òthe preferred remedies for   
unfair dismissal are reinstatement, re-engagement and monetary compensation,   
in that orderÓ citing *O’Laoire v Jackel International Ltd* [1990] ICR 197, 200.

32 LC/MT/22/2005 [*MATSHANGA* P].

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I find that it is equitable, reasonable and just that when an   
employee loses his job in circumstances as the one that happened   
in casu, then a straight order of reinstatement is perfectly in   
order.

The fact that reinstatement has in the past been rarely granted reflects judicial attitudes and those of employees in particular circumstances. Many employees may not claim it, simply because it has not been easily granted in the past, thus becoming a self-fulfilling prophesy. Also unlikely to claim are employees of small employers who do not have the benefit of protection from a trade union-protected environment and may fear renewed contact with the manager or owner who dismissed them.

A further reason is the attitude of the courts, which tend to accept without much question employer’s reluctance to reinstate and a belief that an imposed reinstatement will not work. However, as Deakin & Morris point out, this perception may not be justified, and in fact “there is evidence that re-employment rarely produces disruption to relations within the undertaking concerned and that most reinstated or re-engaged employees stay with the employer for a reasonable length of time after the order is made.”33

*Onus and Factors to Consider in the Exercise of Discretion*   
Consistent with general common law principles, the onus is on the employer, as the party seeking to avoid specific performance, to establish the facts and circumstances, which the court should consider in the exercise of its discretion. 34 A bald statement that the employment relationship is no longer tenable will not do, and was correctly rejected in *Dairibord Zimbabwe Ltd v Muyambi*.35

The court then exercises its discretion on whether or not to grant reinstatement.

33 S Deakin & G Morris (2005) 52.

34 *Farmers’ Co-op Society (Reg) v Berry* 1912 AD 343, held at 350, Ò ‘it is against

conscience that a party should have a right of election whether he would perform   
his contract or only pay damages for the breach of it.’ The election is rather   
with the injured party, subject to the discretion of the Court.Ó

35 S-22-02 at pg 7. Also, *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398   
(A) at 442E-443H, cited in *Intercontinental Trading (Pvt) Ltd v Nestle Zimbabwe*   
*(Pvt) Ltd* 1993 (1) ZLR 21 (H) at 30.

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The discretion is “not completely unfettered” but has to be exercised judicially and not capriciously or on wrong principles of law in order to ensure that justice is done.36

Courts have looked at various factors in the exercise of the discretion. The main issue is whether sufficient evidence has been established to show that the employment relationship “has soured beyond reconciliation”,37 or “is no longer tenable”38 or that reinstatement would result “in the continuation of an intolerable personal relationship”.39

The above is an objective assessment and may arise even in a situation where “no blame whatsoever attaches to the employee.”40

In the aforementioned assessment, the factors cited in the *Schierhout* case are weighty but not exhaustive. Other relevant factors may be considered, such as those mentioned in *Haynes v Kingswilliamstown* *Municipality*.41 These include, impossibility of performance; that reinstatement would be unduly and unreasonably harsh on the defendant, or would produce injustice or would be inequitable under all the circumstances.

The Labour Act provides further statutory examples under s 89 (2) (c) (iii), proviso (ii). These are “size of the employer, the preferences of the employee, the situation in the labour market.” The list is not exhaustive as the section also refers to “any other relevant factors.” Under this rubric can be included factors like level of skills, qualifications, age and levels of unemployment in the particular industry. Examples of factors that have been considered by the courts are numerous, including:

36 *Zimbabwe Express Services (Pvt) Ltd v Nuanetsi Ranch (Pvt) Ltd* 2009 (1) ZLR   
326 (S) at 332 – 333; *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989   
(1) ZLR 344.

37 *Hama v NRZ* 1996 (1) ZLR 664 (S). Also - *Olivine Industries (Pvt) Ltd v Gwekwerere*   
*& Ors* 2005 (2) ZLR 421 (S) at 428F; *Chitambo v ZESA Holdings (Pvt) Ltd & Anor*   
LC/H/331/2013.

38 The phrase used in s 89 (2) (c ) (iii) Proviso (ii) LA 2002.

39 *Commercial Careers College (1980) (Pvt) Ltd v Jarvis*, *supra* at 349F, where

*GUBBAY* CJ commented, Òone which would make it impossible for the employee   
to perform his duties either to his own satisfaction or that of the employer.Ó

40 *Commercial Careers College (Pvt) Ltd v Jarvis*, *supra*, at 349F.   
41 1951 (2) AD 371 (A) at 378H-9A.

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• In circumstances of loss of confidence by the employer with a   
senior employee, denial of reinstatement was held justified.42   
Where there was a “breakdown in the relationship between the   
appellant and the respondent, with no degree of trust or respect   
remaining on either side,” as in *Winterton, Holmes and Hill v*   
*Paterson.*43 In this case a professional assistant, engaged in a   
dispute with the employer, traded insults with senior partners of   
the firm and tried to get an order for civil imprisonment against   
them for contempt of court.

• The moral blameworthiness of the parties. Reinstatement was held   
appropriate because the employer had “dirty hands”, as when   
the employer acted in flagrant bad faith,44 or in breach of   
fundamental rights of employees,45 or because the moral   
blameworthiness of the employee was beyond reproach.46 However   
reinstatement was held inappropriate where the employee took   
alternative employment during suspension.47

• The nature of the breach or unfair labour practice. Where it   
involved breach of a fundamental right of the worker, such as to   
membership of a trade union or to protection from unfair dismissal,   
then reinstatement was held the most appropriate remedy.48

• The size and nature of the employer. The bigger the employer the   
less likely that it will be held that the relationship is no longer   
tenable, since personal contact is minimum.49 The same was held

42 *Muringi v Air Zimbabwe Corporation* 1997 (1) ZLR 355 (S) (involving a managing   
director); *Blue Ribbon Foods Ltd v Dube & Anor* 1993 (2) ZLR 146 (S).

43 1995 (2) ZLR 68 (S).

44 In *Banya v Madhater Mining Co (Pvt) Ltd* LC/H/67/2008 where there was an

order for reinstatement by consent but the employer subsequently reneged   
stating that the employee should have been retrenched. In *Masvingo v Baloyi*   
LC/MS/01/09 the employer failed to comply with s 92E (2) LA 2002.

45 *Commercial Careers College (1980) (Pvt) Ltd v Jarvis*, *supra*, where the employer   
dismissed the employee the day after a visit from the labour officer after the   
employee filed a complaint.

46 *Commercial Careers College (1980) (Pvt) Ltd v Jarvis*, *supra*.

47 *United Bottlers v Kaduya* 2006 (2) ZLR 150 (S) at 153C-D; *Zimsun v Lawn* 1988

(1) ZLR 143 (S) 15.

48 *National Union of Textile Workers and Ors v Stag Packings (Pty) Ltd & Ors* 1982

(4) SA 151 (T); *Jiah & Ors v PSC & Anor* 1999 (1) ZLR 17 (S).

49 *ZUPCO v Chisvo* 1999 (1) ZLR 67 (S); *Commercial Careers College (1980) (Pvt)*

*Ltd v Jarvis.*

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for an employee in a college or state corporation.50 The opposite   
may apply for a small employer.51

• The seniority of the employee and the nature of the job. The   
courts are more likely to rule that the employment relationship is   
no longer tenable in relation to a managerial executive than a   
junior employee, especially in a small company.52

• The intention of the legislature. In *Commercial Careers College*   
*(1980) (Pvt) Ltd v Jarvis,* *supra*, it was held that there was need   
for “account to be given of the law giver’s object in protecting   
the tenure of office of employees. To deny the remedy of   
reinstatement is to circumvent it, albeit upon pain of rendering   
himself liable to criminal prosecution and to a civil action for   
damages.”53 The above is particularly so where denial of   
reinstatement would result in subversion of a basic constitutional   
labour right or fundamental right of employees.54

REINSTATEMENT UNDER STATUTES

The common law principles on reinstatement have been codified, adapted and modified by statutes. Reinstatement is available under statutes, in particular the Labour Act. There are several circumstances under which the remedy of reinstatement may apply under the Labour Act.

The first is when the Labour Court substitutes its own decision for a decision made by a lower tribunal. This may arise under s 89 (2) (a) (ii) of the Act where the Labour Court has power to substitute its own decision in place of that appealed against. Arbitrators enjoy the same power under s 98 (9) of the Act. It may also arise in terms of s 93 (5b) of the Act when the Labour Court determines an application for confirmation of a draft ruling by a labour officer or designated agent.

50 *Commercial Careers College (1980) (Pvt) Ltd v Jarvis*, *supra.*

51 *Girjac Services (Pvt) Ltd v Mudzingwa* 1999 (1) ZLR 243 (S) at 250; *Winterton,*

*Holmes and Hill v Paterson* 1995 (2) ZLR 68 (S), (a law firm).

52 A senior employee was held properly denied reinstatement in *Muringi v Air*

*Zimbabwe Corporation* 1997 (1) ZLR 355 (S); but not for college tutor in   
*Commercial Careers College (1980) (Pvt) Ltd v Jarvis.*

53 See also, *Mushaya v Glens Corporation* 1992 (1) ZLR 162 (H).

54 For instance dismissal of employee on lawful maternity leave – *ARDA v Murwisi*

LC/H/90/04.

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The second circumstance applies when a labour officer or designated agent makes a draft ruling on a dispute of right or unfair labour practice in terms of s 93 (5) (c) of the Act.

The third circumstance is when the Labour Court or an arbitrator exercise their powers in terms of s 89 (2) (c) of the Act in relation to a section 93 (7) application. This is where a conciliatory authority has issued a certificate of no settlement but it is not possible for any reason to refer the dispute to compulsory arbitration or the period for conciliation has expired but the conciliatory authority refuses for any reason to issue the certificate of no settlement.

The fourth and final circumstance is where the Labour Court or the appropriate determining authority makes a finding that the dismissal is affected by a fatal procedural irregularity. This may arise from decisions by labour officers or designated agents under the new s 93 (5), or awards of an arbitrator, or a determining authority under an employment codes or other relevant body. It also indirectly arises when the Labour Court exercises its review jurisdiction.

The final circumstance when reinstatement arises under the Labour Act is in terms of the model code made under the Labour (National Employment Code of Conduct) Regulations, 2006.

GENERAL POWER OF LABOUR COURT TO ORDER REINSTATEMENT ON APPEAL

On appeal, the Labour Court has a general power to confirm or vary the decision appealed against or substitute its own decision in terms of s 89 (2) (a) (ii) of the Act. This reads:

(2) In the exercise of its functions, the Labour Court may -   
(a) in the case of an appeal –

(i) ...

(ii) confirm, vary, reverse or set aside the decision,

order or action that is appealed against, or   
substitute its own decision or order.’ (Emphasis   
added).

An arbitrator enjoys similar powers under compulsory arbitration in terms of s 98(9) of the Act. This states that *‘In hearing and determining* *any dispute an arbitrator shall have the same powers as the Labour* *Court.’*

The above power of the Labour Court under s 89 (2) (a) includes the power to make a straight order for reinstatement, without any

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alternative for damages as would be required under s 89(2)(c)(iii) of the Labour Act. This position was affirmed in *obiter* by *GARWE* JA in *Zimnat Life Assurance Ltd v Dikinya*,55 confirming the same conclusion that this author had earlier argued for.56

Madhuku holds a contrary view, asserting that s 89(2)(a) of the Act does not confer such power on the Labour Court because when operating under that section it would be operating as a court of appeal and not a court of first instance.57 That the proper basis of the powers of the Labour Court are under s 89(2) (c), where supposedly the Labour Court cannot issue a straight order for reinstatement. That it is a jurisprudential absurdity for the legislature to have conferred an employee who reaches the Labour Court via s 93(7) less rights than the one who lands in the same court as an appellant.

This position is also reflected in *Mandiringa & Ors v National Social* *Security Authority*58 where *MAKARAU* JP (as she then was) stated, albeit *in obiter*, that:

It is therefore the settled position of our law that, in ordering   
reinstatement in terms of the Labour Act, the Labour Court,   
labour officers and arbitrators appointed under the Act are bound   
to assess damages in lieu of reinstatement. Any judgment,   
determination or award by these officials that fails to do so is   
liable to be interfered with as misdirection or as failing to comply   
with the Act in a material way. An award that orders   
reinstatement of applicant without awarding a specified amount   
of damages in lieu of reinstatement is incomplete and   
consequently, incompetent and cannot be registered in terms   
of s 98(14) of the Act as an order of this court.

The above arguments are not persuasive but bolster a conservative pro-employer interpretation of the Labour Act centred around a constriction of the powers of the Labour Court. This has been the

55 S-30-2010.

56 M Gwisai, *Labour and Employment Law in Zimbabwe*: Relations of work under

neo-colonial capitalism (ZLC and UZ, 2006) 124-25.

57 L Madhuku, *Labour Law in Zimbabwe*, (FES with Weaver Press, Harare, 2015)

238-40.

58 2005(2)ZLR 329(H) at 333F. The basis of the decision being *Hama v National*

*Railways of Zimbabwe* 1996 (1) ZLR 664(S). The same authority was followed   
in *Olivine Industries (Pvt) Ltd v Gwekwerere* 2005 (2)ZLR 421(S) at 428F. *Girjac*   
*Services (Pvt) Ltd v Mudzingwa* 1999(1) ZLR 243 (S) at 250C-D.

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essential direction of the dominant section of the superior courts in the last decade consistent with the demands of neoliberal capitalism.

In the *Mandiringa* and *Gwekwerere* decisions, the court assumed the continued application of the decision in *Hama v National Railways of* *Zimbabwe*59 despite the material changes in the wording of the relevant provisions of the statutes. As correctly argued by Mucheche, the court “failed to make a distinction between powers of the Labour Court hearing an application and an appeal” under s 89(2)(c) and s 89(2)(a) respectively.60 In *Mandiringa* the court though had hesitancy in the firmness of its conclusion.61

The distinction Madhuku draws between the jurisdiction of the Labour Court as a court of “appeal” and as a “ court of first instance” is, with respect, misplaced. It is now well-established that the appeal jurisdiction of the Labour Court is that of an appeal in the wide sense, going beyond an ordinary appeal, an appeal *stricto sensu.* Citing extensive authorities *MUTEMA* P (as he then was) discussed the different types of appeals in *Chiwara v Crystal Candy*.62 In the appeal in the ordinary sense there is a rehearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether the decision was right or wrong. No fresh evidence may be heard. On the other hand an appeal in the wide sense, may involve an appeal by way of rehearing or an appeal *de novo*. In the former there is a rehearing on the documents, but with a special power to receive further evidence on the appeal.63 An appeal *de novo* involves a fresh hearing with the

59 1996 (1) ZLR 664 (S).

60 C Mucheche, *Law and practice guide on labour dismissal remedies in Zimbabwe:*

*Reinstatement and damages (in foreign currency),* (African Dominion   
Publications, Harare, 2014) 52.

61 *MAKARAU* JP stated 334 that, ÒAssuming that l have erred in holding that an   
award that does not specify an award of damages in lieu of reinstatement is   
incompetent ÉÓ

62 LC/H/213/2009 at p 2-3 Authorities cited included, *Words and Phrases Legally*   
*Defined* 3rd Ed Supp 2004, Lexis Nexis, Butterworths p. 49; and specifically –   
*Quilter v Mapleson* (1882) 9 QB 672 at 676; *Builders Licensing Board v Sperway*   
*Constructions (Sydney) Pty Ltd* (1976) 135 CLR at 619. Generally see also, *ALB*   
*& Anor v ZAIWU* 1998 92) ZLR 196 (S) at 202 summarising the classification of   
appeals cited in *S v Mohamed* 1977 (2) SA 531 (A) at 538 and *Metal & Allied*   
*Workers Union v Min of Manpower* 1983 (3) SA 238 (N) at 242. Also, *Continental*   
*Fashions (Pvt) Ltd v Mupfuriri & Ors* 1997 (2) ZLR 405 (S) at 410.

63 *Wigg v Architects Board of South Australia* (1884) 36 SASR 111 at 113. Applied   
in *Guta v MBCA Bank* LC/H/79/2009.

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parties being entitled to begin again and adduce new evidence, that is a complete rehearing of and fresh determination of the merits of the matter with or without additional evidence or information.64

In *Zhakata v Mandoza N.O. and N M Bank Ltd*,65 *Bhunu* J held that, “an appeal in the context of the Labour Relations Act is an appeal not in the ordinary sense...” This is correct. On appeal the Labour Court can decide a matter on the record as in the ordinary appeal, but in addition may also conduct a hearing into the matter in terms of s 89(2)(a)(i) of the Act.66 The Court is not bound by the strict rules of evidence and the court may ascertain any relevant fact by any means which the presiding officer thinks fit and which is not unfair or unjust to either party.67

The above wide appeal jurisdiction of the Labour Court is not accidental but designed to facilitate its role as the apex body for the resolution of disputes and unfair labour practices in a manner consistent with the purpose and objects of the Act of achieving social justice and democracy in the workplace as stated in s 2A(1) of the Act. The superior courts have since affirmed this exclusive equity jurisdiction enjoyed by the Labour Court unlike the civil courts.68

A restrictive interpretation of the powers of the Labour Court under s 89(2)(a) would fatally cripple the equity jurisdiction of the Labour Court, in particular its power to give effective remedies for breach of rights conferred under the Act, including fundamental employees rights. Such a reading is inconsistent with the purposive interpretation model compelled by s 2A(2) of the Labour Act.

In any case one if one takes into account the history of the section it becomes evident that the legislative intention was always one of clothing the Labour Court with the broadest powers rather than to

64 *Sweeney v Fitzhardinge* (1906) 4 CLR; *Simpson Ltd v Arcipreste* (1989) 53 SASR

9

65 HH – 22 – 05 . See also, *Tuso v City of Harare* HH -1 – 04; *Chahweta v National*   
*Foods Ltd* LC/H/173/2009 where ÒappealÓ under the Act was held to include   
an appeal based on grounds of review.

66 *Air Zimbabwe Corporation v Mlambo* 1997 (1) ZLR 220 (S).

67 Section 90A Labour Act 2002.

68 *Madhatter Mining Co v Tapfuma* S-51-14; *Fleximail Ltd v Samanyau & Ors* S-21-

14; *Malimanji v CABS* 2007 (2) ZLR 77 (S) at 79D-E; *Zhakata v Mandoza N.O. &*   
*N M Bank Ltd* HH – 22 – 05.

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narrow them. The origins of s 89(2)(a) of the Labour Act lies in s 107 of the Labour Relations Act No. 16 of 1985. This read:

In determining an appeal in terms of this Part, the Tribunal may   
confirm, vary or set aside the decision appealed against and   
make an order accordingly, and may include in such order any   
order as to costs that it thinks fit.

The above section was carried through, with some modifications in subsequent amendments of the Labour Relations Act.69 In *Ruturi v* *Heritage Clothing (Pvt) Ltd,*70 the court ruled that s 107 provided the Labour Relations Tribunal with broad powers including the power to make an order for reinstatement, where appropriate. Similarly in *Art* *Corporation v Moyana,*71 the court also ruled that the broad powers of a determining authority under the old s 111(1)LRA 1985 to “make such order as it thinks appropriate for determining the dispute or rectifying the unfair labour practice concerned”, included the discretion to grant or decline reinstatement.

The restriction of the general power previously granted under s 111LRA came through the new s 96(1)(c) introduced by the Labour Relations (Amendment) Act, 1992. This provided a proviso requiring a mandatory alternative of damages to reinstatement or employment. The new provision was replicated in s 89(2)(c)(iii) introduced by s 29 of Act No. 17 of 2002 and subsequently further amended by s 29 of Act No. 7 of 2005, which added two further provisos. What is notable about the last two amendments is that the formulation of the application of the section was narrowed to special applications to the Labour Court under s 93(7) of the Act, but not applied to the general powers of the Labour Court as had been the case with s 96(1)(c) of the Labour Relations Act. It was improper therefore to apply the *Hama* precedent automatically to the changed provisions of s 89(2)(c)(iii) of the Labour Act, without first analysing the implications of the change from the wide formulation under s 96(1)(c)LRA, to the narrow formulation under 89(2)(c)(iii).

69 Presently s 89(2)(2)(a)(ii) and (c) LA 2002.

70 1994 (2) ZLR 334 (S).

71 The relevant provisions were s s 107 and 112 LRA. The court had earlier on

reached the same decision in relation to a similar provision pertaining to the   
powers of a labour relations officer – that is s 111 (2) LRA 1985 - *Art Corporation*   
*v Moyana* 1989 (1) ZLR 304 (S).

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The real jurisprudential absurdity is not in the supposed inconsistency between the powers under s 89(2)(a) and s 89(2) (c) of the Act. As argued below such inconsistency does not arise. The fundamental jurisprudential problem with the approach advocated for by Madhuku is that it creates an inferior set of rights for employees covered by an Act whose ostensible purpose is to advance social justice and equity in the workplace compared to a common law regime, which courts have consistently recognised as offering inferior rights. There is no provision in either sections providing for the ouster, whether expressly or by necessary implication, of the now well established common law principle that reinstatement is a competent remedy for wrongful dismissal, but available at the discretion of the court.

*Powers of Labour Court and labour officers under s 93(5)LA*

*2015*

The Labour Court is empowered under the new s 93(5b) of Act No. 5 of 2015 to confirm a draft ruling by a labour office or designated agent “with or without amendment.” The section is not directly linked to the powers of the court under s 89, which is unsatisfactory. However, the power is broadly couched suggesting that the Labour Court retains broad power to make an appropriate order as it has for an appeal under s 89(2)(a). The issue remains to be tested.

A similar situation obtains in relation to labour officers/designated agents when making a draft ruling in relation to a dispute of right or unfair labour practice under the new s93(5)(c) of the Act. If the dispute or unfair labour practice is a dispute of right, the labour officer, may, upon a finding on a balance of probabilities, make a ruling that –

(i) The employer or other person is guilty of an unfair labour   
practice; or

(ii) The dispute of right or unfair labour practice must be   
resolved against any employer or other person in a specific   
manner by an order –

A. directing the employer or other party concerned to   
cease or rectify the infringement or threatened   
infringement, as the case may be, including payment   
of moneys, where appropriate;

B. for damages for any loss...

As with the powers of the Labour Court in relation to confirmation or

variation of a draft ruling, the above powers of the labour officer are loosely and inelegantly drafted. They are bound to create confusion.

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The powers though are couched widely, in a manner that gives the labour officer broad powers in relation to the draft ruling. Following on precedent, this seems to confer on the labour officer the power to order reinstatement after consideration of the pertinent factors of whether the employment relationship is no longer tenable. The same was upheld in *Mtetwa v Businesss Equipment Corporation*72 where the appeals committee made a straight order for reinstatement without an alternative or damages. This was upheld by the court which held that the employee could not subsequently opt for damages. This is in a similar manner to that of a determining authority under s 111 of the Labour Relations Act, 1985.73 Section 111(1) though was much better worded on the powers of the labour officer, whilst s 111(2) gave explicit examples of how the general power under s 111(1) could be exercised, including an order for reinstatement. The provisions read:

(1) After due inquiry into, and consideration of any matter   
that has been referred to it in terms of paragraph (d) of   
subsection one hundred and nine, a determining authority   
may-

(a) make such order as it thinks appropriate for   
determining the dispute or rectifying the unfair   
labour practice concerned; or

(b) ...

(2) Without derogation from the generality of subsection (1),

an order made in terms of that subsection may provide for   
or direct, as the case may be –

(a) back pay from the time of the dispute or unfair labour

practice concerned; ...or

(b) ....or

(c) reinstatement in a job; or

(d) insertion into a seniority list at an appropriate point;

or

(e) promotion or, if no promotion post exists, pay at a

higher rate pending promotion; or   
(f) employment in a job; or

(g) payment of legal fees and costs; or   
(h) cessation of the unfair labour practice; or   
as may be appropriate

72 S-25-04. *Business Equipment Corporation v Mtetwa* S-14-07 affirmed the   
correctness of the earlier decision.

73 *Art Corporation v Moyana*, *supra*.

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The above formulation of the powers of a determining authority under the old Labour Relations Act, 1985 were clear and concise, and could be used as a basis to amend the new s 93(5)(c) to remove the current confusion.

REINSTATEMENT UNDER S 89(2)(C) LABOUR ACT

The third circumstance when reinstatement applies under statutes is in terms of s 89(2)(c)(iii) of the Labour Act. Reinstatement or employment in a job is provided as a specified remedy under s 89(2)(c) (iii) of the Act. The section reads:

(2) In the exercise of its functions, the Labour Court may, ...   
(c) in the case of an application made in terms of   
subparagraph (i) of subsection (7) of section ninety-   
three, make an order for any of the following or any

other appropriate order –   
(iii) reinstatement or employment in a job:   
Provided that –

(i) any such determination shall specify an amount   
of damages to be awarded to the employee   
concerned as an alternative to his reinstatement   
or employment;

(ii) in deciding whether to award damages or   
reinstatement or employment, onus is on the   
employer to prove that the employment   
relationship is no longer tenable, taking into   
account the size of the employer, the preferences   
of the employee, the situation in the labour   
market and any other relevant factors;

(iii) should damages be awarded instead of   
reinstatement or employment as a result of an   
untenable working relationship arising from   
unlawful or wrongful dismissal by the employer,   
punitive damages may be imposed.

There is considerable controversy over the interpretation of the section. Firstly whether it solely applies to s 93(7) applications or is of broader effect. Under s 93(7)(ii) of the Act when a conciliatory authority has issued a certificate of no settlement but it is not possible for any reason to refer the dispute to compulsory arbitration or the labour officer for any reason refuses to issue a certificate of no settlement after the prescribed period allowed for conciliation, any

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party to the dispute may apply to the Labour Court, in case of a dispute of right, for an order in terms of s 89(2)(c) of the Act. Another issue is what is the effect of proviso (i) to s 89(2)(c)(iii) compelling an alternative order for damages when reinstatement or employment is awarded and who has the right of choice to effect the alternative, the employee or the employer. Related to the above is whether the previous *locus classicus* in this area, *Hama v National Railways*,74 still applies, given the amendments effected by s 29 of the Labour Amendment Act, No. 5 of 2005.

*History of Section*

The controversies arise from the wording and history of the section. The original formulation of the precursor to the section, namely s 107 of the Labour Relations Act, 1985, was broadly worded, and without the qualification of the damages alternative. The same applied to determining authorities under s 111(1)LRA 1985. Section 112(2) LRA 1985 gave specific examples of how the power could be exercised, including making an order for reinstatement. The courts held that in terms of the above the Tribunal and determining authorities could, in appropriate circumstances, award a pure order of reinstatement without an alternative of damages.75

The first qualification arose with s 96(1) (c) of the Labour Relations Amendment Act No. 12 of 1992. It provided:

Without derogation from the generality of sections ninety-three   
and ninety five, a determination made in terms of those sections   
may provide for –

(a) back pay from the time when the dispute or unfair labour   
practice arose;

(b) ...

(c) Reinstatement or employment in a job provided that any

such determination shall specify an amount of damages to   
be awarded to the employee concerned as an alternative   
to his reinstatement or employment.

In *Hama v National Railways of Zimbabwe*, *supra*, the court held that by virtue of s 96(1) (c)LRA 1992 an order for reinstatement must be

74 1996 (1) ZLR 664 (S).

75 Art Corporation v Moyana 1989 (1) ZLR 304 (S); Ruturi v Heritage Clothing

(Pvt) Ltd 1994 (2) ZLR 374 (S).

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accompanied with an alternative order for the payment of damages in lieu of reinstatement. The case became the *locus classicus*.76

The proviso to s 96(1)(c)LRA 2002 did not specify who had the right to make the choice between reinstatement and damages, between the employee and the employer. *Hama* was silent on the matter but in *BHP Minerals Zimbabwe (Pvt) Ltd v Takawira*77 the court held that although the matter had not been dealt with directly the courts seemed to assume the choice lay with the employer. The court ruled that logically it made sense to interpret the proviso as for the benefit of the employer. “The employer is given the opportunity to, as it were buy his way out of his obligation. It makes no sense to allow the employee to claim money in place of reinstatement.”

The effect of the above was to effectively neutralize the remedy of reinstatement under the Labour Act. It gave the employer a veto over its application hardly any different from the old classical common law position that had proscribed reinstatement as a matter of law. The courts did not explain how this could be so under a statute one of whose purposes was to protect employees from arbitrary dismissal.

The provision was subsequently retained but in a modified manner as s 89(2)(c)(iii) of the Labour Act, inserted by s 29 of the Labour Relations Amendment Act, No. 17 of 2002. It read:

(2) In the exercise of its functions, the Labour Court may –   
(a) ...

(b) ...

(c) in the case of a application made in terms of

subparagraph (i) of subsection (7) of section ninety-   
three, make an order for any of the following or any   
other appropriate order –

(i) back pay ...

(ii) ...

(iii) reinstatement or employment tin a job:

Provided that any such determination shall specify

76 Followed in numerous cases including, *ZESA v Bopoto* 1997 (1) ZLR 126(S);   
*Mhowa v Beverly Building Society* 1998 (1) ZLR 546(S); *Olivine Industries (Pvt)*   
*Ltd v Gwekwerere & Ors* 2005 (2) ZLR 421 (S) at 428F; and *Net\*One Cellular*   
*(PVT) Ltd v Communications and Allied Services Workers Union of Zimbabwe*   
*and 56 Employees* S-89-05.

77 1999 (2) ZLR 77 (S).

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an amount of damages to be awarded to the   
employee concerned as an alternative to his   
reinstatement or employment;

(iv) ...

Although the formulation of the reinstatement/damages proviso was

exactly the same with that in the Labour Relations Amendment Act (No. 12 of 1992) there was a change in the scope of application of the provisions. Whereas s 96(1)(c)LRA 1992 applied generally to determining authorities including the Labour Relations Tribunal, s 89(2)(c)(iii)LA 2002 expressly stated that it applied to applications made in terms of s 93(7)(ii) of the Labour Act. It did not expressly apply to s 89(2)(a) when the court dealt with appeals. *Prima facie* there was therefore a narrowing of the scope of application.

Despite the apparent change in the scope of application of the provision, the courts mainly continued to apply the provision in the same way as under s 96(1)(c)LRA 1992.78 They did not explain why the rationale of the *Hama* decision should continue to apply generally, when its basis, that is the wide scope under s 96(1)(c), had now been restricted to the special s 93 (7) application. They did not explain why it was necessary to depart from the plain and express wording of s 89(2)(3)(c) that expressly stated that it applied to the special s 93(7) applications, including whether any absurdity would arise for instance in comparison to the powers of the court in an appeal under s 89(2)(a) of the Act. Perhaps if they did, they might have come to a different conclusion as indeed the court did in obiter in *Zimnat Life* *Assurance Ltd v Dikinya*.79

A further material amendment was introduced by s 29 of the Labour Amendment Act No. 7 of 2005 amending s 89(2)(c)(iii). The amendment introduced two further provisos to proviso (i), which potentially impacted on the reinstatement/damages issue, as discussed below.

78 *Mandiringa & Ors v National Social Security Authority* 2005(2)ZLR 329(H) at   
333F; *Olivine Industries (Pvt) Ltd v Gwekwerere & Ors* 2005 (2) ZLR 421 (S) at   
428F; *Net\*One Cellular (PVT) Ltd v Communications and Allied Services Workers*   
*Union of Zimbabwe and 56 Employees* S-89-05; *Chitambo v ZESA Holdings (Pvt)*   
*Ltd & Anor* LC/H/331/2013.

79 S-30-2010.

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*Present Law on Reinstatement under S 89(2)(C)Labour Act*

In *Mvududu v ARDA*80 *PATEL* J specifically left the question of the full import of s 89(2)(c)(iii)LA 2005 open, although *in obiter* the judge seemed to accept that the Labour Court has the discretion to order reinstatement.

It is my respectful submission that s 89(2)(c)(iii) of the Labour Act does no more than substantially incorporate, with modifications, the position already provided for under the general appeal power of the Labour Court under s 89(2)(a)LA 2005 and under modern common law. That is the Labour Court can grant the remedy of reinstatement to an unlawfully or wrongfully dismissed employee who claims it, but subject to the discretion of the court to decline the remedy where the employer discharges the onus that the employment relationship is no longer tenable. A further modification being that unlike under s 89(2)(a)LA 2005, a reinstatement order under s 89(2)(c)(iii) must be accompanied with an alternative order for the payment of damages by virtue of proviso (i) to s 89(2)(c)(iii). The proviso is for the benefit and exercise by the employee. The proviso though is not in material conflict with s 89(2)(a) of the Labour Act as the court exercising its general equity powers can also include the same. It is also consistent with trends in common law and is designed to facilitate the just, effective and expeditious resolution of labour disputes.

There are several grounds for the above approach. The starting point is the amendment to s 89(2)(c)(iii) LA 2002 by s 29 of Act No. 7 of 2005. This was highly significant. The amendment changed the formulation that had been used in both s 96(1)(c) of the Labour Relations Act and under Act No. 17 of 2002. Whilst retaining the proviso on the damages alternatives, it added two critical provisos, provisos (ii) and (iii). These provide the “coloured context” through which proviso (i) must be understood. The provisos show the clear legislative intention to retain reinstatement as the primary remedy for wrongful dismissal as well as the essential principles of common law.

The first point is that despite the wording of proviso (i) the subsequent provisos vest the Labour Court with the power to decide whether to grant reinstatement or damages. Proviso (ii) expressly states that “in deciding whether to award damages or reinstatement or

80 SC – 446-14.

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employment…” Then can be no question of “deciding” if the employer is allowed to subsequently unilaterally opt out of reinstating and paying damages. Proviso (ii) makes clear that the onus “to prove that the employment relationship is no longer tenable” is with the employer. If the employer fails to discharge such onus, it follows that reinstatement must be ordered. There would be no point in placing such onus on the employer, if the employer is allowed to subsequently unilaterally decide whether to reinstate or pay damages, as was previously held.81 But the opposite applies. Reinstatement may no longer be practicable or because of changed circumstances making the employee now prefer damages instead of reinstatement as originally claimed. 82

Proviso (iii) reiterates the position, providing that “should damages be awarded instead of reinstatement as a result of an untenable working relationship arising from unlawful or wrongful dismissal by the employer, punitive damages may be imposed.” The wording is clear that the award may be damages or reinstatement, and that in case of the former punitive damages may be awarded. If proviso (i) precluded discretion on the Labour Court then the wording of proviso (iii) as with proviso (ii) would not make sense.

Under the three provisos the deciding agent is clearly the court, as under common law and as acknowledged by labour scholars.83 Drawing from common law, proviso (ii) does not provide the court with an unfettered discretion but subjects it to the overall requirement of whether the “employment relationship is no longer tenable,” by reference to a non-exhaustive list of factors. Again drawing from common law, the onus to establish why reinstatement should not apply lies with the employer. alternative for damages were the employer has proven that the relationship is no longer “tenable.”

81 *BHP Minerals Zimbabwe (Pvt) Ltd v Takawira* 1999 (2) ZLR 77 (S); *Gauntlet*   
*Security Services (Pvt) Ltd. v Leornard* 1997 (1) ZLR 583 (S).

82 As was tried, but unsuccessfully by the employee in *BHP Minerals Zimbabwe*   
*(Pvt) Ltd v Takawira*, supra; and in *Mtetwa v Business Equipment Corporation*   
S-25-04; and further affirmed in *Business Equipment Corporation v Mtetwa* S-   
14-07.

83 83G Makings states that after Act No. 7 of 2005, the ÒÉ *decision as to whether*   
*to order reinstatement or damages now lies with the dispute resolution*   
*authorityÓ,* in G Makings, *Useful Labour Cases*, 4th ed ( Aquamor, Harare,   
2011) 44. See also C Mucheche (2014), *supra* at 48-49.

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The second point is that s 89(2) must be read holistically and purposively. In *Sagitarian (PVT) Ltd t/a ABC Auctions v The Workers* *Committee of Sagitarian (PVT) Ltd,*84 *GWAUNZA JA*, cited authority to the effect that a “section, of whatever length, must have a unity of purpose... Separate subsections must all have some relevance to the central theme which characterises the section.” That general words may be “coloured” by their context.

The powers of the Labour Court under s 89(2) generally must be read in line with the purpose of the Act under s 2A(1)(f) of the Act to secure the just, effective and expeditious resolution of disputes. Employees also have a right to protection from unfair dismissal under s 12B(1) of the Act. It is now well-established that the normal or primary remedy for unfair dismissal is reinstatement. A construction that makes the position of the “protected” employee under the Act worse than that of the ordinary employee under the common law, by virtually giving the employer a veto power over reinstatement or to “buy out” such remedy cannot be consistent with the objectives of the section or the Act in general. Section 2A(2) requires that the Act be construed in a manner that best ensures the attainment of its objectives.

The above interpretation also removes any unnecessary conflict that may be read between the powers of the Labour Court when hearing a s 93(7) application and when exercising its general appeals powers under s 89(2)(c) of the Labour Act. Under its broad power in terms of the later section the court may, but is not obliged to issue an accompanying alternative order of damages as recognised in the *Dikinya* case, *supra*. It generally should, for the convenience and expeditious resolution of the dispute, if reinstatement subsequently prove impracticable after the judgment. This was the situation historically with a determining authority under its broad powers in terms of 111(1)LRA 1985 and the more specific powers under s 112LRA 1985. There was no necessary conflict.

*Who Has the Right of Choice, Employee or Employer?*

The wording of proviso (i) to s 89(2)(c) LA 2005 is clear that an order for reinstatement must be accompanied by an alternative order of damages. In *Net\*One Cellular (PVT) Ltd v Communications and Allied*

84 2006 (1) ZLR 115 (S) at 118E -119C-E.

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*Services Workers Union of Zimbabwe* *and 56 Employees*,85 *CHIDYAUSIKU* CJ stated;

It is quite clear from the above section (s 89 (2) (c) (iii)) that   
the Labour Court is enjoined to make an award of damages as   
an alternative to reinstatement.

The question though is who has the right of choice– does it remain the employer per the *Takawira* decision or has this to change in light of the amendments to s 89(2)(c) under Act No. 7 of 2005? In the *Hama* case the matter was not dealt with. Subsequently though the courts, starting with the *Takawira* decision, ruled that it was the employer.86 There was no justification for this. The wording of s 96 (1)(c) did not necessarily mean that choice was with the employer. The court acknowledged as much in the *Takawira* case, but went on to ascribe the right to the employer.

However, a holistic consideration of s 89(2) (c) shows that such interpretation is inconsistent with the section and the purpose of the Act. It also runs afoul of well established principles of common law on remedies. It is respectfully submitted that it is time for the courts to reconsider the issue, in view of the fact that *Takawira* was made before Amendment No. 7 of 2005.

Only an interpretation that gives the choice to the employee avoids the above pitfalls. Provisos (ii) and (iii) give the deciding power to award reinstatement or damages to the court, but provided it is the employee who has exercised their right to choose that as the primary relief. If not, the question does not arise. The court can only grant reinstatement if the employer has failed to discharge the onus to show that relationship is no longer tenable. A reading that reposes the employer with the power to unilaterally choose whether to reinstate or pay damages after the judgment, defeats the purpose of the provisos of vesting that power with the court, in pursuance of a claim by the employee. It is illogical and runs counter to the very purpose of provisos (ii) and(iii) to provide reinstatement as the first remedy unless the employer has failed to discharge the onus.

Contrary to the argument in *Takawira* the reverse applies well. Whereas the employer may fail to discharge the onus on it under proviso (ii)

85 S-89-05.

86 *Gauntlet Security Services (Pvt) Ltd. v Leornard* 1997 (1) ZLR 583 (S); *ZESA v*

*Bopoto* 1997 (1) ZLR 126(S).

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and hence reinstatement is ordered. But in practice the employer has before it every tool to make such reinstatement impracticable for the worker. Mucheche puts it well, comparing such an enforced reinstatement to building “a permanent structure on sinking sand”:87

No matter how strongly an arbitrator or judge of the Labour   
Court may feel about reinstatement, it will be ridiculous to force   
an employee into a cage of reinstatement which is nothing short   
of a circle of despair. Such an employee’s woes may be   
compounded by the fact that the belligerent employer may   
choose not to give him/her work to do and render him/her a   
white elephant.

Besides the above, many workers become scared of again facing employers or managers that they fought over in court, and understandably prefer to move on even if they have won reinstatement. This is especially true of small to medium employers and those without a trade-union protected environment.88 The employment relationship is inherently a personal one, in which these dynamics are inevitable. This explains the series of cases that came before the courts where workers who had successfully won reinstatement made a u-turn to seek damages. In *Shabani v ZIMPLATS*89 the court approved the Appellant’s request for damages as opposed to reinstatement on the grounds that he was now employed elsewhere and “that the atmosphere at the Respondent institution is no longer conducive for him to work under.”

Proviso (i) of s 89(2)(c)(iii) can therefore be read to be designed to allow the flexibility necessary in the application of specific performance in the context of the employment relationship. Whereas under the common law where a party is awarded specific performance but the defendant fails to comply, the plaintiff has to bring a new action for cancellation and damages, with the first order remaining extant and the second order standing independent.90 The above is clearly a long and cumbersome process.

87 C Mucheche (2014) 50.

88 Deakin and Morris (2005) 522.

89 LC/H/48/2009 [*Makamure* P].

90 R Christie (2006), *supra* at 350 citing various authorities including, *Schein and*

*Sliom v Joubert* 1903 TS 428; *Evans v Hart* 1949 4 SA 30 (C ), and *Papenfus v*   
*Luiken* 1950 2 SA 508 (O). Also, but perhaps more narrowly see, *Olivine Industries*   
*(Pvt) Ltd v Gwekwerere* 2005 (2)ZLR 421(S) at 428F; *Girjac Services (Pvt) Ltd v*   
*Mudzingwa* 1999(1) ZLR 243 (S) at 250C-D.

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Christie states though that a plaintiff who sues for specific performance may include an alternative claim for cancellation and damages and this may be awarded. Alternatively, that even when not included in the summons as an alternative claim, “cancellation and damages may be awarded on a clause asking for general or other relief... or in the absence of such a clause and without amendment of the declaration.”91

The trend under common law as outlined by Christie is one towards removing the obstacles to an effective remedy to a party who has been awarded specific performance but the defendant fails to comply. It is in that light that Proviso (i) to s 89(2)(c)(iii) should be taken. It codifies the above trend by making it easier for the employee to get the alternative remedy of damages where the one of reinstatement has become impracticable or unobtainable for whatever reason. The employee does not have to institute fresh proceedings to get relief, but the Act places the obligation on the court to make the alternative order of damages to the one of reinstatement. Should there in fact be no problems, then that’s the end of the matter as the employee gets her or his primary remedy. But equally so, should reinstatement prove to be sinking sand, the employee gets the monetary compensation. Such a construction well accords with the purpose of the Act of expeditiously and justly resolving disputes. It is particularly suited for a court which is not governed by the strict formalities and technicalities of the civil courts.

The above interpretation of s 89(2)(c) is in accordance with common law, unlike the one that virtually overturns the now established principle that reinstatement is a competent remedy for wrongful dismissal. After all its the *Hama* decision itself that reiterated the principle that courts must not easily infer the ouster of common law unless this is by express provision or by necessary implication.

Such an interpretation is also jurisprudentially sound and accords with the legislative intention of protecting employees from unfair dismissal and promoting fair labour standards. Where the employer has failed to discharge the onus on it to show that the relationship is no longer tenable, there is no reason why reinstatement should not be granted. Under fair dismissal legislation reinstatement is recognised as the primary remedy for unfair dismissal. In some instances it may be the only effective remedy as in cases of unfair discrimination against trade

91 R Christie, *ibid*.

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unionists,92 or cases where the moral blameworthiness of the employer is particularly high as in cases of gender or racial discrimination or victimisation of employees.93 The deadly side effect of the contrary interpretation being that it encourages employers to unfairly dismiss union and workers committee activists, or discriminate against women including sexual harassment or violate other fundamental rights of employees knowing fully well that the courts will allow them to buy out the victim.

This was exactly the Achilles heel of the old position, which rewarded the guilty party by giving him, the “the opportunity to, as it were buy his way out of his obligation”, as admitted in the *Takawira* case, *supra*. This is contrary to the well-established principle of common law that the choice of remedy lies with the wronged party, subject to the discretion of the court, including specific performance.94 It is unfair for the wrong-doer to have such choice as was done in the cases that gave the employer such choice. Giving the employer the choice offends the *nemo ex proprio dolo consequitur actionem* maxim, “no one maintains an action arising out of his own wrong”.95

The opposite applies where the worker is the one reposed with the right of choice. A purposive reading of s 89(2) avoids any unnecessary conflict in interpretation of the powers of the Labour Court under s 89(2)(a) and under s 89(2)(c) of the Act. A literal reading of s 89(2)(c) of the old Labour Act shows that the s 89(2)(c) jurisdiction of the Labour Court would, unlike the old s 96(1)LRA not apply generally, but only to a s 93(7) application. However, there is no need to look at it this way, as l previously argued. 96

Following the approach in *Sagitarian (PVT) Ltd t/a ABC Auctions v* *The Workers Committee of Sagitarian (PVT) Ltd*, supra, the section

92 *National Union of Textile Workers and Ors v Stag Packings (Pty) Ltd & Ors* 1982   
(4) SA 151 (T); *Jiah & Ors v PSC & Anor* 1999 (1) ZLR 17 (S); *Chitambo v ZESA*   
*Holdings (Pvt) Ltd & Anor* LC/H/331/2013.

93 *Commercial Careers College (1980) (Pvt) Ltd v Jarvis*, *supra*

94 *Farmers’ Co-op Society (Reg) v Berry* 1912 AD 343, held at 350, Ò ‘it is against

conscience that a party should have a right of election whether he would perform   
his contract or only pay damages for the breach of it.’ The election is rather   
with injured party, subject to the discretion of the Court.Ó

95 *Mutasa v Masvingo Brick Tile* LC/MS/13/05; *Standard Chartered Bank Ltd v*   
*Matsika* 1997 (2) ZLR 389 (S) and *Mushaya v Glens Corporation* 1992 (1) ZLR   
162.

96 M Gwisai (2006) 127, and also applied in *Chitungwiza Municipality v Mvududu*   
LC/H/71/2009 p 3.

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must be read with unity of purpose around its central theme. The two subsections can be read together an din a non-conflictual manner. Under its general power in terms of s 89(2)(c) the court can apply the specific powers provided under s 89(2)(c)(iii), including making an order with an alternative of damages. But it is not compelled to and may go beyond this, given the broad wording of the subsection. The above has always been the situation historically. The powers specified under the present s 89(2)(c) of the Labour Act were similar to those of a determining authority under s 111(2) of the Labour Relations Act, 1985. But the same authority also enjoyed broad unqualified powers under s 111(1)LRA 1985, which are similar to the powers of the Labour Court in terms of s 89(2)(c) of the Labour Act. This interpretation is consistent with s 2A(2) of the Labour Act and best facilitates the Labour Court in implementing its broad equity jurisdiction.

Finally the above interpretation avoids possible glaring absurd results. For instance an interpretation that compels a mandatory damages alternative order in which the employer has the choice to reinstate or pay, could lead to impalpable injustice in cases of unfair dismissal by constructive dismissal under s 12B(3)(a) of the Labour Act. Section 89(2)(c) does not provide for an independent standing relief of damages, but only as an alternative to an order for reinstatement. In one case an arbitrator, following the above rigid approach, made an order of reinstatement or damages. But in constructive dismissal cases reinstatement clearly does not apply, the intolerable relationship being the reason the employee resigned. Only a flexible interpretation of the powers of the court that gives it authority to decide on what is the applicable remedy, subject to the employee’s initial choice of what relief to seek, is the correct approach.

*Recommendations*

To capture the above characters of the remedy of reinstatement the courts and the legislature need to reformulate its current wording, to avoid confusion or subversion of the legislative intention. For instance even within the current framework of both s 89(2)(c)(iii) and s 89(2) (a) of the Labour Act, courts, arbitrators, labour officers and designated agents can formulate their orders appropriately to show clearly that the option of taking damages lies with the employee. An order could be worded as follows:

The appellant is to be reinstated into her former position without   
loss of salary and benefits from the date of dismissal to the date

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of reinstatement less mitigation and should the appellant find   
that reinstatement is no longer practicable or preferable, the   
appellant is to be paid damages as an alternative to   
reinstatement as may be agreed upon the parties or that failing,   
as may be determined upon application by this court.

Similarly there is need to amend s 89(2) (a) (b) and (c) of the Labour Act to achieve greater clarity. It would remove the reference to the s 93(7) applications but provide for a general provision dealing with orders by the Labour Court and other determining authorities under the Labour Act encompassing all applications, references or appeals to the court and /or other determining authorities like a labour officer, designated agent, arbitrator or determining authority under an employment code or national model code. A useful reference to model the amendment of s 89(2) (b) (c) is the old s 111(1) and s 112 LRA 1985 as read with s 107.

Finally the reinstatement/damages proviso should be re-worded to clearly spell out the right of choice lies with the employee where reinstatement is no longer practicable or preferable after the court has found in favour of the employee. For instance Proviso (i) could then read:

Reinstatement or employment in a job;

Provided that-

(i) any such determination shall specify an amount of damages

to be awarded to the employee concerned as an alternative   
to his or her reinstatement or employment if the employee   
finds that reinstatement or employment is no longer   
practicable or preferable.

REINSTATEMENT IN CASES OF PROCEDURAL IRREGULARITIES AND REVIEW

The third circumstance of reinstatement under statutes is where the Labour Court or the appropriate determining authority makes a finding that the dismissal is affected by a material procedural irregularity or the proceedings are set aside on review.

Irregularities may arise at various stages of proceedings under the Labour Act. This may be in hearings under an employment code or under the national model code. It may be in hearings by arbitrators, labour officers or designated agents. The issue may be pertinent in appeals before the Labour Court or when the court exercises its general review jurisdiction or in applications.

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The effect of procedural irregularities was well summarised in *Maposa* *v CMED (Pvt)*,97 where MATANDA-MOYO P (as she then was) held:

The law is very clear on the question of the effect of procedural   
irregularities. Procedural irregularities can render the entire   
proceedings void, and if an act is void, then it is a nullity.

In *Tamanikwa & Ors v Zimbabwe Manpower Development Fund*,98 respondent failed to comply with the provisions of s 12B of the Labour Act but dismissed its employees using an alternative set of regulations, it was held:

Any disciplinary procedures which have been effected outside   
the peremptory provisions of s 12B are clearly unlawful. The   
dismissal of the appellant was therefore null and void.

These decisions follow a longstanding line of cases dealing with precursors to the Labour Act, notably *Standard Chartered Bank of* *Zimbabwe Ltd v Matsika,*99dealing with statutory regulations or employment codes.100 In other instances the courts have ruled that the effect of the procedural irregularities is to render the proceedings at the very least voidable at the instance of the employee.101 The above must be read though in the context of the settled law that an irregularity which does not cause prejudice does not by itself vitiate proceedings. In *Nyahuma v Barclays Bank (Pvt) Ltd*102 it was held that; “..it is not all procedural irregularities which vitiate proceedings. In order to succeed in having proceedings set aside on the basis of procedural irregularity, it must be shown that the party concerned was prejudiced by the irregularity.” Or put differently a party “should not escape the consequences of his misdeeds simply because of a failure to conduct proceedings properly”,103 or because of technicalities.104

97 LC/H/81/2007. Cited, *McFoy v United Africa Co. Ltd* (1961) 3 AII ER 1169 at   
1167; *Jacks Club of South Africa & Ors v Feldman* 1942 AD 340 at 359.

98 2013(2)ZLR 46(S) at 61.

99 *Standard Chartered Bank of Zimbabwe Ltd v Matsika* 1996 (1) ZLR 123 (S);

*Mugwebie v Seed Co. Ltd & Anor* 2000 (1) ZLR 93(S).

100 *Madoda v Tanganda Tea Co. Ltd* 1999 (1) ZLR 374 (S); *Standard Chartered Bank*

*Zimbabwe Ltd v Chikomwe & Ors* S-77-00; *Kukura Kurerwa Bus Co v Mandina*   
LC/H/72/2008.

101 *Minerals Marketing Corporation of Zimbabwe v Mazvimavi* 1995(2) ZLR 353(S). 102 2005 (2) ZLR 435 (S) 438E-F. Cited *Jacks Club of South Africa & Ors v Feldman*

1942 AD 340 at 359.

103 *Air Zimbabwe v Mensa* S-89-04.

104 *Dalny Mine v Banda* 1999 (1) ZLR 220 (S); *Air Zimbabwe Corporation v Mlambo*   
1997 (1) ZLR 220 (S).

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The effect of holding the dismissal null and void, is effectively to reinstate the employee in their former job, as the dismissal is taken as never having occurred. This is what was done in the *Tamanikwa* and *Matsika* decisions. The reinstatement though may be temporary. The employer is entitled to reinstitute fresh proceedings on the same facts, but in a procedurally correct manner. This is what distinguishes reinstatement in cases of procedural irregularities from that of reinstatement on the merits.

The Labour Court, on appeal may exercise its powers in terms of s 89(2)(a)LA, to conduct a re-hearing to cure the irregularities, or if this is not possible, remit the matter. When this happens, the employment relationship is deemed to continue. In the case of a re- hearing the court is starting afresh on a clean page and the effective date of termination is from “the date on which the irregularity is cured.”105 The finding of irregularity “means that the employee was never lawfully dismissed. He must therefore continue to be treated as an employee pending the outcome of the hearing on remittal.” 106

The same situation obtains on review. Where proceedings are set aside on review, the status *qua ante* is restored, and in the case of dismissal the employee is effectively reinstated in their former position. Reinstatement is automatic. There is no issue of discretion of awarding damages, as would be the case on appeal.107 In *ZFC Ltd v Geza*,108 the court held:

The relief available on review is that proceedings or the decision   
may be ‘set aside or corrected’ ...Miss Geza asked for a great   
deal more than that. She wanted an order that ZFC Ltd reinstate   
her or pay damages. That is the kind of relief one seeks on   
appeal, not on review.

Where proceedings are set aside on review and the employee reinstated, as with the case of procedural irregularities in general, this may be only for a temporary period, as the employer is entitled to re-institute proceedings on the same charges but in a procedurally correct manner. This is why in cases of procedural unfairness it is

105 *Dalny Mine v Banda* 1999 (1) ZLR 220 (S).

106 *Air Zimbabwe Corporation v Mlambo* 1997 (1) ZLR (S) at 223.

107 Muringi v Air Zimbabwe Corporation & Anor 1997 (2) ZLR 488 (S). Generally

see, Bailey v Healthy Professions Council of Zimbabwe 1993 (2) ZLR 17 (S);   
Health Professions Council v McGown 1994 (2) ZLR 329 (S) at 373C.

108 1998 (1) ZLR 137(S) at 139.

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preferable to institute proceedings by way of an appeal rather than an application in terms of s 89(1)(d1)LA when the court exercises its general review jurisdiction similar to that of the High Court. As discussed above, an “appeal” under the Labour Act, is an appeal in the wide sense and encompasses grounds of appeal based on procedural irregularities or review, where appropriate, but on a narrower scale than the general review jurisdiction of the Labour Court under s 89(1)(d1) of the Act.109

REINSTATEMENT UNDER S 6 (2) OF THE NATIONAL EMPLOYMENT CODE

The final framework under which the issue of reinstatement may arise under the Labour Act is in terms of s 6 (2) of the Labour (National Employment Code of Conduct), Regulations, 2006, the model code.

An employer who has good cause to believe that an employee has committed misconduct may suspend such employee and conduct a hearing into the alleged misconduct and within fourteen days hand down a determination.110 In terms of s 6 (2) the employer –

… may, according to the circumstances of the case-

a) serve a notice, in writing, on the employee concerned   
terminating his or her contract of employment, if the   
grounds for his or her suspension are proved to his or her   
satisfaction; or

b) serve a notice, in writing, on the employee concerned   
removing the suspension and reinstating such employee if   
the grounds for suspension are not proved.

A question that arises is whether if the employee is not found guilty, reinstatement is automatic or the employer has discretion not to impose reinstatement if the relationship has broken down?

The precursor to s 6(2) was s 3 (2) S.I. 371 of 1985,111 which was similarly worded but with the difference being that the determining authority was not the employer but a labour relations officer. The courts initially ruled that the determining authority had no discretion, but had to order reinstatement if his or her finding was that the

109 See also, DE van Loggerenberg, *Superior Court Practice*, 2nd ed. (Lose-leaf,   
Juta) A1-32.

110 Section 6 (1) Model Code.

111 Labour Relations (General Conditions of Employment) (Termination of

Employment) Regulations, 1985.

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employee was not guilty, and vice versa - *United Bottlers (Pvt) Ltd v* *Murwisi* 1995 (1) ZLR 246 (S).112 This position was overruled in *Hama* *v National Railways of Zimbabwe*113where the court ruled that the common law position of discretion was retained under the Regulations moreso because under the amended s 96(1)(c)LRA it was mandatory that an order for reinstatement be accompanied by an alternative order of damages. It is submitted that the situation under s 6(2) of the model code is now different and that where the employer does not find the employee guilty of the alleged offence the suspension must be removed and the employee reinstated. Reinstatement is automatic.

This is logical, because the reinstatement/damages proviso is no longer applicable under s 6 (2) of the model code. The provisions of s 6 (2) are clear and admit of no ambiguity, providing for “removing the suspension and reinstating such employee if the grounds for suspension are not proved.” The provisions are peremptory as per *Tamanikwa &* *Ors v Zimbabwe Manpower Development Fund*.114 In any case under the model code we are dealing with a suspended employee rather than a dismissed employee.

Interpreting s 6 (2) of the model code in a discretionary manner, as may be suggested because of the phrase in s 6 (2) that the employer, “may, according to the circumstances of the case”, defies common sense and leads to glaring absurdities. “May” in those circumstances really signifies the peremptory. The changed structure and nature of s 6 (2) of the model code clearly make the *Murwisi* case the more applicable precedent rather than the *Hama* decision.

Whereas under S.I. 371 of 1985, the determining authority was an independent third party, the labour relations officer, who could accordingly carry out an objective exercise of discretion on whether to grant reinstatement, and if not, assess damages. The same applies to the Labour Court or an arbitrator under s 89(2) of the Labour Act. But this cannot be so under the model code. Under the code, it is the same employer who charged the employee, conducted the hearing and found the employee not guilty, who should decide whether

112 Initially declared in obiter by MCNALLY JA in Masiyiwa v T M Supermarket 1990   
(1) ZLR 166, holding, ÒTo put it another way, he has a choice, but that choice   
is governed, not by his discretion, but by his finding ÉÓ

113 1996 (1) ZLR 664 (S).   
114 2013(2)ZLR 46(S) at 61.

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reinstatement should apply or not, and if not, assess damages. This clearly flies in the face of the “basic tenets of natural justice” and the employee’s right to protection from unfair dismissal under s 12B(1).

If after a internal process that it completely runs and dominates the employer has found the employee not guilty, then the logical thing is that the employee be reinstated as provided in s 6 (2) (b), as argued by Madhuku.115 Of course this raises problems where the relationship has broken down or the employee no longer wants reinstatement, a situation normally catered for by the alternative of damages. But this is the fundamental problem of S.I. 15 of 2006 as a dispute resolution system. It attempts to square a circle by impermissibly superimposing a pluralist based system on a unitarist based one. This contradiction cannot be resolved other than by either creating a semi-autonomous determining authority at the workplace made up of representatives of both the employer and employee as is normally done under employment codes, or alternatively outsourcing this to an entirely different third party, like the labour relations officer, as was done under S.I. 371 of 1975.

There is urgent need to address this anomaly. In the absence of this, an employee who no longer wants reinstatement can only resign after the reinstatement, unless she or he can sue for constructive dismissal where appropriate.

CONCLUSION

The above survey of the law, legislative and common law, shows that the remedy of reinstatement has come a long way, evolving from the position of complete non-recognition under classical common law to one of general acceptance as a competent remedy and finally its recognition as the primary remedy for unfair dismissal. This can only be so under an Act whose declared purpose is *inter alia*, the attainment of social justice and under a new constitutional dispensation that enshrines labour rights including the right to fair labour practices and standards.

With such clear and established legislative and constitutional foundations one can only hope that the judiciary will follow suit to fully recognise the remedy of reinstatement, for such is the only way to ensure that the employee’s right to protection from unfair dismissal and to fair labour practices and standards is fully and finally realised.

115 L Madhuku (2015) 125-27.

ACCESS TO INFORMATION LAWS, ENVIRONMENTAL RIGHTS   
AND PUBLIC PARTICIPATION IN THE WILDLIFE SECTOR

LENIN TINASHE CHISAIRA1

ABSTRACT

*The wildlife sector is strategic in Zimbabwe for its economic, social* *and ecological purposes and hence the right to access information on* *wildlife governance and conservation is critical. Zimbabwe has many* *municipal and international law commitments on environmental* *information rights, and practitioners can utilise these to facilitate* *public participation in wildlife governance and conservation.* *Environmental information rights are fundamental to the prevention* *of environmental threats such as wildfire conflicts, corruption and* *lack of transparency. This essay analyses the law on access to* *information and especially State obligations at municipal and* *international law and the extent to which State practice acts to* *impede or enable the rights of the public to access information critical* *for transparency and open governance of the wildlife sector. The* *essay will make a comparative analysis of the environmental* *information laws in force within the European Union region since* *they seem more advanced than other regions in the world.*

*Keywords: Environmental Law; Information Rights; Wildlife; Public* *Participation; Zimbabwe*

1. INTRODUCTION

The right to access information by the public and by practitioners is critical for the protection of the environment2 and wildlife conservation, especially in regions where the wildlife sector plays a critical role for State revenue generation, cultural symbolism,

1 LLM *Cand*, International Human Rights Law and Public Policy (UCC, Ireland);   
LLM, Economic Regulation (London); PGCert, Environmental and Natural   
Resources Law (London); LL.B (Hons) (Univ. of Zimbabwe). Legal and Research   
Officer at Zimbabwe Environmental Law Association. Emails:   
info@leninchisaira.com; [tinashe.chisaira@gmail.com](mailto:tinashe.chisaira@gmail.com). Grateful for comments   
made on the initial paper by Prof Maeve McDonagh, School of Law, University   
College Cork, Ireland.

2 See: Mason, M “Information Disclosure and Environmental Rights: The Aarhus   
Convention” in 2010 Vol 10 No 3 Global Environmental Politics 10.

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economic leisure, social and ecological purposes. The right to access environmental information is therefore vital for environmental conservation, prevention of environmental threats and is an important element of the main environmental-related legislation in Zimbabwe and at the international levels. Scholars have highlighted that:

The right on the accessibility of the information relating to the   
status of the environment… owes its existence, in the   
contemporary form, to the long running genesis of the idea that   
the improvement of the accessibility of the information on the   
environment and on the activities that have adverse or damaging   
effects upon the environment is the key goal of the   
environmental law. The accessibility and the right of access to   
such accessible information are in the direct connection with   
one of the fundamental principles of the environmental law,   
the principle of preventive action.3

Access to information rights are therefore crucial for wildlife conservation and governance in Zimbabwe and Africa where the wildlife and general environmental sectors are associated with the occurrence of environmental and ecological threats, for instance, poaching, reports of elite corruption4 and related environmental injustice impunity, the latter usually instigated by private businesses.5 Wildlife and environmental rights can come under threat due to the reported rise of corruption, wildlife crime and general opaque environmental governance. Duarte in an observation on South Africa makes the following critical observation:

[W]ildlife crime poses a significant threat to biodiversity,   
communities and tourism. It promotes ecological degradation,   
counteracts conservation efforts and poses a threat to the   
sustainable development and use of natural resources. It also   
exploits socio-economically vulnerable communities.6

3 Vucic M “The right to environmental information as a technique for the   
protection of the environment” in 2011 Vol 63 No 3 *Medunarodni Problemi*   
449-450

4 See, for instance: The Conversation, “How poaching claims against Grace Mugabe   
benefit Mnangagwa” in *The Star* (Kenya 16 April 2018) < [https://www.the-](https://www.the-star.co.ke/news/2018/04/16/how-poaching-claims-against-grace-mugabe-benefit-mnangagwa_c1744236)   
[star.co.ke/news/2018/04/16/how-poaching-claims-against-grace-mugabe-](https://www.the-star.co.ke/news/2018/04/16/how-poaching-claims-against-grace-mugabe-benefit-mnangagwa_c1744236)   
[benefit-mnangagwa\_c1744236](https://www.the-star.co.ke/news/2018/04/16/how-poaching-claims-against-grace-mugabe-benefit-mnangagwa_c1744236)> accessed 06 September 2018.

5 See Chamberlain L “Fighting Companies for Access to Information” in 2016 Vol   
13 No 23 *Sur International Journal on Human Rights* 199

6 Gonçalves D “Society and the rhino: A whole-of-society approach to wildlife   
crime in South Africa” in 2017 Vol 60 *SA Crime Quarterly* 9

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A legal analysis of the association between information and environmental rights and wildlife conservation is pertinent. Zimbabwe is a paradox wherein there exist reports of misuse of wildlife resources alongside strong provisions guaranteeing constitutionally-protected environmental rights7 and access to information rights.8 Studies carried on Zimbabwe’s wildlife sector by researchers and conservationists also indicate the problems of lack of information as a hindrance to environmental and wildlife conservation. The lack of access to information has been linked to the general nature of the political environment in the recent past. Gratwicke and Stapelkamp, conservation researchers, highlight this environmental information problem in the wildlife sector:

Information about the conservation industry is scarce and   
anecdotal due to the corresponding break down in many of the   
wildlife management systems. Unlike the recent past, when more   
organized systems of efficient environmental management   
monitored and preserved large tracts of the country’s flora and   
fauna, Zimbabwe’s current political and environmental upheaval   
has created its own brand of natural catastrophe that threatens   
lives, both animal and human.9

Zimbabwe has good access to information and environmental rights laws at the municipal level and is a signatory to relevant treaties at international levels. At the domestic level, the rights to environmental information are provided in the Constitution and specific statutes, notably the Environmental Management Act.10 To some extent, the right to access information is also covered by the Access to Information and Protection of Privacy Act (AIPPA).11 However, the AIPPA’s controversy — mostly in political governance — seems to vitiate the very objectives of protecting the right to information for the public. The AIPPA, like freedom of information legislation around the world, was intended to secure people’s rights to freedom of information. The Act, like the Official Secrets Act, has ostensibly achieved different results and has been vilified by civil and political rights advocates. Asogwa and Ezema add to the debate by stating the following:

7 Constitution of Zimbabwe Amendment (No. 20) Act, 2013, s 73

8 ibid s 62

9 Gratwicke B and Stapelkamp B “Wildlife Conservation and Environmental

Management in an ‘Outpost of Tyranny’” in 2006 Vol 3 *ZimConservation* Opinion

3

10 [*Chapter 20:27*]   
11 [*Chapter 10:27*]

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AIPPA has been used more to suppress information than to make   
information available. The argument is that AIPPA is an   
instrument for government control of information and the   
suppression of opposition. For instance, reports have shown that   
in January 2005, five officials were arrested under the OSA for   
breaching the Act by revealing the internal disputes of the ruling   
ZANU PF party to foreign governments.12

The prevalence of such legal controversy at the domestic level should evoke some positives when Zimbabwe’s record at international level is considered. The State is a signatory to some international treaties providing for the protection of both access to information and environmental rights. Treaties on environmental rights include the Convention on International Trade in Endangered Species of Flora and Fauna (CITES Convention)13 and the SADC14 Protocol on Wildlife Conservation and Law Enforcement.15 Regarding access to information, the State is a signatory to the African Charter on Human and People’s Rights (Banjul Charter)16 and the Declaration of Principles on Freedom of Expression in Africa17.

This article presents a legal critique of the interaction between the laws governing access to information, environmental rights and public participation in the context of wildlife conservation and governance in Zimbabwe. The study outlines and debates access to information in the context of emerging environmental issues. The paper also makes an analysis, especially with European and international law provisions.

2. SIGNIFICANCE OF ENVIRONMENTAL INFORMATION RIGHTS

Access to information rights on wildlife conservation creates an atmosphere conducive to active and informed public participation in

12 Asogwa BE and Ezema IJ “Freedom of access to government information in   
Africa: trends, status and challenges” in 2016 Vol 26 No 3 *Records Management*   
*Journal* 318, 331

13 Convention on International Trade in Endangered Species of Wild Fauna and   
Flora (Adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243   
(CITES)

14 Southern African Development Community

15 SADC Protocol on Wildlife Conservation and Law Enforcement (entered into

force 30 November 2003)

16 African (Banjul) Charter on Human and Peoples’ Rights (Adopted 27 June 1981)

entered into force 21 October 1986 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M.   
58 (1982) (Banjul Charter)

17 Declaration of Principles on Freedom of Expression in Africa (adopted 23 October   
2002) African Commission on Human and Peoples’ Rights, 32nd Session

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environmental protection and policy decision making processes. Brunch and others, for instance, highlight that *‘for the public to effectively* *advocate for environmental protection, access to relevant information* *is important; civil society needs to know of environmental threats* *and the origins of those threats.*’18 Effective information rights laws are therefore always critical for important advocacy in the wildlife sector and the broader environmental sectors.

The public, environmental rights practitioners, environmental justice groups and communities need information rights in order to express themselves on wildlife conservation matters. The right to access information for these groups needs to be sufficiently protected, respected and linked with practical and accessible remedy structures in the legal framework. The right of access to information enables societies that are dependent on wildlife conservation to participate and contribute to the decision-making process, and such participation is a vital element in any democratic society.19 Participation and the right to freely express views are necessary for the public and practitioners to gain traction. The right to access information has been “commonly recognized by international human rights treaty bodies as coming within the scope of the right to freedom of expression.”20 Thus there is an inseparable association between access to information and the ability for free and informed expression. The twin freedoms of information and expression are critical for the democratic participation of the public in wildlife and environmental governance and conservation.

When policy decisions are made by the State on wildlife and environmental rights issues that are not transparent or undesirable from the perspective of the public, the inherent trust that should exist between the governed and the leaders is threatened.21 Circumstances exist in the wildlife sector in Zimbabwe where State

18 Brunch C et al “Constitutional Environmental Law: Giving Force to Fundamental   
Principles in Africa” in 2001 Vol 26 *Columbia Journal of Environmental Law*   
131, 179

19 See, for instance: Byrne A “Report of the Work of the Committee on Free   
Access to Information and Freedom of Expression by the Chair” in 1999 Vol 25   
No 5 *IFLA Journal* 299

20 McDonagh M “The Right to Information in International Human Rights Law” in   
2013 Vol 13 No 1 *Human Rights Law Review* 25

21 For further discussion on the concept of the social contract between the   
government and the governed, see: J Rousseau *Discourse on Political Economy*   
*and the Social Contract* Oxford Paperbacks, Oxford, 1999

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decisions on wildlife governance have elicited protest from the public and environmental and wildlife practitioners. Media and civil society reports have exposed a system where wildlife policy decisions are reached with seeming lack of regard for the interests or participation of the public, for instance, as follows:

Zimbabwe’s decision to export wild animals to China will… drive   
communities living near nature reserves deeper into poverty…   
Zimbabwe has in recent years come under fire from   
conservationists after it sold elephants to China under what was   
described as inhumane conditions. Environment minister Oppah   
Muchinguri-Kashiri recently said the country would export more   
wild animals.22

Public participation should be taken into account within the contemporary political context where developing and developed States conflict with the nature of international environmental law. Zimbabwe has generally been known for its anti-West stance, and this reflects in policy positions including wildlife governance and conservation. Nickerson supports this thesis in the following passage:

Although Zimbabwe is party to numerous international   
environmental agreements, it should not be assumed that the   
country adopts entirely the prevailing, usually Western-oriented   
view of environmental issues. In fact, Zimbabwe, like many Third   
World nations, has voiced serious complaints about the degree   
to which international environmental law has been the product   
of primarily developed nations.23

These reports are evidence of a State whose wildlife sectors suffer from lack of participation by concerned members of the public and environmental practitioners. For instance, consultations in decisions such as export of live wildlife, and curbing poaching through encouraging tip-offs. The growing problems of poaching have been raised in recent studies as follows:

Some of the illegally hunted species in the northern GNP   
(Gonarezhou National Park) are of conservation concern:

22 “Conservationist slams Zim wildlife exports” in The Zimbabwe Independent   
(Harare, 22 Jan 2016) <[https://www.theindependent.co.zw/2016/01/22/](https://www.theindependent.co.zw/2016/01/22/conservationist-slams-zim-wildlife-exports/)   
[conservationist-slams-zim-wildlife-exports/](https://www.theindependent.co.zw/2016/01/22/conservationist-slams-zim-wildlife-exports/)> accessed 16 October 2017.

23 Nickerson, BJ “The Environmental Laws of Zimbabwe: A Unique Approach to   
Management of the Environment” in 1994 Vol 14 No 2 Boston College *Third*   
*World Law Journal* 189, 203.

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crocodile is classified as lower risk; elephant, lion, cheetah,   
hippopotamus are classified as vulnerable, and leopard is   
classified as near threatened on the IUCN (the International Union   
for the Conservation of Nature) Red List (IUCN 2012).24

The justification for environmental information rights in the wildlife sector in Zimbabwe and other parts of Southern Africa has never been more threatened than in the past decade. There has been growing harassment of practitioners and journalists and lack of transparency and public consultation in policy decisions making concerning, for instance, the export of baby elephants and other live wildlife species to zoos in countries such as the Peoples’ Republic of China.25 Government officials have been making decisions on matters concerning hunting, licencing, trade, conservation and export of wildlife species without explicit sharing of information or allowance for public scrutiny. On the other hand, investigative reporting on public officials implicated in an alarming rise in cyanide-poisoning and poaching of elephants and other wildlife species for ivory, trophies, medicine, food and accessories has been clamped down.26

3. OUTLINE OF THE LAW

*3.1 Municipal Law*

Zimbabwe is highly dependent on its environmental and natural resources base27 which is reflected in the country’s laws. Many laws provide a foundation for freedom of information in the Zimbabwean natural resources and extractive sectors. However, there is a need to critique these regarding the right to information. The relevant legislation includes the 2013 Constitution of Zimbabwe, the Access to Information and AIPPA28 and the Environmental Management Act29.

24 Gandiwa E et al “Illegal hunting and law enforcement during a period of   
economic decline in Zimbabwe: A case study of northern Gonarezhou National   
Park and adjacent areas” in 2013 Vol 21 No 3 *Journal for Nature Conservation*   
133, 139.

25 Op cit note 21

26 See: Associated Press in Harare, “Zimbabwe journalists arrested for linking

police with elephant poisonings” in *The Guardian* (London, 03 November 2015).   
<[https://www.theguardian.com/media/2015/nov/03/zimbabwean-journalists-](https://www.theguardian.com/media/2015/nov/03/zimbabwean-journalists-arrested-for-linking-police-to-poaching)   
[arrested-for-linking-police-to-poaching](https://www.theguardian.com/media/2015/nov/03/zimbabwean-journalists-arrested-for-linking-police-to-poaching) > accessed 12 August 2018.

27 See, for instance, the 2013-2018 Policy blueprints, the Zimbabwe Agenda for   
Sustainable Socio-Economic Transformation (ZIMASSET), Economic Blueprint,   
2013-2017 (*Government Printers*, Harare, 2013).

28 Access to Information and Protection of Privacy Act [*Chapter 10:27*]   
29 Environmental Management Act [*Chapter 20:27*]

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The Constitution, as the supreme law in Zimbabwe, provides for both environmental rights and the right of public bodies to access information. The Constitution also includes the right of the people to measures that promote conservation, as follows:

Every person has the right to have the environment protected   
for the benefit of present and future generations through   
reasonable legislative and other measures that promote   
conservation.30

The constitutional right of access to information tallies with the constitutional right to conservation promotion by the state. In order for society to enjoy the constitutional rights to wildlife conservation, all persons and groups must be able to access and receive reports from State and wildlife public bodies on how the environment is being progressively conserved. This provision makes an overview of the law on access to information necessary. On the right of access to information, the Constitution of Zimbabwe provides as follows:

Every person, including the Zimbabwean media, has the right of   
access to any information held by any person, including the State,   
in so far as the information is required for the exercise or   
protection of a right.31

Provisions in the Environmental Management Act (EMA) strengthen the constitutional right. EMA provisions outline the principles of environmental management in Zimbabwe and the critical provision on access to environmental information in Section 4 (1) (b) states that:

Every person shall have a right to access to environmental   
information, and protect the environment for the benefit of   
present and future generations and to participate in the   
implementation of the promulgation of reasonable legislative,   
policy and other measures that prevent pollution and   
environmental degradation; and secure ecologically sustainable   
management and use of natural resources while promoting   
justifiable economic and social development.32

Thus, access to environmental information is an absolute right and explicitly obliges the State to facilitate such access, in this case, to

30 Constitution of Zimbabwe (n 6) s 73 (1) (b) (ii) 31 Ibid s 62 (2)

32 Environmental Management Act s 4 (1) (b)

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information held by public bodies involved in wildlife conservation and governance. This access should be easily implemented by directives given to public bodies and agencies in the environmental and wildlife conservation and governance sectors.

*3.2 State Obligations under International Law*

Zimbabwe has several international commitments in the area of access to information, environmental justice and wildlife conservation. Both soft and hard laws that have been ratified should provide environmental practitioners and the public with the right to access to information on environmental matters within the wildlife sector. These include the CITES Convention33, the Banjul Charter and the Declaration of Principles on Freedom of Expression in Africa.

Zimbabwe is also a signatory to the SADC Protocol on Wildlife Conservation and Law Enforcement. The protocol was adopted in 1999, and it obliges SADC member states to set up a SADC-wide wildlife management database. On information sharing, the Protocol directs that:

The States Parties shall establish a regional database on the   
status and management of wildlife. The regional database shall   
comprise data on all wildlife resources within the Region; and   
be accessible to States Parties and the general public.34

While information on the wildlife species of Southern Africa can be gleaned from a visit to the website of various national parks, no comprehensive and updated database outlines verifiable estimates of wildlife populations and other vital statistics such as tracking changes in the populace of the various species. Neither is information on decision making behind export of live animals available whilst this is pertinent mainly to the rural communities living within the boundaries of various national parks, sanctuaries and game reserves.

4. LEGAL GAPS AND COMPARATIVE ANALYSIS OF LEGISLATION

Despite its status as signatory to various international conventions, Zimbabwe is not in full compliance with its obligations. The right of

33 Zimbabwe joined the CITES Convention on 19 May 1981, and it entered into   
force by accession on 23 June 1981. The CITES Convention obliges Parties to   
enable public access to periodic reports prepared by such Party through CITES   
(n 12) art VIII (8).

34 SADC Protocol on Wildlife Conservation and Law Enforcement (n 14) art 8 (1).

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access to information is still restricted from members of the public civil society, communities and the media and this hinders public participation especially for poor communities living in wildlife- populated areas. Cirelli and Morgera argue that:

Public participation in decision-making and planning, as well as   
access to justice, are significant contributing factors in ensuring   
that governance of wildlife resources is transparent, authorities   
are accountable, and that the diverse interests of society — in   
particular, those of the poor, other disadvantaged groups, and   
of local and indigenous communities — are duly taken into   
account.35

As a member of the African Union and signatory to the AU Declaration of Principles on Freedom of Expression in Africaa, the public, communities and civil society are entitled to share information relating to wildlife, and environmental conservation. The Declaration provides protection against sanction for people who share information regarding potential environmental threats. The specific section states that:

[N]o one shall be subject to any sanction for releasing in good   
faith information on wrongdoing, or that which would disclose a   
serious threat to health, safety or the environment save where   
the imposition of sanctions serves a legitimate interest and is   
necessary in a democratic society.36

This is an extension of the Banjul Charter which provides for the right for all people to receive information as well as to ‘express and disseminate’ opinions.37

In Zimbabwe, in 2015, following the cyanide poisoning of around sixty elephants by poachers, investigative journalists reported suspected links between the poachers, an international ivory syndicate and top government officials in the Zimbabwe Republic Police. The journalists were arrested for ‘publishing falsehoods’38 and in 2017, two years later, their cases were still before the courts. The persecution of

35 Cirelli MT and Morgera E “Wildlife Law and the Legal Empowerment of the   
poor in Sub-Saharan Africa” in 2009 FAO Legal Paper Online #77 26

36 Declaration of Principles on Freedom of Expression in Africa (n 16) art IV (2) 37 Banjul Charter (n 15) art 9 (1) and (2)

38 “Zimbabwe journalists arrested for linking police with elephant poisonings” in

*The Guardian* (London, 03 November 2015) < [https://www.theguardian.com/](https://www.theguardian.com/media/2015/nov/03/zimbabwean-journalists-arrested-for-linking-police-to-poaching)   
[media/2015/nov/03/zimbabwean-journalists-arrested-for-linking-police-to-](https://www.theguardian.com/media/2015/nov/03/zimbabwean-journalists-arrested-for-linking-police-to-poaching)   
[poaching](https://www.theguardian.com/media/2015/nov/03/zimbabwean-journalists-arrested-for-linking-police-to-poaching)> accessed 09 September 2018.

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information-sharing media, civil society, individuals and activists in Zimbabwe is part of a more extensive and systematic clampdown on freedom of information in the broader natural resources sector and in the ultra-sensitive diamond mining sector39.

Public bodies and the State must carry out the proactive duty of helping stakeholders to access to information on environmental justice. While the SADC Protocol on Wildlife Conservation and Law Enforcement states the need for proactive disclosure of wildlife information through the mutual sharing of such information amongst member states and with the general public, the protocol does not encourage or oblige member states to educate the public on ways of obtaining access wildlife information. In contrast, the UNECE40 Aarhus Convention41 provides that:

Each Party shall promote environmental education and   
environmental awareness among the public, especially on how   
to obtain access to information, to participate in decision-making   
and to obtain access to justice in environmental matters.42

Hence it is imperative that the SADC region comes up with measures to promote the education of environmentally affected communities and stakeholders to obtain access to information on wildlife conservation and decision making. These means may include training on accessing and interpreting data from the internet, making applications for wildlife reports from government departments, safari operators as well as from reputable research institutions, local government structures and civil society.

5. CONCLUSIONS AND WAY FORWARD

*5.1. Effective Utilisation of the Legal Framework*

The rights provided by the laws on access to environmental information and wildlife conservation will be better achieved when practitioners and the public can link up various tactics such as litigation, research, lobby and advocacy with clear campaigns and calls. These tactics can

39 Human Rights Watch, Diamonds in the Rough: Human Rights Abuses in the Marange Diamond Fields of Zimbabwe (Human Rights Watch, New York, 2009).

40 United Nations Economic Commission for Europe.

41 Convention on Access to Information, Public Participation in Decision-Making

and Access to Justice in Environmental Matters (adopted 25 June 1998, entered   
into force 30 October 2001) (Aarhus Convention)

42 Ibid Art 3 (3).

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effect the implementation of the constitutional and human right to access information. Professor Welshman Ncube and others state that the link between the various tactics is efficient:

Effective environmental protection and development not only   
requires guaranteed rights to access to information…and   
democratic ideals in an open, free and critical society, but also   
requires a strong, vibrant, active, and above all, vigilant civil   
society … imbued with a strong culture of responsibility,   
accountability and transparency in relation to governance in   
general.43

Interested stakeholders must utilise effectively the existing legal framework for access to information in the environmental justice and wildlife conservation movement. As the 2013 Constitution of Zimbabwe provides for constitutional environmental and information rights, environmental groups and stakeholders may also utilise the courts in cases where environmental decisions and information is not made reasonably available. The concept of *habeas data*44 could be utilised to ascertain the extent; scientific justifications and political, personal or political motives behind wildlife decisions such as export of baby elephants.

Existing legislation, for instance, the country’s notorious AIPPA, which has been viewed with hostility by various segments of the Zimbabwe human and media rights sectors since the law’s inception in 2002, offers opportunities for the public and environmental rights practitioners. An interesting section of the AIPPA specifies that whenever there is policy advice on the state of the environment, such advice should be disclosed to members of the public. Hence while part of the Act gives information exemptions and detects that “[t]he head of a public body may not disclose to an applicant information relating to advice or recommendations given to the President, a Cabinet Minister or a public body,”45 the Act goes on to make a proviso on environmental matters. The Act states that such exemption does not apply to, among a few other exclusions,

43 Ncube W “Towards the Constitutional Protection of Environmental Rights in   
Zimbabwe?” in 1996 Vol 13 *Zimbabwe Law Review* 97, 122

44 Brunch et al (n 17) 182. This is a “mechanism for obtaining access to   
constitutionally guaranteed information which has been utilised with success   
in Latin America

45 Access to Information and Protection of Privacy Act (n 26) sec 15 (1)

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“information relating to the state of the environment.”46 Therefore the AIPPA also arguably provides an opportunity for the public and environmental practitioners to seek information on otherwise inaccessible policy advice concerning the wildlife sector. The information may be from the safari industry or pro-hunting research institutions or any another sector that may not be expected to sympathise with environmental justice or proper wildlife conservation.

*5.2. Proactive Disclosure by Public Bodies*

Access to information in the environmental sector depends on political will and the administrative framework.47 Currently, environmental and wildlife information is hardly available, even on official websites of environmental and wildlife agencies in Zimbabwe. Specific public bodies dealing with environmental information such as the Zimbabwe Parks and Wildlife Management Authority, EMA and the Ministry of Tourism, Environment and Hospitality must ensure that reports and information on wildlife trade, license and population statistics are readily available to the public in electronic form.

By comparison, the EU is relatively up to date on this requirement. Directives48 of the European Parliament and Council directs member states to ensure that “environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunication networks”49 and furthermore directs the regular update of information. The directive was timeously domesticated by member states, for instance in the Republic of Ireland through an updated statutory instrument.50 Hence the commitment of European member states towards access to information and environmental justice can serve as a preliminary guide for access to information in Zimbabwe and Southern Africa.

46 Ibid s 15 (2)

47 See: Taylor J and Eleanor B “How do public bodies respond to freedom of

information legislation? Administration, modernisation and democratisation”   
in 2010 Vol 38 No 1 *Policy and Politics* 119

48 Directive 2003/4/EC of the European Parliament and of the Council of 28 January   
2003 on public access to environmental information and repealing Council   
Directive 90/313/EEC (14 February 2003) L 41/26 Official Journal of the   
European Union.

49 Ibid art 7 (1)

50 European Communities (Access to Information on the Environment)

(Amendment) Regulations 2014 [S.I. No. 615 of 2014]

51 Alexander J and McGregor, J “Wildlife and Politics: CAMPFIRE in Zimbabwe” in

2000 Vol 31 *Development and Change* 605, 624.

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*5.3. Transparency and Informed Public Participation*

Enabling transparency, access to information and encouraging informed public participation in the wildlife sector is an advantageous position for society and the environment. Public participation is especially critical in strengthening the rights of people to participate in general governance and policy-making m processes.

In the past, Zimbabwe’s wildlife and community initiative the Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) was introduced in ways regarded as lacking transparency by communities in wildlife-rich areas, and that resulted in a massive protest against the policy initiative:

Distrust and fear have been among the most important products   
of the Gwampa CAMPFIRE initiative… A development project   
with democratic potential had become the focus of resistance   
and fear. An intervention promising a restoration of   
environmental rights threatened eviction from the land.51

In that regard, it is imperative for government officials to lift the current secrecy around access to information on environmental justice and wildlife conservation to benefit democracy and promote trust in the space of wildlife conservation. Legal scholars have additionally observed that most governments have “the tendency of many states in Africa to treat natural resources as proprietary owners to the exclusion of their people who remain perpetually impoverished in the midst of plenty.”52 This is a retrogressive mindset that will not result in any tangible gains for policymakers in Zimbabwe, Africa or worldwide. Secrecy and a patronising approach to environmental and wildlife information must be strongly discouraged.

5.4. CONCLUSION

In conclusion, environmental information laws in Zimbabwe based on the various pieces of existing legislation are comprehensive enough to provide a substantive legal right to access information on wildlife conservation, sales and governance. The main issues and impediments rest with the policy framework and the accompanying lack of political will. Concrete steps for the achievement of adequate access to

52 Murombo T “The Utility of Environmental Rights to sustainable development in   
Zimbabwe: A contribution to the Constitutional Reform Debate” in 2011 Vol 11   
*African Human Rights Law Journal* 120, 132.

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environmental in the wildlife sector of Zimbabwe requires measures that include effective utilisation of the new municipal and international legal frameworks; proactive disclosure by public bodies in the environmental and wildlife sectors; improved transparency and an informed and committed public, practitioners and judiciary. The implementation of the right to access environmental information will enable public participation in law and public policy decision making processes. The State should abide by its duties through international and regional treaties on access to information and environmental rights regarding the strategic and ecologically significant wildlife sector. This entails proactive measures by environmental and wildlife conservation bodies and legal practitioners to enable the public with the right of access to verifiable reports and statistics on wildlife.

THE RULES OF CIVIL PROCEDURE IN THE MAGISTRATES   
COURTS OF ZIMBABWE: WHEN RULES OF CIVIL PROCEDURE BECOME AN ENEMY OF JUSTICE TO SELF-ACTORS

RODGERS MATSIKIDZE1

ABSTRACT

*Access to justice is central to justice delivery in any democratic* *society. Most initiatives in Zimbabwe on access to justice are focused* *on the substantive law. Recently an attempt was made to reform* *rules of civil procedure but it appeared the exercise was more of gap* *filling than a real reform. There was no specific goal and the method* *was not inclusive particularly of the most affected litigant-the self-* *actor. This paper proposes a number of approaches that can be utilised* *to ensure that access to the court is enhanced. The main approach* *being advanced is simplification of rules of civil procedure. Once* *litigants are able to bring their matters to the courts then delivery* *of justice is enhanced.*

*Key Words: Access to justice; Rules of civil procedure; Self-actor;* *Simplification*

INTRODUCTION

This article2 discloses an adverse picture on access to justice by the self-actors in the Magistrates Court of Zimbabwe. The statistics of self-actors failing to access justice shows the long road Zimbabwe as a country needs to navigate before justice is for all.3 The self-actors’ journey to access justice seems to be a long arduous one and points

1. Rodgers Matsikidze is a PhD student with the University of Witswatersrand   
University of Johannesburg, Director-Legal Aid and Attachment Office &   
Lecturer- Civil Procedure and Labour Law, University of Zimbabwe and a   
practising legal practitioner at Matsikidze and Mucheche Legal [Practitioners:](http://Practitioners:www.mmlawchambers.co.zw)   
[www.mmlawchambers.co.zw](http://Practitioners:www.mmlawchambers.co.zw). He is also a Trustee of the Law Society of   
Zimbabwe, Councillor, Council for Legal Education in Zimbabwe, and board   
member for several organisations including Community Working Group on Health.   
(CWGH).

2. The article is based on my MPhil thesis: Rodgers Matsikidze, *The Civil Procedure*   
*in the Magistrates Court of Zimbabwe. A denial of justice to self-actors?*   
Unpublished M.Phil thesis, University of Zimbabwe, 2014,140.

3. Ibid,140.

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to the need for substantial reform of the civil procedure in the Magistrate Court. A number of scholars have written extensively as regards to the possible solutions to the problem of access to justice through the courts. Most of these scholars are Western and North American scholars and they contextualize the access to justice problem within the European context.4

In the European and North American context, the thrust is on placing the responsibility of making sure that everyone accesses justice on the state. These authors look at the problem of access to justice from different perspectives, hence their solutions are modelled by their perspectives many of which are resource inclined. 5 A number of scholars believe that it is the State that should provide legal aid to all those who cannot afford lawyers. However, in Zimbabwe, the provision of legal aid to litigants is very limited particularly in civil litigation. However, in well-resourced jurisdictions, provision of legal aid provides enhances access to justice.6 There are serious problems in Zimbabwe like lack of adequate water and food which although at par with the right of access to justice tend to get more focus as opposed to the right of access to justice. In other words, the problem is not just the procedures in the courts but poverty is also a huge and decisive factor, in self-actors accessing justice. In my thesis it was established that access to justice is broader than the question of legal aid or legal representation.7 Access to justice examines the issues such as the number of courts, or proximity to litigants and the substantive law, i.e. to what extent does the substantive law protect self-actors’ rights.8 Access to justice further examines the question of procedural access which is the focus of this paper. In this paper it is argued that procedural access ought not to be difficult for self-actors to follow. It

4. See Lord Woolf, “Report on Civil Procedure Reform in UK”, 1994, Also Sir Rupert   
Jackson’s Report on UK Civil Procedure, 2013

5. See Chan Gary K.Y, “The Right to Access to Justice, Judicial Discourse in   
Singapore and Malaysia*”, Asian Journal of Comparative Law*, Vol 2, Issue 1,   
Berkeley, 2007, Singapore Management University.

6. See Buhai Sande L, “Access to Justice for Unrepresented Litigants: A comparative   
Perspective”, *Loyola of Los Angeles Law Review*, 42, 2009.

7. See Rodgers Matsikidze, *The Civil Procedure in the Magistrates Court of*   
*Zimbabwe. A denial of justice to self-actors?* Unpublished M.Phil thesis,   
University of Zimbabwe, 2014

8. Goldschmidt Jona, Barry Mahomey, Harvey Solomon and Joan Green, *Meeting*   
*the Challenge of Pro-se Litigation: A Report and Guidebook for Judges and*   
*Court Managers*, American Judicature Surly, USA, 1998.

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demystifies what seems to be a mystery to a number of scholars who want to define access to justice in the context of provision of legal representation. This paper argues that it is possible to enhance access by simplifying the rules of the Magistrates Court of Zimbabwe and the forms that have to be used by litigants.

The theoretical framework providing guidelines for enhancing procedural access to justice is already well established. In England, for example, there is a framework of eight “basic principles which should be met by a civil justice system so that it ensures access to justice.” These were identified by Lord Woolf in his inquiry report on Access to Justice in the United Kingdom.9 The eight basic principles are as follows:-

(1) It should be just in the results it delivers.

(2) It should be fair and seen to be so by ensuring that litigants

have an equal opportunity, regardless of their resources,   
to assert or defend their legal rights; providing every   
litigant with an adequate opportunity to state his own case   
and answer his opponent’s, and treating like cases alike.

3) Procedures and costs should be proportionate to the nature   
of the issues involved.

(4) It should deal with cases with reasonable speed.   
(5) It should be understandable to those who use it.   
QUOTE IND(6) It should be responsive to the needs of those

who use it.

QUOTE IND(7) It should provide as much certainty as the nature

of particular cases allow.

QUOTE IND(8) It should be effective: adequately resourced and

organised so as to give effect to the above principles. 10

The above principles anchors the proposed solutions to the reform of

the rules of civil procedure in Zimbabwe. I therefore suggest a number of approaches and solutions to the growing woes of self-actors and these are extensively discussed herein.

HOMEGROWN INITIATIVES: CONTEXTUALIZING THE REFORM AGENDA

There is no doubt that the initiatives to improve access to justice in Zimbabwe should be homegrown. The initiatives should be linked to

9. Lord Woolf, Access to Justice, Interim Report, June 1995 and also Access to   
Justice, July 1996.

10. Lord Woolf, Access to Justice Final Report, July,1996.

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the socio-economic context. In other words, they should relate to the self-actors’ experiences in the Zimbabwean courts.11 The majority of self-actors lack knowledge of substantive and procedural law.12 Hence any solution should be aimed at ensuring that the self-actors fully understand the applicable law of the day and the procedures thereof.

The majority of self-actors have no money to hire legal practitioners. This is mainly due to the economic meltdown in the past years that has reduced most professionals to pauper levels let alone the middle income and low-level income employees. In other words, the means to hire legal practitioners are not there as available resources are put to immediate needs like shelter and food.13Self-actors are found not only in the rural areas but also in the urban areas.14Although having formal education may often assist, the problem of self-actors is not that they are uneducated but that they are not learned in legal issues.15

Self-actors, when in court have no one to assist them on procedures that they may not understand.16Having identified these aspects as key problems, it follows that the solutions should be related to the problems.

*Provision Of Legal Aid*

While legal aid plays a fundamental role in enhancing justice in Western countries like USA, Canada and United Kingdom in Zimbabwe it will hardly be a major solution in the current. Hence legal aid will remain a limited avenue to improve access to justice. Currently in Zimbabwe a few organizations are focusing on providing legal aid on civil matters.

Certainly, legal aid is not an immediate solution to the self-actors’ problems due to lack of adequate funding. Moreover, legal aid would

11. See Rodgers Matsikidze, The Civil Procedure in the Magistrates Court of   
Zimbabwe. A denial of justice to self-actors? Unpublished M.phil thesis,   
University of Zimbabwe, 2014,p105

12. Ibid p106.

13. See also UNICEF ZIMBABWE REPORT, Beyond Income: Gendered Well-Being and

Poverty in Zimbabwe, <https://www.uncef.org> accessed on 12 February 2017   
and Poverty and Poverty Datum Line Analysis in Zimbabwe 2011/12,   
[www.zimstat.co.zw](http://www.zimstat.co.zw)

14. Ibid p89 note 11.

15. Ibid p89.

16. See Galanter M, “Why the Haves” come out ahead: Speculation on the limits of

legal challenge”, Law and Society vol 9,No 1,1974.

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not address the problems of those litigants who, even though they have resources, choose to appear in court on their own. Legal aid does not address the problem of complexity of the court procedures which if address may increase access to court. Hence while it is accepted that legal aid is a possible avenue to assist self-actors, its success would depend on availability of funding.

*Introducing Legal Literacy for All*

In the Canadian province of Saskatchewan, a committee on civil law reform recommended a wide spectrum of level of education and literacy amongst unrepresented litigants, as well as a diverse ability to express oneself in a public forum.17 This initiative may be a route to go in Zimbabwe. Zimbabwe might need to introduce law as one of the subjects at Ordinary Level and Advanced Level. The impact may not be felt immediately, but in the long run those with legal background may have a better understanding of the law. However, to cater for the generality of populace, community libraries may be needed to house legal literature. Road shows in rural and urban areas by the Ministry of Justice showcasing civil procedure might help to demystify some of the key procedural aspects. However, this does not bring a direct reform to the civil procedure but it will seek to increase the legal knowledge of potential litigants. While this approach may be a long term still it will be a move in the right direction.

INTRODUCING AUDIO AND VIDEO MANUALS AS INSTRUCTORS TO SELF-ACTORS IN COURT In addition, video and audio media in vernacular languages on substantive and procedural law issues may be developed and sold in shops. If the expense is huge, the other route will be to avail such media for free at every court and public hall. These will be automatically played continuously to allow those, who would be litigants to listen to or watch them. Those tapes will be playing as manual tapes. The video and audio media will take potential litigants through every step of procedure recorded. However, the use of video and audio media to educate potential litigants would only be effective if the rules of court procedure are simplified, and it also means more resources will be needed to fund this kind of a project.

17. See Law Society of Upper Canada report of 2008, [www.Isuc.on.ca](http://www.Isuc.on.ca) accessed 10   
April 2011.

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*Introducing Alternative Dispute Resolution Services*

There will be need to establish arbitration and conciliation centres like the current set up being used in dealing with labour disputes in Zimbabwe.18 In conciliation there are no rules of procedure save for ground rules to govern the conduct of the parties.19 These fora will help by providing a unique environment in which the self-actors can easily express themselves. The conciliators or mediators should be duly trained lawyers who can advise parties on the position of the law when required. Arbitration, unlike conciliation or mediation, involves a third party who produces a binding decision on all parties. The advantage of arbitration is that parties agree to their own procedure. In other words, parties agree to what they understand. These initiatives can be useful but they are limited to specific types of dispute i.e. family law. In complex civil cases, they may not serve the purpose.

*Representation by a Pro Bono Lawyer or Trained Paralegal*

There is need to extend pro bono services to civil cases as well. The challenge with this approach is that such an initiative may meet resistance with the lawyers in commercial practice.20 This is so because of the magnitude of self-actors’ cases in Zimbabwe, as it may mean that every lawyer would be handling a pro bono case each month. Morally it means the lawyer in question would be shouldering the responsibility of the government by bearing the *in forma pauperis* (pro bono) costs.21 This may create resentment of *in forma pauperis* cases by lawyers and naturally services of a disgruntled legal practitioner may not be the best to the client. The paralegal thrust can be useful although in essence use of paralegal creates problems of demarcation of representation *vis a vis* the role of a legal practitioner. Moreso still there are some cases were paralegal may still not adequately represent the self-actor to the same competence of a trained lawyer.

*Use of Customary Fora for Dispute Resolution*

Customary fora may be the way to resolve the challenge of complexity of procedures faced by self-actors. There are a number of fora that

18. See Labour Act 28.01 sections 93 and 98.

19. See Labour (Settlements of Disputes) Regulations, SI 217 of 2003

20. Maru Vivek, Between Law and Society-Paralegals and Provision of Primary justice

Services in Sierra Leone, Open Society Justice Initiative, New York, 2006.   
21. See ibid, 2014 note 11.

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were used to solve disputes before 1890 when, Zimbabwe resorted to the Roman-Dutch legal system and imported procedure. The customary fora started from the level of the family head, *dare,*22village head to the chief/paramount chief or king. This limitation arises from the fact that many of the chiefs are not appointed on merit or academic achievement but in terms of inheritance laws of a particular clan. In addition, there is a danger of cultural biases’ due to them applying cultural practices that are gender insensitive.

In addition, chiefs and headmen are concentrated in rural areas.23 This leaves out the urban population who are affected by the general law. The major drawback of using customary fora is that the general law (i.e. common law and statutory law) is alien to the customary fora. The outcome of the research shows that the majority of the cases brought to court are under the auspices of general law.

EXPANSION OF THE ZIMBABWE WOMEN LAWYERS’ ASSOCIATION (ZWLA)   
EMPOWERMENT PROGRAMME

The ZWLA empowerment model empowers women through training of women self-actors’ litigants on drafting their court papers properly. The programme largely caters for family law matters and focuses on women self- actors. The women come for advice and are grouped into various groups considering the nature of their cases, i.e. those with maintenance cases are grouped together. If particular groups reach certain numbers, they are given a day on which they should come and see a qualified lawyer. On the day in question they will be trained on how to complete maintenance forms or draft claims. They will be further taught on filing of the papers and presentation of their cases in Court.

The current limitation is that the empowerment programme is limited to women litigants with maintenance cases. In the area of maintenance cases the procedures are already simplified. Hence the procedure in any maintenance case is standardized and parties only fill in the details. This initiative needs to be expanded, that is by further identifying other areas of civil litigation that may require forms that can be standardised. A good example would be to standardize the eviction

22. Dare means family council of elders.

23. Nyamusi-Musembi Celestine, The Urban Poor, Problems of Access to Human

Rights: Traditional justice institutions-Can they be more effective? Institute of   
Development Studies, University of Sussex, September 2002.

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process. A claim form can be designed, as well as defence form, etc. This can also be applied to guardianship and custody applications. The forms should then identify all possible annexures that may be required to support the claim or defence. Like what ZWLA does, at every court there will be then a paralegal or a lawyer who then teaches litigants with similar cases on what to do, how to fill in the forms. These forms can be drafted for use up to the execution stage.

Admittedly, this initiative may not be able to take all kinds of cases or address the self-actors’ challenges in full although it may eliminate a number of procedural problems such as lack of skill in drafting a claim or a defence or failure to use appropriate forms in terms of the Court rules. However, an evaluation of ZWLA’s empowerment model noted that, though women were taught the stages in the court procedures, they still face procedural hurdles and for that reason it is submitted that the focus should be on making the court procedures more accessible. There is potential to revolutionize the Magistrates Court through this initiative regardless of its limitations. It is more of an equivalent to the self – help scheme in America but at a cheaper level. The self-actors with similar cases would be coming to court at specified days of the week for assistance.

*Redefining the Role of the Magistrate*

In Zimbabwe, the role of the Magistrate in a civil case is that of a referee or an umpire. Our judicial system is adversarial in nature and does not allow the Magistrate to descend into the arena. Hence the Magistrate, even if aware that there is certain evidence which the self-actor ought to furnish, will just proceed on the (inadequate) evidence without informing the self-actor and may dismiss the claim or defence on the grounds of inadequate evidence. However, in light of the quest for justice, there is need to give wider powers to a Magistrate to ascertain the real issues and evidence required in any matter.24 Through court observations and in-depth interviews with some Magistrates it was clear that some cases are lost by self-actors on purely technical issues and failure to provide the evidence that is required.

Magistrates should be allowed even before trial or hearing to call parties in chambers and hear them informally. In those meetings the

24. Ibid p152-3 note 11.

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Magistrate should be allowed to point out the problems/deficiencies associated with the plaintiff’s claim or the defendant’s defence. In that respect the case is decided on merits rather than procedural irregularity. Hence there is need to reform the role of the magistrate from being a mere referee to being a more active participant. This inquisitorial approach would help self-actors in accessing justice.

*Simplification, Orality and Domestication of the Procedure: The* *Immediate Solution to Woes of Self-actors*

This initiative is the most convincing and all encompassing. This is what scholars like Cappelletti call for.25 The current civil procedure is legalistic and complicated. The procedure does not have any provisions for informality. Simplification is cheap and can be efficiently dealt with.

The first step in simplifying the civil procedure in the Magistrates Court would be to completely overhaul the rules of the Court in terms of content and language.

The Rules should be changed in terms of language by introducing plain English and vernacular languages. In South Africa their constitution is in vernacular language, hence there is nothing peculiar in the use of the vernacular languages in courts. In fact, the rules of court are in a vernacular of other nationals i.e. the English. The language barrier has been the epitome of many litigants’ problems. If one asks, “What is your cause of action?”, in English, it may be difficult for a self- actor to appreciate but if put in a vernacular language, obviously the self-actor would appreciate the meaning. Plain English removes some legalese and Latin words, which have no relevance in the delivery of justice.

Many self-actors support the use of simplified English or local languages. In terms of content, the Rules should at each and every stage have simplified content and forms. This entails removal of a number of unnecessary procedures like detailed summons.

The Ministry of Justice and Legal Affairs in conjunction with the Judicial Service Commission should come up with a team of civil procedure

25. Cappelletti M & Garth B, ‘Access to Justice: The Worldwide Movement to Make   
Rights Effective, A General Report’ in Access to Justice, vol 1, A World Survey   
Book 1, edited by Cappelletti and Garth B, 1-124, Alphen and Rijn Sijthoff and   
Noordhoff,1978.

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law experts to spearhead a programme of procedural law and other reforms that can help self-actors to end the woes they currently face.

The following reforms are recommended:

*Creating A Clients’ Services Office at Each Magistrates Court*

The Clients’ Service Office (CSO) can be a useful tool and office to the self-actor and to the state. Instead of Magistrates being burdened with improper actions, the CSO becomes the first screening port of call. This office can be manned by a paralegal, or an experienced clerk or a lawyer. The duties of the officer manning the CSO would be to cater for all self-actors who need general guidance as to what should be done, in particular the nature of cases that can be brought in the courts. The officer can even peruse the court papers the self- actors would want to file and advise accordingly. The officer would also be the custodian of the court manual book to be created. In fact, he or she would be an equivalent of a tour guide. It is also high time our courts provide for a client services department.

*Developing a Manual Tool for Self-actors*

There should be a manual book for self-actors and would be users of the civil procedure in the Magistrates Court. This manual book should be like any other manual book and translated in all languages. The manual book should cover the following areas: -

*i. The Court itself and its officials*

Under this heading the manual should provide the structure of the Court and key officers, — clerk’s office, interpreters, Magistrate’s office, Messengers of Court’s office and what they do. This will naturally enable the self-actor to have a quick grasp of the various offices they would be dealing with on a number of aspects. The manual would be a one stop tour guide. This manual should be available in the Clients’ Services Office. It should also cover the areas listed below.

*ii The jurisdiction of the court*

In the manual book for self-actors there ought to be explanations as regards to the jurisdiction of the court. In particular, what is meant by jurisdiction, monetary or otherwise. The manual should give examples of cases that ought to be brought before the Magistrates Court.

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*iii. The drafting of pleadings/claims and defences*

The manual should also have a provision for examples of common claims and how they are put across in court, likewise there ought to be examples as regards to possible defenses that can be brought in court. There could also be cartoons to illustrate the same, in graphical terms.

*iv. Summary of key procedures*

The manual should encompass summaries of key procedures of stages in an action and in an application. These key steps should be explained in simple terms and also the rationale to have such should be provided. This would help the self-actors to know what ought to be done next instead of just abandoning their cases. This answers a finding that shows that some of the cases were abandoned by self-actors because they did not know what to do next.

*v. Follow up procedures and hints*

The manual should also inform the self-actors how they should follow up their cases. In addition, it should provide for the frequencies of follow ups on cases. In addition, the manual should provide for hints on issues to watch out if one has commenced proceedings in the court. Hints could be on common mistakes self-actors often make.

*vi. The enforcement mechanisms*

The manual should also provide information on how a victorious party can enforce a judgment including the practical stages to be followed and samples of documents to be used. The manual should have the contact and offices details of the messenger of court.

*vii. The appeal and review procedures*

The manual ought to provide details on appeal and review procedures. In particular, it should offer information on how appeals and applications for review should be done and to which court. Obviously at this juncture it may be advisable to then inform the self-actors that they may require the services of legal practitioners to take their cases on appeal or review in the High Court.

Critics of the proposed manual could argue that it would give self- actors an unfair advantage over their represented counterparts who may not receive similar detailed information from their lawyers. However, lawyers [Lawyers spent four years studying those Rules]

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already have an upper hand, therefore the self-actors would not have any advantage over others. In fact, it would be a significant step towards creating a level playing field. Moreover, the self-actors would not be assisted to prosecute their case or draft documents specifically. They will be given general directions on what ought to be done. Such assistance would definitely not be equivalent to legal representation.

In real terms it reduces the burden on the courts to deal with defective papers. Hence costs of running the court are naturally reduced. The costs are lessened even to the self-actors as they would be able to successfully proceed without legal representation.

*Abridged and Simplified Version of Action Procedure*

The simplified version of the procedure ought to have only key and basic stages like the names of the parties, their addresses, the claim section where the claim would be filled in, the reasons for the claim. In addition, the summons should be clear on what relief should be granted. This simplified summons is easy to complete because it only provides basic information to be filled in. A simplified summons will be easy to complete and should be accompanied by explanatory notes, with examples on expected answers. This is unlike the current summons that provides for a number of things to be completed without guidance. There particulars of claim would be drafted as per the Plaintiff’s understanding as opposed to being guided. In addition the current summons format is worded in legal language and one problem observed is the complex legal terminology which is alien to users.26

Each and every stage of the procedure should then have those kinds of forms and simplified content. In other words, this initiative does not take away the need for Rules. Rules should be maintained but subject to the above modifications. Such a reform will not be expensive but may take some time to be fully implemented. In addition, at the courts, the clerk’s office should be manned by a lawyer whose role is to vet the completed summons and offer advice strictly on problematic procedural aspects. The procedural stages in the Magistrates court should be trimmed to only the following: -

a) General issues stage   
b) Summons stage

26. See Order 8 of the Magistrates Court (Civil) Rules,1980

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c) Defence or acceptance of claim stage;

d) Elaboration of claims and defence stage;

e) Narrowing of issues stage before a Magistrate stage;

f) Trial or hearing stage;

g) Enforcement of judgment stage.

These procedures can be enshrined in only seven main rules of the court.

*The Appearance to Defend*

On this one I believe the current title for this stage, ‘Notice of Appearance to Defend’ is rather misleading. It should simply be termed ’Notice of Intention to Defend.’

This simplified version is quite clear and should then be sold in shops or at Clients’ Services Office at cost recovery price. The self-actor who is a defendant would only be required to enter few details on dotted lines. This would be unlike the current Notice of Appearance to Defend which contains legalese and sometimes is assumed to an end itself by some self-actors.27

*Introduction of Stage Called Plaintiff’s Request for Defence*

After the appearance to defend there should be a stage called Plaintiff’s request for Defence. This would be different from the current stage were after an appearance to defend a request for further particulars may be made or for default judgment.28 Again, the new version would remove the overloaded legalese.

This kind of a reply is straight forward and helps to remove the discovery stage29. If the defendant wishes to further request for facts and documents, he should then request for such under a simpler document titled Request for supporting documents and facts. This stage removes a number of complicated stages like request for further particulars and motion to strike out30.Once this has been done, the plaintiff is obliged to furnish all documents and other exhibits to be relied upon to the defendant. All essential facts should be furnished

27. Ibid Order 10

28. ibid Order 11 and 12   
29. ibid Order 18

30. ibid Order 12, 14, and 16

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as well. Hence no need for the discovery stage. The summons should have all documents sought to be relied upon attached to it.31After this has been done the parties should be given ten days to file any additional documents of facts they think are essential to their case. After this stage the clerk then informs the parties to attend the Pre – Trial Meeting with the Magistrate. It should be the responsibility of the Clerk of Court to call parties for pre-trial meetings. Once they are called the parties should appear before the Magistrate for the pre – trial meeting. This removes the obligation of the parties to apply for a pre= trial conference and serve time and costs of the proceedings unlike in the current form where there are many stages in the civil procedure rules.32

PRE-TRIAL MEETING

The pre-trial meeting should allow the Magistrate to conciliate or arbitrate where possible and advise the parties of possible solutions. The Magistrate should be allowed to record a settlement, in the event of agreement, that is binding on all parties and capable of enforcement. In the event that parties do not settle, the presiding Magistrate should in consultation with parties draft a document called Trial Summary. (See Appendix 10).

*Trial Stage*

During the trial stage, the procedures should also be simplified. Parties should be allowed to ask questions in vernacular and also the Magistrate’s role should not be limited to umpire-ship but the magistrate should have an active role of trying to ascertain the truth. Indulgencies, postponements and introduction of new evidence and material should be allowable if there is a genuine reason. At the trial the Magistrate should first explain to the parties what they are expected to do and the burden of proof on issues and constantly guide them during trial.

*Enforcement Stage*

The enforcement stage should be made easier. The Messenger of Court should be allowed to interview successful parties and inform them of

31. Ibid Order 18 32. Ibid Order 19

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the forms to be completed. Furthermore, the fees for enforcement should be reasonable or self-actors should be allowed to pay in instalments for their judgments to be enforced.

The simple procedure suggested above would help a lot in making the system cheaper and friendly to self-actors. Even to lawyer’s life would be easier as they would use the same procedures that are simplified. Other ancillary issues like default judgment, consent to judgment and summary judgment can be addressed similarly as well.

*Application Procedure*

The application procedure should be simplified as well. There should be prescribed forms and affidavits like in the maintenance court. The forms should be capable of being used by lay people.

A simpler version of a court application should be as in Appendix 11 and 11(b) as supporting affidavit. The current court application requires to be accompanied by an affidavit that sets out the cause of action, parties’ particulars and also the relief they are seeking. There is no form of what the affidavit entails.33The court should then have discretion after filing of the opposition to the application by respondent to refer the matter to trial or decide it on the papers filed.

These forms should be in prescribed form and if litigants wish to write more than one affidavit they may retype the documents to create more space or add more affidavits or special blank affidavits. The notice of opposition should be more simplified than the one in the rules and should provide for guidance on the key issues to be included in the defence through opposition.34

CONCLUSION

It is my view, there is need to start reform in this area immediately. All key stakeholders should be involved. The Ministry of Justice and Legal Affairs may do consultative meetings with self-actors to validate the findings of this research and then proceed to engage a team of lawyers with interest and expertise in access to justice to start redrafting simplified rules with all key sets of forms. This initiative will not require a lot of resources.

33. ibid Order 22   
34. Ibid Order 22 Rule 2

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The resources needed would be to cover the consultative meetings, funding for the experts, drafting meetings, printing of copies of the Rules and the manual book. Once the first draft is finalized, it would be prudent to start a pilot project with one or two courts and work with the new court procedures for a year. If the results are acceptable then the new civil court procedure would be rolled out to all courts.

It has argued that there is need for reform as proposed in this study if justice is to be a reality for those who cannot afford lawyers. In addition, it should be realized that the civil procedure in our courts should not be an end itself but an avenue to enhance justice. It should not make justice costly and inaccessible but should balance its role to maintain orderliness and at the same time availing access to self- actors. The right of access to court is a right that unlocks other rights and should be enhanced forthwith.

RIGHTS INFERENCE: UNDERSTANDING THE MEANING OF   
SECTION 46 OF THE CONSTITUTION OF ZIMBABWE BEYOND GUBBAY CJ’S DICTUM

BY JUSTICE ALFRED MAVEDZENGE1

(in loving memory of the late Blasio Zivengwa Mavedzenge)

ABSTRACT

*The Constitution of Zimbabwe guarantees a wide range of* *fundamental rights. These are set out in Chapter four-the Declaration* *of Rights. However, the Constitution is silent on a number of* *fundamental rights which include the right to access adequate* *housing, the right to development and the right to the protection of* *family. Thus, the Constitution does not expressly provide for these* *rights, yet in the preamble it, captures and expresses a vision of a* *prosperous and just society that is based on human dignity. There is* *a real risk that this vision will remain a pipe dream if individuals do* *not enjoy these rights. In this paper, I examine how and the extent to* *which the interpretive guidelines set out in section 46 of the* *Constitution, can be applied as a tool to infer or read in rights that* *are not expressly provided for in the Constitution’s Declaration of* *Rights. Inevitably I also examine the theoretical underpinnings of* *the rules provided for in section 46 and argue that, the courts need* *to engage with those theories in a critical and nuanced fashion in* *order to develop a meaningful jurisprudence on how fundamental* *rights should be interpreted in Zimbabwe.*

*Key words:* constitution-constitutional court-section 46-constitutional values-rights-human dignity-constitution of Zimbabwe.

INTRODUCTION

Amongst the progressive attributes of the 2013 Constitution of Zimbabwe is that it guarantees an expansive Declaration of Rights, especially when one compares it to the previous Lancaster House

1. Justice Alfred Mavedzenge holds a PhD in Constitutional Law from the University   
of Cape Town. He is a Researcher at the University of Cape Town Law Faculty’s   
Democratic Governance and Rights Unit, and is an associate at Maja and   
Associates Commercial Law Chambers.

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Constitution of 1979 and to Constitutions of other jurisdictions.2 Yet, it is also true that the Constitution of Zimbabwe does not expressly guarantee certain rights that are very important, especially for the socio-economic well-being of individuals and groups. Such rights include the right of every person to access adequate housing3, the right to development4 and the right to the protection of family.5

Some may argue that if the Constitution does not expressly guarantee these rights, then there is no need for courts to bother about their enforcement.6 This is a misplaced argument. There is more to constitutional interpretation than just the words that are written in the Constitution. Usually constitutions are meant to capture and express a broad vision of a society. They rarely provide adequate details on how that vision should be achieved.7 The courts, government agencies and everyone seized with constitutional interpretation, must then interpret the Constitution in a manner that promotes the realisation of the stated goal or vision.

There can never be any reasonable doubt that, through the 2013 Constitution the people of Zimbabwe aspire to establish for themselves a *“just and prosperous nation”*8that is founded on *“recognition of* *inherent dignity and worth of each human being*”9 as well as “*the* *equality of all human beings*.”10 That aspiration cannot be achieved if individuals and communities cannot enjoy such rights as the right to development, the right to access adequate housing and the right

2. Such as the Constitution of Zambia and the Constitution of Botswana

3. The Constitution expressly provides for the right to shelter for children in section

81 (1) (f).

4. See art 1 and article 2 of the United Nations General Assembly,X*Declaration on*

*the Right to Development: Resolution / adopted by the General Assembly*, 4   
December 1986,XA/RES/41/128. Also see Arjun Sengupta “Right to Development   
as a Human Right” in 2001 Vol. 36, No. 27 *Economic and Political Weekly*

5. See art 18 of the African Charter on Human and Peoples’ Rights and for a   
discussion of what this right entails see United Nations Human Rights Committee   
“Report on protection of the family: contribution of the family to the realization   
of the right to an adequate standard of living for its members, particularly   
through its role in poverty eradication and achieving sustainable development   
(A/HRC/31/37)”

6. This may be the view of those who argue in favour of a strict literal interpretation 7. Iain Currie and Johan De Waal make similar observation in The Bill of Rights

Handbook 6th ed, *Juta and Company* 2013 at p. 135 and 136   
8. See preamble of the Constitution of Zimbabwe, 2013   
9. See section 3 (1) (e) of the Constitution of Zimbabwe, 2013   
10. See section 3 (1) (f) of the Constitution of Zimbabwe, 2013

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to the protection of family. The Committee on Economic, Social and Cultural Rights (CESCR) has interpreted the right to adequate housing as the *“right to live somewhere in peace, security and dignity*”11, thereby underscoring the inseparability of this right from the vision of establishing a society based on respect for human dignity.12 The same can be said with respect to the right to the protection of family13 and the right to development.14

Clearly these rights are so important that they cannot be ignored, if Zimbabwean courts are to interpret the Declaration of Rights in a manner which realises the vision captured in this Constitution. In this paper, I do not address how these particular rights can be read into the Zimbabwean Declaration of Rights. I have done so elsewhere.15 The question that I grapple with is whether and to what extent does section 46 of the Constitution of Zimbabwe require courts to infer rights that are not expressly provided for in the Declaration of Rights?

I take the position that, as a general rule, section 46 of the Constitution requires courts to adopt a broad approach to interpretation of fundamental rights. I acknowledge that this has already been pointed out by the Constitutional Court of Zimbabwe-albeit in passing.16 Thus, apart from just mentioning it and regurgitating Gubbay CJ’s *dictum* in a 1994 case of *Rattigan* v *Chief Immigration*X*Officer*17, the Constitutional Court has not engaged on this subject in a deeper and nuanced fashion. For instance in *Madzimbamuto v Registrar General*, Ziyambi JA simply said:

The approach to interpretation of a constitutional right has been   
laid down in many decisions of the predecessor of this Court.   
Thus in Rattigan & Ors v Chief Immigration Officer & Ors 1994

11. See UN Committee on Economic, Social and Cultural Rights (CESCR), *General*   
*Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant)*,   
13 December 1991 at para 7

12. See Justice Alfred Mavedzenge PhD thesis “An analysis of how Zimbabwe’s   
international legal obligation to achieve the realisation of the right of access   
to adequate housing, can be enforced in domestic courts as a constitutional   
right, notwithstanding the absence of a specific constitutional right of every   
person to have access to adequate housing” *University of Cape Town*, 2018

13. Supra note 4   
14. Supra note 3   
15. Supra note 11

16. See *Mawere v Registrar General* (2015) ZWCC 04 at para 20 and *Madzimbamuto*   
*v Registrar General* [2014] ZWCC 5 at 5–6

17. 1994 (2) ZLR 54 (S) at 57 F–H

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(2) ZLR 54 (S) at 57 F-H the Court held: “This Court has on   
several occasions in the past pronounced upon the proper   
approach to constitutional construction embodying fundamental   
rights and protections. What is to be avoided is the imparting of   
a narrow, artificial, rigid and pedantic interpretation; to be   
preferred is one which serves the interest of the Constitution   
and best carries out its objects and promotes its purpose. All   
relevant provisions are to be considered as a whole and where   
rights and freedoms are conferred on persons, derogations   
therefrom, as far as the language permits, should be narrowly   
or strictly construed.18

After citing the above *dictum*, the learned Ziyambi JA went straight to conclude and give an order without providing any meaningful analysis of what this *dictum* entails, as if the *dictum* is self-explanatory. The rest of the bench concurred with this judgment. The Court took a similar approach in *Mawere* v *Registrar* *General*19, where Garwe JA (with concurrence of the entire bench) cited Gubbay’s *dictum* and a couple of other remarks by judges from other jurisdictions, but did not engage with this *dictum* to provide any nuanced interpretation of section 46 of the Constitution.

Therefore, beyond Gubbay CJ’s *dictum*, there is not yet any meaningful jurisprudence that has been developed on the practical implications of section 46, especially when interpreting constitutional rights. There is therefore a gap in the Zimbabwean jurisprudence on this subject. Through this paper, I hope to make a contribution towards addressing this gap.

The centre piece of my argument is that section 46 of the Constitution is an expression of the following doctrinal theories of constitutional interpretation: rights interdependence and indivisibility; the doctrine of the ‘living’ constitution, the value based and purposive theory of interpretation-and these presuppose a broad and or value laden approach to rights interpretation, which in turn allows the courts to infer some of these rights that are not expressly provided for in the Declaration of Rights. First, I consider what section 46 says.

SECTION 46 OF THE CONSTITUTION OF ZIMBABWE

Section 46 sets out rules governing the interpretation of constitutional rights. It is framed as follows:

18. Supra note 16 *Madzimbamuto* v *Registrar General* at p.5-6 19. Supra note 16, para 20

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When interpreting this Chapter, a court, tribunal, forum or body—

a) must give full effect to the rights and freedoms enshrined   
in this Chapter;

b) must promote the values and principles that underlie a   
democratic society based on openness, justice, human   
dignity, equality and freedom, and in particular, the values   
and principles set out in section 3;

c) must take into account international law and all treaties   
and conventions to which Zimbabwe is a party;

d) must pay due regard to all the provisions of this   
Constitution, in particular the principles and objectives   
set out in Chapter 2; and

e) may consider relevant foreign law;

in addition to considering all other relevant factors that are to   
be taken into account in the interpretation of a Constitution.

Thus, in addition to other relevant factors (such as views expressed in literature by eminent scholars) which courts have discretion to consider, section 46 identifies certain factors as mandatory. These are: the need to ensure that rights are given their intended full effect: the need to protect and promote constitutional values: the need to promote compliance with international legal duties, norms and standards: and the need to ensure that the interpretation is anchored on textual context. Each of these factors or considerations is an expression of the doctrinal theories that I identified above, and their common purpose is to ensure that rights are interpreted in a manner that guarantee their effective realization. I begin by discussing how the rights interdependence and indivisibility theory underpins the rules in section 4620 and why that should result in courts inferring certain rights upon the Declaration of Rights.

RIGHTS INTERDEPENDENCE AND INDIVISIBILITY

Section 46 (1) (a) obliges courts to interpret the Declaration of Rights in a manner that gives *‘full effect’* to the fundamental rights and freedoms enshrined therein. The Constitutional Court often regurgitates this provision, without explaining its practical implications.21 In order to identify the practical implications of section

20. Of the Constitution

21. Supra note 17 and supra note 18

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46 (1) (a), regard must be had to the theoretical underpinnings of the rule prescribed therein.

The rule of constitutional interpretation, encapsulated in section 46 (1) (a) is a constitutional instruction for the court to observe and apply the rights indivisibility and interdependence principle, when interpreting the Declaration of Rights. Essentially, this principle entails that fundamental rights cannot be interpreted and enforced separately or in isolation because the effective realisation of certain rights depends on the simultaneous enforcement of other relevant fundamental rights.22 Put differently, in order to ‘give full effect’ to a right as is required by section 46 (1) (a), the court must recognize that some rights must be enforced simultaneously because there is a conceptual relationship of interdependence between or amongst them.

Craig Scott suggests that there are two types of relationships of interdependence between human rights, and these are the “*organic* *interdependence*” and the *“related interdependence*”.23 Organic interdependence is the relationship where:

one right forms a part of another right and may therefore be   
incorporated into that latter right. From the organic rights   
perspective, interdependent rights are inseparable or   
indissoluble in the sense that one right (the core right) justifies   
the other (the derivative right). To protect right x will mean   
directly protecting right y...24

Thus, the concept of organic interdependence requires us to perceive certain rights as constituent elements of other rights. Craig Scott uses the example of the right to life and the right to adequate housing.25 He argues that if the fundamental right to life is interpreted broadly to mean the right to live a life in human dignity, then one cannot live such a life without having access to adequate housing.26

22. Craig Scott “Interdependence and Permeability of Human Rights Norms: Towards   
a Partial Fusion of the International Covenants on Human Rights” in 1989 *Osgoode*   
*Hall Law Journal*. p. 781. Also see Sandra Liebenberg. *Socio-economic Rights:*   
*Adjudication under a Transformative Constitution* 2010 p. 51

23. Supra note 22, Craig Scott at p. 779

24. Ibid

25. Supra note 22, Craig Scott at p. 780

26. Also see E Wicks. “The Meaning of Life: Dignity and the Right to Life in

International Human Rights Treaties.” in 2012 *Human Rights Law Review* at p.   
206: Also see UN General Assembly *“Promotion and Protection of Human Rights:*

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Yacoob J in *Government of the Republic of South Africa v Irene* *Grootboom*27 makes a similar assertion.

According to Scott, the organic interdependence of fundamental rights can be explained on the basis of two conceptions. First is what he describes as the *“logical or semantic entailment.”*28 It is the idea that certain fundamental rights are to be regarded as ‘general core rights’ and such rights logically imply other rights (derivative rights).29 Thus the ‘derivative right’ is a logical consequence of the ‘core right’. For example, it can be argued that the right to life is a ‘general core right’ which logically implies a range of other rights including the right to have access to basic social services that are necessary for human life.30 In this connection, the right to access adequate housing is therefore, a ‘derivative right’ that is ‘logically derived’ from the right to life. The relationship between the right to life (as the core right) and the right to access adequate housing (as a derivative right) is that of logical entailment in the sense that, it is illogical to expect individuals to enjoy their fundamental right to life if they are not guaranteed access to a basic livelihood such as adequate housing. Similarly, it can be argued that the fundamental right to [substantive] equality is a ‘general core right’ which logically takes within its scope, other ‘derivative rights’ such as the right to development for a previously marginalized community.

Critics may argue that the above approach allows judges to replace the law with their own logic and this may undermine the rule of law and separation of powers between the judiciary and law or policy makers. In defence of Scott’s logical entailment approach, I argue that this approach is not a licence to constitutional flights of fancy as it does not mean that there are no limitations regarding the extent to

*Human Rights Questions, Including Alternative Approaches for Improving the*   
*Effective Enjoyment of Human Rights and Fundamental Freedoms”*[A/71/310]   
8 August 2016, para 27

27. 2000 (11) BCLR 1169 (CC), para 23

28. Supra note 22, Craig Scott at p. 781

29. Ibid

30. Also see the decisions of the Supreme Court of India in the following cases:

*Maneka Gandhi v Union of India* (1978) 1 SCC 248; *Shantistar Builders v Narayan*   
*Khimalal Totame* AIR (1990) SC 630; *Ahmedabad Municipal Corporation v Nawab*   
*Khan Gulab Khan* laws (SC)-1996-10-10; *Kharak Singh v State of Uttar Pradesh*   
AIR 1963 SC 1295 and *Sunil Batra v Delhi Administration* AIR 1978 SC 1675;   
*Francis Coralie Mullin v The Administrator, Union Territory of Delhi* (1981) 2   
SCR 516, para 518

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which judges should apply their logic. As will be made clearer in the following sections of this paper, the judge’s logic must be rational in the sense that it must be guided by the textual context- which comprises of the prescribed constitutional values, principles, international law and the words used in framing the right. Yacoob J in *Government of South Africa* v *Grootboom*31 demonstrates how this approach to constitutional construction can be applied within the above highlighted limits, for purposes of giving effect to the constitutional vision.

Scott identifies the second form of organic interdependence as the ‘effectivist or foundational conception’ which asserts, for example that “*the right to an adequate standard of living is part of or is* *justified by the right to life because the effectiveness of the latter* *right depends on it”*.32 Thus, the ‘effectivist conception’ entails that the enforcement of one right cannot be effective without simultaneously enforcing the other right.

Both the logical entailment and the effectivist approach (as Craig Scott’s conception of the rights indivisibility and interdependence theory) require courts to refrain from interpreting rights as if they are isolated from the other. As I mentioned earlier, the Constitutional Court, by citing with approval Gubbay CJ’s *dictum*, has expressed this view.33 However, it has not demonstrated in its jurisprudence, the implications of that rule. In practice, the implications of this rule (as encapsulated in section 46 (1) (a) of the Constitution) is therefore that even if a right is not expressly guaranteed in the Declaration of Rights, the court must infer that right (the derivative) upon another expressly guaranteed right (the core right) as long as the ‘core right’ is grammatically framed broadly, and as long as it can be proven that the expressly guaranteed right cannot be implemented effectively without simultaneously enforcing the implied (derivative right) right. Thus, section 46 (1) (a) of the Constitution is an expression of the rights indivisibility and interdependence doctrine, which requires courts to interpret the expressly guaranteed rights as widely as the language allows in order to infer other rights which the Constitution is silent on. In a sense therefore, section 46 (1) (a) requires courts to refrain from perceiving the Declaration of Rights as an exhaustive list of constitutional rights. It ought to be perceived as an outline of the

31. Supra 26, at para 19-25 and 35-40   
32. Supra note 22, Craig Scott at p. 781 33. Supra note 17 and Supra note 18

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‘core rights’ upon which numerous other derivative rights can be inferred.34

*Section 46 as an Expression of the Doctrine of a ‘Living*   
*Constitution’*

As discussed earlier, s 46 (1) (a) of the Constitution, requires courts to interpret the fundamental rights enshrined in the Declaration of Rights in a manner that gives full effect to those rights, while s 46 (1) (b)35 obliges courts to interpret fundamental rights in a manner that upholds and promotes the entrenched constitutional values. In order to give constitutional rights their full effect and to protect the underlying constitutional values, courts have to refrain from rigidly holding on to the traditional and age old interpretations of fundamental rights.36 Instead, the courts must develop and embrace new, nuanced and updated meanings of fundamental rights in order to address contemporary challenges which threaten to render rights illusory or which threaten the values that underlie the Constitution.

Thus, the rules of constitutional interpretation, provided for in section 46 (1) (a) and (b) have their theoretical roots in the doctrine of a living constitution. Regard must therefore be had to this doctrine if we are to fully grasp the practical implications of section 46 (1) (a) and (b) on rights interpretation.

Arguably, the doctrine of a living constitution was originally developed in the American jurisprudence,37 but it must be noted that the Supreme Court of Zimbabwe38 confirmed the application of this doctrine in Zimbabwe when it held that:

A Constitution is an organic instrument. Although it is enacted   
in the form of a statute, it is *sui generic*. It must broadly, liberally   
and purposively be interpreted so as to avoid the austerity of   
tabulated legalism and so as to enable it to continue to play a   
creative and dynamic role in the expression and the achievement   
of the ideals and aspirations of the nation, in the articulation of

34. To the extent permitted by the words used to frame the core rights

35. Of the Constitution of Zimbabwe, 2013

36. Supra note 16, *Mawere v Registrar General*, para 20

37. For a discussion on this see See Aileen Kavanagh “The Idea of a Living

Constitution.” in 2003 *Canadian Journal of Law and Jurisprudence*   
38. Though prior to the enactment of the 2013 Constitution

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the values bonding its people and in disciplining its   
Government.39

Unfortunately, in the above case, the Supreme Court simply reproduced the *dictum* of Mahomed J.40 The Court did not engage sufficiently with the doctrine itself, to examine its practical implications beyond the rhetoric contained in the *dictum* cited above. However, one of the scholars on this subject, Aileen Kavanagh provides a clearer description of this theoretical approach to constitutional interpretation. She describes it as:

The claim that the courts shoulddevelop and update   
constitutional law when interpreting it. In other words, the idea   
of the living Constitution forms part of an exhortation to the   
courts to interpret the Constitution in a certain way, [that is],   
to interpret it so as to develop its content, to keep it abreast of   
changes in society, to update it and adapt it to modem needs   
and circumstances.41

Thus, as a general rule the constitution must be interpreted in a manner which adapts the meaning of its provisions to the present-day realities, and the interpretation generated must be one which is in sync with the contemporary needs and circumstances of society.42 The practical implications of this rule [as encapsulated in section 46 (1) (a) and (b)43] is therefore that, when interpreting constitutional rights the courts should not restrict themselves to the traditionally accepted meaning of certain constitutional rights. Where necessary, they should adapt the scope and meaning of these rights in order to address contemporary challenges which threaten to render those rights illusory or which threaten the values upon which the constitutional order is based. Thus, in a sense, the courts should infer certain rights upon those that are expressly guaranteed in the Constitution, as a means of addressing contemporary challenges which threaten the realisation

39. Supra note 16, *Mawere* v *Registrar General* at para*.* Also see *Capital Radio Pvt*   
*Ltd v Broadcasting Authority of Zimbabwe* 2003 (2) ZLR 236 (5), p 247 b-d

40. In *S* v *Mhlungu* 1995 (3) SA 867; 1995 (7) BCLR 793 (CC) at para 8, which he   
later applied in *Government of the Republic of Namibia* v *Cultura* 2000 1994(1)   
S.A. 407 (Nm S) at 418 F-H when he was sitting as Chief Justice of the Supreme   
Court of Namibia

41. See supra note 37, Kavanagh, at p. 56

42. See *Hunter v Southam* (1984) 11 D.L.R. (4th) 641 at 649 and *Attorney-General*

*(Manitoba) v Metropolitan Stores (MTS) Ltd* (1987) 38 D.L.R. (4th) 321, para   
330.

43. Of the Constitution of Zimbabwe, 2013

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of the expressly guaranteed right or the constitutional values which the right is meant to protect.

For instance, in Zimbabwe, the right to life may have originally been conceptualised to protect individuals from unlawfully being deprived of their life,44 perhaps because the major threat to that right was arbitrary or extrajudicial killings. Following certain radical changes in contemporary society, new threats to human life have also emerged. The threat to human life is no longer limited to the act of arbitrary killing by another human being, but they now also include loss of life due to vicious diseases and epidemics (such as cancer, HIV and AIDS) or due to malnutrition and poverty. If the ultimate purpose of the constitutional right to life is to protect human life, then the scope of the obligations of the duty bearer can no longer be interpreted as limited to refraining from or protecting people from arbitrary killings. The interpretation of the fundamental right to life has to be adapted to the contemporary needs of society which is to protect human beings from contemporary threats to human life which now include poverty and the resultant lack of access to necessities of livelihood such as adequate housing. Thus the right to life, which originally may have meant the right to be protected from arbitrary killing, should now also be given a nuanced meaning-which is the right to receive reasonable assistance by the state in order to access basic necessities of life in order to prevent loss of human life and to protect human dignity.

However, as Kavanagh cautions, “*constitutional interpretation by the* *courts can be creative in order to bring it up to date with the* *contemporary needs and circumstances, but this creativity should* *take place within certain constraints*.”45 Thus, the Constitution cannot mean whatever the judge wishes it to mean. There has to be a perimeter within which the court exercises its creativity to adapt or develop the scope of the constitutional rights to meet the contemporary needs of the society. Kentridge AJ46 also emphasised this point by stating that:

[w]hen interpreting constitutional rights] it cannot be too   
strongly stressed that the Constitution does not mean whatever

44. See section 12 (1) of the previous Constitution: The Lancaster House Constitution   
of Zimbabwe, 1979

45. See supra note 37, 7 at p. 57

46. In *S V Zuma* 1995 (2) SA 642 (CC) at 17

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we might wish it to mean. We must heed Lord Wilberforce’s   
reminder that even a Constitution is a legal instrument, the   
language of which must be respected...I would say that a   
Constitution embodying fundamental principles should as far as   
its language permits be given a broad construction.

As I indicated earlier, the Constitution requires courts to respect the text used in framing the constitutional right, when interpreting the Declaration of Rights.47 This is implicitly prescribed in section 46 (1) (d) which requires courts to take into account the relevant provisions, when interpreting constitutional rights. Therefore, the scope and content of the right must be interpreted to address contemporary needs but within the confines of the words used to frame the right.

To illustrate this point, Rebecca Wilkinson48 argues as follows in respect of the Constitution of the United States of America:

Many clauses of the Constitution are unequivocal and leave no   
room for [such] interpretation. For example, the prescribed age   
requirement for Senators requires no [creative] interpretation   
because its meaning cannot change. Yet some clauses are   
couched in general phraseology. The Constitution does not   
provide explicit guidance on how to interpret provisions such as   
‘cruel and unusual’ or ‘unreasonable searches and seizures’.   
These terms are ‘value-laden’ and consequently, various   
interpretations are possible.49

Similarly, in Zimbabwe certain constitutional provisions are farmed narrowly. For example, the right to shelter in section 81 (1) (f) is for children, who are defined as *“every boy or girl under the age of* *eighteen*”.50 It is therefore clear that adults cannot rely on this right to claim access to shelter as a right.51 However, some rights are framed broadly. For instance, the right to life is framed in s 48 (1) as *“Every* *person has the right to life.”* This is a broad formulation which gives adequate room for the court to interpret this right in accordance with certain constitutional values, to address contemporary threats to human life and reach the conclusion that this right implies the

47. See section 46 (1) (d) of the Constitution of Zimbabwe, 2013 and *Zimbabwe*   
*Electoral Commission v Commissioner General, ZRP* (2014) ZWCC 3 at para 8

48. In “Interpreting a Living Constitution” 2015 *North East Law Review* at p.*7-13* 49. Ibid, p. 7

50. See section 81 (1) of the Constitution of Zimbabwe, 2013

51. Supra note 11

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duty of the state to make adequate housing accessible, in order to protect and promote the attainment of life in human dignity.

Similarly, under the right to equality, the duty of the state to achieve substantive equality is framed in broad terms in s 56 (6)52 as follows: *“The State must take reasonable legislative and other measures to* *promote the achievement of equality and to protect or advance people* *or classes of people who have been disadvantaged by unfair* *discrimination.”* This allows the courts the flexibility to give content to this obligation through an interpretation process which seeks to protect constitutional values and give expression to the constitutional vision of a society based on human dignity and equality. In that regard, it can be argued for instance that the measures contemplated in section 56 (6) include making adequate housing accessible to disadvantaged groups, or the right to development for such groups, in order to achieve substantive equal protection of human dignity between or amongst different communities in the country. Given that most fundamental rights are framed broadly,53 it is possible to apply the rules prescribed in section 46 (1) (a) and (b) to infer certain rights upon those that are expressly guaranteed in the Declaration of Rights.

VALUE-BASED INTERPRETATION OF FUNDAMENTAL RIGHTS

In addition to observing the principle of rights indivisibility and applying the doctrine of a living constitution, courts are also required to adopt a value-based approach to rights interpretation. This is encapsulated in section 46 (1) (b) as follows:

vWhen interpreting this Chapter [the Declaration of Rights], a court, tribunal, forum or body- (b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom and in particular, the values and principles set out in section 3 [of the Constitution].

In a number of cases which include *Mawere v Registrar General*54and *Madzimbamuto v Registrar General,*55the Constitutional Court interpreted the above provisions to mean that they require courts to interpret fundamental rights broadly, purposively and with flexibility,

52. Of the Constitution of Zimbabwe, 2013

53. See for example the following sections of the Constitution of Zimbabwe: 48

(1); 51; 57; 56 (6) and 74

54. Supra note 15, Mawere v Registrar General

55. Supra note 15, Madzimbamuto v Registrar General

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in order to protect the values underpinning Zimbabwe’s constitutional democracy. For instance, the Constitutional Court said:

[W]hen interpreting constitutional rights] what is to be avoided   
is the imparting of a narrow, artificial, rigid and pedantic   
interpretation; to be preferred is one [an interpretation] which   
serves the interests of the Constitution and best carries out its   
objects and promotes its purpose.56 [My emphasis.]

As I mentioned above, this is Gubbay CJ’s *dictum* in *Rattigan* v *Chief* *Immigration* *Officer*. By reproducing this *dictum* several times, the Court has underscored the idea that a value-based approach requires courts to interpret fundamental rights broadly. Whilst it is true that a broad construction is usually necessary, it is not always the case that rights should be interpreted broadly in order to protect constitutional values. In certain circumstances, the court may have to attach a narrow interpretation in order to protect certain constitutional values.57

The above incorrect assumption may have been made because the Court seems to have adopted Gubbay CJ’s *dictum* without further engaging (in its jurisprudence) on what these values actually mean and how (in practice) they should be applied when interpreting constitutional rights. There are numerous constitutional values that are enshrined in section 358 and it is impossible for the Court to examine what all these values mean every time when the Court interprets fundamental rights. However, what would be expected of the Court is to engage on the relevant values and incrementally create a nuanced jurisprudence on what those values mean and how in practice they influence the interpretation of a right. The failure by the Constitutional Court to do this has resulted in a dearth of local jurisprudence on the meaning of constitutional values and how they should be applied when one is interpreting fundamental rights. Thus, beyond Gubbay CJ’s *dictum* (which as I showed above, makes some incorrect assumptions) there is yet to be a nuanced interpretation and application of section 46 (1) (b) of the Constitution of Zimbabwe.

56. Supra note 15, *Mawere case* at para 20

57. For example see *President of the Republic of South Africa v Modderklip Boerdery*

*(Pty) Ltd* 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) where the right to free use   
of private property was interpreted narrowly in order to protect the dignity of   
the evictees which would be violated if they were to be evicted without being   
given alternative housing.

58. Of the Constitution of Zimbabwe, 2013

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Christo Botha defines value-based interpretation as an approach which entails “*a value-coherent construction - the aim and purpose of which* *must be ascertained against the fundamental constitutional values.*”59 In practice, the first step is therefore to identify the constitutional value(s) which would be affected by the court’s interpretation of the right(s) in question. After that the court has to discuss what those values entail or require of society and individuals, the norms and standards implied by those values. The last step is to then incorporate the norms and standards implied by those values or to adopt an interpretation which best protects or promotes those norms and standards. Whether a court should adopt a broad or narrow approach in order to protect the constitutional values is a question whose answer depends on what scope of the right would be best suitable to accommodate and protect the norms and standards implied in the constitutional values.

Comparative jurisdictions provide examples of how the above approach can be applied. Similar to section 46 (1) (b) of the Constitution of Zimbabwe, the 1993 interim Constitution of South Africa required courts to interpret rights in a manner that protects and promotes the entrenched constitutional values. This rule of interpretation was retained in the final Constitution of South Africa, 1996. One of the enshrined values is human dignity. In *S v Makwanyane*60 the Court grappled with the question whether capital punishment is constitutionally valid or not. It was contended that capital punishment is unconstitutional because it amounted to cruel, inhuman and degrading punishment and therefore, it was an impermissible limitation of the freedom from cruel, inhuman and degrading punishment.61 In a way, the Court had to interpret what the constitutionally guaranteed freedom from cruel, inhuman and degrading punishment entails.62 This had to be done in a manner that protects the constitutional value of human dignity. The Court thoroughly engaged with the concept of human dignity in order to deduce what it entails as a constitutional value.63 Although most judges who sat on this case wrote separate judgments, they all seem to agree64 that by entrenching the value of

59. See *Statutory Interpretation: An Introduction for Students* 4th ed 2005 p. 193 60. 1995 (3) SA 391 (CC), 1995 (6) BCLR 665

61. Ibid at para 27 for the summary of the arguments by parties

62. Ibid, see for example paras 131 to 134

63. And a fundamental right as well

64. See the judgments of Langa J, Madala J, Mahomed J and Mokgoro J in supra

note 59 at paras 223 - 227; 237 - 243; 263; and 307 - 313 respectively.

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human dignity, the Constitution recognizes that human beings have inherent worthiness which must be protected at all times. O’Regan J put this more directly and vividly as follows:

The importance of dignity as a founding value of the new   
Constitution cannot be overemphasised. Recognising a right to   
dignity is an acknowledgement of the intrinsic worth of human   
beings: human beings are entitled to be treated as worthy of   
respect and concern.65

The above interpretation of human dignity was considered in order to define what the freedom from cruel, inhuman and degrading punishment entails as a right. The Court concluded that, punishment is inhuman and degrading if its impact depraves, undermines or destroys the inherent worthiness of the human being.66 Thus, the meaning of the freedom from cruel, inhuman and degrading punishment was interpreted by incorporating the value of human dignity. In the same case, a similar approach was applied to interpret the meaning of the right to life.67 In subsequent cases, the Court applied a similar approach to interpret the meaning of the right to equality,68 the right to adequate housing69and the right to privacy.70

Elsewhere, the Supreme Court of Canada71 and the Federal Constitutional Court of Germany72 applied a similar approach to interpret the meaning of the freedom from cruel, inhuman and degrading punishment. In India, the Supreme Court has similarly incorporated the value of human dignity into the right to life in order to reach the conclusion that the right to life implies the right to live in human dignity.73

65. Supra note 59 at para 328

66. Ibid. See for example para 95, and paras 144-145

67. Supra note 59 at para 327

68. See *Prinsloo* v *Van der Linde* 1997 (6) BCLR 759; 1997 (3) SA 1012 (CC) at 31-33:

*President of the Republic of South Africa v Hugo* (6) BCLR 708; 1997 (4) SA 1 at   
para 41 and *Harksen v Lane* NO 1997 (11) BCLR 1489; 1998 (1) SA 300 (CC) at   
para 93

69. Supra note 26

70. National Coalition for Gays and Lesbians Equality v Minister of Justice 1998

(12) BCLR 1517; 1999 (SA) 6 (CC)

71. Kindler v Canada (1992) 6 CRR (2d) 193 SC at 241

72. [1977] 45 BVerfGE 187, 228 (Life Imprisonment case)   
73. Supra note 29

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In citing the above as examples, I am aware that human dignity as a conceptual value means much more than respect for the inherent worthiness of the human being.74 I am also aware that the meaning of human dignity and many other values such as equality, is a highly contested subject which has seen courts and scholars in different jurisdictions interpreting them differently.75 Therefore I am not (at this juncture) advocating that the Constitutional Court of Zimbabwe should adopt similar interpretations as those developed by other courts in the jurisdictions that I cited above. Rather, the point that I am making is that the Constitutional Court has a role to give meaning to the constitutionally entrenched values. This cannot be achieved by merely restating section 46 (1) (b)76 or Gubbay CJ’s *dictum* when interpreting fundamental rights. The Court must develop a nuanced Zimbabwean jurisprudence on the interpretation of these values, and it must demonstrate clearly how these values are informing the interpretation of rights. As Laurie Ackermann77 rightly argues, this means that the court must engage with the relevant philosophical theories that led to the development of these values. Such analysis must also be anchored on Zimbabwe’s historical and contemporary contextual realities. In South Africa for instance, Ackermann J of the Constitutional Court in *Prinsloo* v *Van der Linde* 199778 took into account South Africa’s historical background of apartheid, contemporary realities of racial inequalities, and juxtaposed these against Ronald Dworkin’s theory of equality, to develop an interpretation of what the value of equality in South Africa entails. He concluded that the entrenchment of equality as a constitutional value represents South Africa’s aspiration to break from its apartheid past and achieve a society where the inherent worthiness of each person is equally respected and protected (which is Dworkin’s interpretation of equality79). Jurisprudence has thus been developed to the effect that the right to equality in South Africa does not always

74. Laurie Ackermann, *Human Dignity: Lodestar for Equality in South Africa* 2013   
at p. 23-24 and 28-29

75. And sometimes putting different emphasis on different aspects of these values.   
For this discussion see Oscar Schachter “Human Dignity as a Normative Concept”   
in 1983 Vol 77, no 4 *The American Journal of International Law* pp 848-854

76. Of the Constitution

77. Supra note 73 at p.28-29

78. 1997 (6) BCLR 759; 1997 (3) SA 1012 (CC) at para 31-42 where Ackermann J

engages with Ronald Dworkin’s theory on equality and juxtaposes that theory   
against South Africa’s apartheid history

79. Ronald Dworkin. *Sovereign Virtue: The Theory and Practice of Equality* 2000p.

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mean the right to receive equal treatment, but it also mean that previously marginalised groups should receive preferential treatment so as to achieve the constitutional goal of a substantively equal society.80 Yacoob J in *Government of South Africa v Grootboom* 81 takes a similar approach to interpret what the value of human dignity entails in the interpretation of the right of access to adequate housing.

When the Constitutional Court of Zimbabwe adopts this approach, it will be clear (as it is in comparative jurisdictions) that by requiring courts to adopt a value laden approach to rights interpretation, the Constitution obliges courts (where necessary) to infer other rights upon those that are expressly guaranteed in the Declaration of Rights. The inference of rights is a consequence of incorporating certain constitutional values into the expressly guaranteed rights. However, as Lord Wilberforce said: “*a Constitution is a legal instrument, the* *language of which must be respected……a Constitution embodying* *fundamental principles should as far as its language permits be given* *a broad construction.”*82 As I pointed earlier, this rule is encapsulated in section 46 (1) (d). Therefore, the inference of other rights, which is done by means of incorporating certain values into the expressly guaranteed rights, can only be done to the extent permitted by the words used to frame the fundamental right.

PURPOSIVE INTERPRETATION OF FUNDAMENTAL RIGHTS

By virtue of binding courts to attach an interpretation which gives full effect to the right, section 46 (1) (a) of the Constitution83 is in a sense a constitutional injunction for courts to apply a purposive approach to constitutional rights construction. Scholars on this subject84 describe purposive interpretation as an approach which requires that the interpretation of legal provisions must not exclusively be limited to the literal meaning of words but should also consider the context in order to infer the design or purpose which lies behind the legal provision. The Supreme Court of Canada explained and illustrated this approach as follows:

80. Supra note 77   
81. Supra note 26   
82. This was cited by Kentridge AJ inX*State v Zuma* 1995 (2) SA 642 (CC)

83. Which requires the court to attach an interpretation that gives full effect to   
the right.

84. G Devenish. *Interpretation of Statutes* 1992) p. 36. Also see L Du Plessis. *Re-* *Interpretation of Statutes* 2002 p. 96 and Iain Currie supra note 6 at p 136-137.

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The meaning of a right or freedom guaranteed by the Charter   
[must] be ascertained by an analysis of the purpose of such a   
guarantee; it [must] be understood, in other words, in the light   
of the interests it was meant to protect. In my view…the purpose   
of the right or freedom in question is to be sought by reference   
to; the character and larger objects of the Charter [and] the   
language chosen to articulate the specific rights or freedom, to   
the historical origins of the concepts enshrined, and where   
applicable, to the meaning and purpose of the other specific   
rights and freedoms with which it is associated within the text   
of the Charter.85

Thus, purposive interpretation is an approach which requires the court to go beyond the grammatical construction of the right and ascertain the purpose of the fundamental right in question. This approach has been cited with approval by the Constitutional Court of Zimbabwe,86 which means that there can never be any doubt that section 46 (1) (a) embodies a purposive approach to constitutional construction. The Constitutional Court of Zimbabwe has even provided guidelines relating to the steps which must be taken when applying this approach. It has thus suggested that the purposive approach should be considered only if limiting the interpretation to the literal meaning of the right would produce an absurd meaning-87an unreasonable interpretation which (for instance) undermines the object of the Constitution.

However, what remains unclear is how the court should ascertain the purpose of the right in the event that a literal meaning would produce an absurd interpretation. If this is not clarified, then the purposive approach remains vulnerable to abuse. It becomes a license for judges to replace the law with their own opinions clothed as ‘the purpose of the Constitution’. As I argue elsewhere88, the Constitutional Court’s ruling in *Justice Mavedzenge v Minister of Justice*89 is a practical example of how the purposive approach can be misused if there is no clarity about how the judge should ascertain the purpose of the right. Some scholars90 have observed that the purpose of a legal provision can be ascertained from documents which describe the background

85. R v Big M Drug Mart Ltd 1985 18 DLR (4th) 321 para 395-396

86. See Zimbabwe Electoral Commission v Commissioner General, ZRP (2014) ZWCC

3, para 8. Also see Justice Alfred Mavedzenge v Minister of Justice, legal and   
parliamentary affairs CCZ 05-18 at page 9

87. Ibid, *Zimbabwe Electoral Commission v Commissioner General, ZRP* at para 8 88. Supra note 11

89. Supra note 85

90. Supra note 7, Iain Currie at p. 141

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leading to the drafting of the provision. Reliance on ‘*travaux* *preparatoires*’ is allowed in international law.91 This may be a useful strategy only if those documents and their authenticity can be ascertained, which is rarely the case.92

Reference can also be made to the historical context in order to identify the purpose of the right.93 Here the assumption is that the constitutional right seeks to prevent certain things that happened in the past from happening again in the future,94 or that the constitutional right is guaranteed in order to consolidate certain gains that were made in the past. Unfortunately, historical facts and events are usually a highly contested and disputed terrain to the extent that it is usually impossible to ascertain the truth or veracity of certain historical claims.

Textual context can also be useful when ascertaining the purpose of the right.95 This is the idea that the purpose of the right should be ascertained by taking into account relevant provisions in the Constitution and their historical origins. For instance, Iain Currie and Johan De Wall96 suggest that “*purposive interpretation is aimed at* *teasing out the core values that underpin*” the right. This view seems to be based on the assumption that every right is guaranteed in order to protect a certain value, and therefore, the best way of identifying the purpose is to ask the question: what value does the right seek to protect or advance? To a great extent, this assumption is true and can be the most useful way of identifying the purpose of the right because, a Constitution should be read holistically.97

The Constitution of Zimbabwe provides for a list of values and principles under section 3. It declares that Zimbabwe is founded on respect for those values and principles. It further provides for a Declaration of Rights which, in terms of section 46 (1) (b) must be interpreted in a manner that upholds and promotes the values enshrined in section 3. Therefore, section 46 (1) (b) of the Constitution makes it abundantly

91. See Article 32 of the Vienna Convention on the Law of Treaties (1969)   
92. Supra note 59 at para 17-18

93. See *Brink v Kitshoff* 1996 (4) SA 197 (CC) at para 40 for an example of how

historical context was taken into account to ascertain the purpose of equality   
as both a constitutional value and a right.

94. Supra note 39, *S* v *Mhlungu* at para 8

95. Supra note 7, Iain Currie at p. 143

96. Ibid at p.136-137

97. Ibid at 143-144, for a detailed discussion on this

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apparent that there is a correlation between section 3 of the Constitution and the Declaration of Rights apparent. The correlation is that the rights and freedoms guaranteed in the Declaration of Rights are primarily98 meant to serve and protect the values that are enshrined in section 3 of the Constitution. Therefore, section 3 forms the textual context which should be considered by the court in order to ascertain the purpose of the right. By this I am not arguing that the court should not consider context outside of section 3. Rather, the argument is that constitutional values in section 3 should be the primary reference point when the court is ascertaining the purpose of the right. The courts can proceed to consider context outside of section 399 if an inquiry focused on section 3 has failed to produce a clear answer regarding the value or principle which the right seeks to protect. Such an approach creates certainty regarding how courts should identify the purpose for which a right has been guaranteed. It shields the constitution from being replaced by the judges’ own personal or collective opinion-sometimes based on their own preferred version of history-which is then presented as the true purpose of the right.

Thus, the purposive approach is a necessity and must be anchored on the constitutional provisions (especially the values). By instructing courts to adopt a purposive approach to rights interpretation, section 46 (1) (a) of the Constitution requires that, where it is necessary to protect the purpose of the right, certain rights should be inferred upon those that are expressly guaranteed in the Declaration of Rights. For instance, if the right to life is interpreted by taking section 3 (1) (e) of the Constitution into account as the primary textual context, then the purpose for guaranteeing the right to life is to ensure that the “*inherent dignity and worth of each human being*”100 is respected at all times. This would then mean that the right to life implies other rights such as the right to access adequate housing because human dignity cannot be protected without ensuring that individuals and their families have access to adequate housing. In that sense, the purpose for guaranteeing he right to human dignity would not be

98. There are numerous interests to be served, including the constitutional   
objectives in Chapter two of the Constitution, but the primary here I suggest   
that the primary interests are the constitutional values

99. For example, reference should also be made to the objectives set out in Chapter   
Two of the Constitution as required by section 46 (1)(d)

100. See section 3 of the Constitution

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achieved if the right to access adequate housing is not inferred upon the right to life. Put differently, the right to life cannot be enforced effectively, as required by section 46 (1) (a) if it is interpreted without inferring upon it certain other rights which guarantee people access to basic amenities that are necessary for the protection of human dignity.

The above approach may be criticized by some as a conflation of section 46 (1) (a), which requires rights to be given full effect, and subsection (b) which requires courts to uphold constitutional values when interpreting these rights. There is no conflation because the two subsections (a) and (b) have a common purpose-which is to ensure that constitutional rights are interpreted in a manner which does not render them to be illusory and mere paper tigers. Whereas subsection (a) requires rights to be given full effect, subsection (b) provides the means through which how rights can be given full effect. The means is to interpret them in a manner that protects the values which underpin those values. In that sense, the protection of the constitutional values is either the purpose for which the right was guaranteed or the constitutional values function as signposts for identifying the purpose served by the right. Thus, section 46 (1) (b) is a means to achieve that which is required by subsection (a). In that sense, the purposive approach to interpretation is itself a value laded approach to rights construction and therefore section 46 (a) and (b) must be interpreted together and holistically. Thus, the two are like a bow and arrow which must be applied together in order to give rights teeth and meaning.

CONCLUSION

The rules of constitutional interpretation that are provided for in section 46 (1) (a) and (b) of the Constitution have their conceptual roots in certain theories of constitutional construction, namely: the rights indivisibility and interdependence theory, the doctrine of a living constitution, the value based and purposive approach. These theories are underpinned by a common objective-which is to facilitate the interpretation of rights in a manner that promotes their effective realization. When applied properly they will inevitably result in certain rights being inferred upon the Declaration of Rights. Thus, section 46 (1) (a) and (b) is can be an effective pathway for reading in rights which the Constitution is silent on, yet the enjoyment of those rights is a precondition for the realization of the rights and the vision that is expressly guaranteed or expressed in the Constitution. However, for

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this to happen, the courts must adopt a more robust approach to the application of the interpretive rules. This demands courts to go beyond regurgitating what has been said by other courts or judges. The courts must provide a comprehensive, deeper and nuanced engagement with the conceptual underpinnings of these rules of constitutional interpretation.

AN INTERROGATION OF THE LAW RELATING TO   
COHABITATION IN ZIMBABWE AND THE NEED FOR LAW REFORM1

BY BEVERLEY CASMILA MADZIKATIRE2 AND ELIZABETH RUTSATE3

ABSTRACT

*This article specifically interrogates the extent to which the continued* *lack of recognition of cohabitation relationships under Zimbabwean* *law has resulted in disproportionate gendered impacts on women* *involved in such relationships. Yet in all fairness and to a large extent,* *a cohabitation relationship performs the same function as that of a* *legally recognised marriage. It argues that the non-recognition is* *discriminatory and violates section 56(1) of the Constitution of* *Zimbabwe. The article builds a case on the need for law reform of* *marriage laws in Zimbabwe that takes into account international* *best practice.*

*Key words:* Cohabitation, property, marriage, equality, non- discrimination

INTRODUCTION

There is no legal definition of cohabitation in Zimbabwe nor are there specific laws governing such relationships. A contextual definition of the term has been adopted for purposes of this article. Cohabitation is whereby “two adults live together in a relationship resembling a marriage in some key respects, without being married” either under civil or customary law4. The family is traditionally created by virtue

1 This article is largely drawn from a dissertation entitled, “A Critique of the   
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Beverley Casmila Madzikatire in partial fulfilment of the requirements of the   
Bachelor of Laws Honours Degree (LLBs)obtained in 2018 that was supervised   
by Dr. Elizabeth Rutsate who has further revised and edited it as at 15 September   
2018;

2 Beverley Casmila Madzikatire is a former law student at the University of   
Zimbabwe, Faculty of Law who graduated with the LLBs Honours degree in   
2018.

3 Dr. Elizabeth Rutsate is a Senior Law Lecturer within the Faculty of Law at the   
University of Zimbabwe.

4 Hubbard et al, *A Family Affair :The Status of Cohabitation in Namibia and* *Recommendations for Law Reform (*2010)Hubbard et al (Legal Assistance Centre)

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of a marriage acknowledged through a ceremony of payment of lobola (bride wealth) or exchange of marriage vows in a court of law or at church. For a cohabitation relationship to exist; there neither would have been any payment of lobola nor marriage in court. Consequently in the eyes of the law the couple is viewed as merely cohabiting; more like two unrelated people sharing a house. Traditionally under Shona customary law, this is widely known as “kuchaya mapoto” or “kutizira”.5 Public policy therefore seems to militate against such relationships6 with the law offering limited protection to cohabiters during the subsistence of the relationship as well as at its dissolution. Yet in all fairness and to a large extent, a cohabitation relationship performs the same function as that of a legally recognised marriage.

2. BACKGROUND

Zimbabwe is a democratic society7 which is founded on respect for values and principles which include the recognition of equality of all human beings as well as non-discrimination.8 Hence all persons have a right to equal protection and benefit of the law9 and the right not to be treated in an unfairly discriminatory manner on the basis of their social status.10 It is against this background that one notes the need for legal recognition of cohabitation relationships in Zimbabwe. Whilst the subject remains contentious especially regarding whether non- recognition of cohabitation “is fair, reasonable and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom”11 or whether it is in the interests of public morality12, it is submitted that an approach taken in *Karambakuhwa v Mabaya*13 is more encompassing vis-à-vis the rights and situation of cohabitants in Zimbabwe.

From an international perspective, there has been in some jurisdictions acceptance and legal recognition of family forms that are different

5 Literally translated to “beating of pots” or “eloping”

6 Chirawu Slyvia, *Family Law in Zimbabwe Student Notes* (unpublished,2016) pg

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7 section 1 of the Constitution of Zimbabwe,2013

8 section 3(1)(f) & section 56 (1)

9 section 56(1)

10 section 56(3)

11 section 86(2)

12 section 86(2)(b)

13 An unreported Supreme Court case no. 158/89 where a cohabitation relationship

was given legal recognition

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from marriage. One of the most progressive jurisdictions which recognise cohabitation is Norway which provides a framework of laws protecting such relationships. Tanzania also recognises cohabitation. It is an inarguable fact that cohabitation has become more normative and has attained significant similarity to marriages when viewed from legal and economic perspectives. This calls for law reform which will enable the de jure status to adjust and/or conform to social realities on the ground as emphasized in *Zimnat Insurance Company Limited v* *Chawanda*14where it was stated that law in a developing country cannot afford to remain static but must be dynamic and accommodating to change. Law must adapt itself to fluid socio- economic norms and values as well as evolving views of justice. A key question has been what has been the basis for arguing in favour of or against the recognition of cohabitation as a marriage worthy of legal recognition?

1. ARGUMENTS ADVANCED FOR AND AGAINST THE LEGAL RECOGNITION OF   
COHABITATION RELATIONSHIPS

*1.1. The Argument in Favour of Recognition of Cohabitation*   
*Relationships*

The legal recognition of cohabitation relationships has been an area of heated debate with various scholars advocating for the protection of vulnerable partners of such relations while others strongly argue against such protection. H.R Hahlo15 states that “the fundamental objection to placing a common-law marriage on the same or nearly the same legal footing as a legal marriage is that as long as marriage is retained as a legal institution couples who do not choose to avail themselves of it but prefer to ‘shack up’ make a deliberate choice. This has been largely referred to as autonomy of the individual, freedom of choice. In other words, it is not the right of lawmakers to dictate to persons (who have chosen not to marry) that consequences flowing from marriage will attach to their relationship. A person who chooses not to marry therefore cannot claim spousal benefits.

The only justification Hahlo gives for recognition of cohabitation relationships is compassion for the woman who is usually the one who pays for attaching to a cohabitation union the consequences of a legal marriage. Research however, reveals that not all cohabitation

14 1990 (2) ZLR 143(S)

15 *The South African Law of Husband and Wife* 5th edition (1985)

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relationships are by choice for example some cannot afford to pay the traditional bride price, some live together as a prelude to marriage, often while they are saving for the expenses attendant upon marriage. Some are precluded by family reasons such as forbidden interracial or interreligious marriages. Alternatively some parties who genuinely want to marry cannot obtain a divorce from their existing spouse16 thus the choice argument seems misplaced.

Another argument advanced against legal recognition of cohabitation relationships is that, the marriage institution loses its sanctity and significance as recognition of such relationships protects persons who undermine the very essence of the marriage institution. This is evidenced by the existence of “mistress-patron” affairs. This seems to be a public policy consideration based on preventing immorality. However D. Singh17 distinguishes between a cohabitant and a mistress. A female cohabitant is defined as one who is in a relationship and cohabits in the same household as a male partner whilst the “mistress- patron” relationship carries clear connotations of a deliberate variation of the monogamous ideal because the mistress appears to coexist with her lover’s spouse “in a form of quasi-polygamy, which activity undermines the conventional marriage.18 Permanent and stable relationships or partnerships should therefore be distinguished from those of intermittent character.

J.D. Sinclair19 states that;

...a better argument for intervention is that the only thing that   
distinguishes marriage from cohabitation is a piece of paper   
that testifies to its existence. An undeniable similarity exists   
between a recognised marriage and a cohabitation relationship.   
The nature of the human relationship is ubiquitously identical,   
children are often the result, and women are notoriously left   
financially at risk when the relationship fails...Marriage and   
cohabitation create similar emotional involvements,   
dependencies and complex issues of finance and property.

16 Johnson v Johnson [1982] 12 Fam Law 116 cited in D Bloy *Family Law* (1995) pg   
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17 Divya Singh “Cohabitation relationships revisited: Is it not time for acceptance?   
(1996) Volume 29, Issue 3, Comparative and International Law Journal of   
Southern Africa

18 ibid

19 *The Law of Marriage*, Vol.1, 1996

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In essence cohabitants face the same practical problems as their married counterparts with whom any children should live and encounter property and financial matters and possibly some element of domestic violence or molestation.20 To that end cohabitants need legal protection.

Sinclair notes two attitudinal perspectives to the legal protection of cohabitation, one restrictive and the other realistic. On one hand the question asked is whether cohabitation per se deserves special protection by the law? On the other hand is the pertinent question based on reality, that is, whether the victims of breakdown of intimate relationships deserve special legal protection? The answer to the latter is in the affirmative. One should not look so much as to whether on face value cohabitation deserves legal protection but at the victims of the breakdown of the relationship.

*1.2. Challenges Associated with Non-recognition of Cohabitation* *Relationships*

The current family laws perpetuate discrimination and stigmatization of cohabitants as legal status and benefits resulting from marriage are the sole privilege of married couples. It can be argued that this tramples upon the rights firmly entrenched in the Zimbabwean Constitution namely the right to equal benefit and protection of the law and the right to non-discrimination. Non-intervention in the context of cohabitation manifests a choice to allow substantial suffering to continue unalleviated21. The economically weaker partner is always at the mercy of the stronger partner.

The law becomes retrogressive as it fails to fulfil its purpose of adjusting to social changes in the lives of society. Thus it has been said that by assuming that families always arise out of marriage and using marriage as its point of departure, the law lags behind social change.22 Hence the criticisms which have been levelled against the contemporary analysis of the family in Africa are premised on its tendency to define the family in terms of marriage23 with many African law systems rarely making any provision for the rights of women who

20 D. Bloy *Family Law* (1995)

21 Sinclair supra

22 Amstrong. A et al, *Uncovering Reality: Excavating Women’s Rights in African*

*Family Law,* WLSA   
23 ibid pg 57

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are not formally married24 yet the concept of a family is not cast in stone but covers a wide range of relationships which include cohabitation relationships.

2. THE LEGAL STATUS OF COHABITATION RELATIONSHIPS IN ZIMBABWE: A BRIEF   
OVERVIEW OF THE DOMESTIC LEGAL FRAMEWORK

*2.1. Introduction*

According to Hahlo (supra), a cohabitation relationship is neither a legal marriage nor does it ripen into one by the lapse of time. Consequently, a cohabitation relationship generally lacks a clearly determined legal status and there are no specific laws which are suited to govern this type of relationship. Resultantly cohabitants suffer certain vulnerabilities. To ascertain the legal standing of cohabitation relationships in Zimbabwe, in this paper a cohabitation relationship is contrasted with marriage. The main argument here is that; if only a piece of paper distinguishes marriage from cohabitation, is the lack of such paper by cohabitants enough justification to deny them the legal benefits and protection enjoyed by spouses in a marriage? To reach an informed conclusion, specific legal aspects that affect cohabitants in Zimbabwe are explored with the key aim of revealing the vulnerabilities that cohabitants encounter in each different aspect discussed.

*2.2. Cohabitation and the Law in Zimbabwe*

Due to its colonial history, Zimbabwe has a dualist legal system whereby general law (comprised of received laws and statutory law) operates side by side with customary law.25 Coupled with other influences from all over the world emanating from globalization, this has brought about a legal pluralist environment. Ultimately this has meant that common law, customary law and people’s customs and practices26 have been accepted as applicable sources of law.27 There exists a potential conflict of laws applicable to a particular situation regarding whether it is general law or customary law that should apply. Traditionally a choice of law criterion has been adopted to determine the applicable system

24 Ibid

25 Section 192 of Constitution

26 As long as they are positive cultural norms

27 S. Chirawu, G.Murungu et al, *Challenging the Status Quo-Gender, HIV/AIDS*

*and the Law in Zimbabwe: A Rights-based Approach*, (2007) *WLSA*

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of law. However the 2013 Zimbabwean Constitution has had the effect of overriding some customary law choices which perpetuated gender inequality as they tended to be discriminatory against certain groups of people particularly women as based on gender.

Section 3 of the Customary Law and Local Courts Act28 provides guidelines on the law to be applied in a given situation. Unless the justice of the case otherwise requires, customary law applies in any civil case where the parties have expressly agreed that it should apply; or regard being had to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or regard being had to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply. In all other cases, the general law of Zimbabwe is applicable. Surrounding circumstances in relation to a case include the mode of life of the parties; the subject matter of the case; the understanding by the parties of the provisions of customary law or the general law of Zimbabwe and the relative closeness of the case and the parties to the customary law or the general law of Zimbabwe.

In *Mabaudi v Mhora*29it was stated that customary law cannot be applied to a cohabitation union. The parties in *casu* did not have a customary union, which is the only recognized type of union under customary law. The court held that general law could not be applied as there was no cause of action pleaded based on general law and none seemed to be applicable to the particulars of claim set out. It follows that the applicable law to a cohabitation relationship is general law but a party must specifically plead a recognized cause of action such as mounting an action based on tacit universal partnership or unjust enrichment.

Despite its growing contribution to the family setup, there is no clear legal framework governing cohabitation in Zimbabwe. The complete framework of legislation governing family law is not designed to cater for cohabitants but “spouses” and to a limited extent unregistered customary law unions which have always been distinguished by the payment of *lobola* or bride-wealth*.* The distinction between an unregistered customary law union and cohabitation seems to have fallen away as the payment of *lobola* no longer is an essential element

28 [*Chapter 7:05*]

29 (HH) unreported case no 60/11

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under customary law as enunciated in *Katekwe v Muchabaiwa*30 and *Karambakuhwa v Mabaya* (*supra*).

Whilst there are mechanisms in place that can be invoked by cohabiting couples31, the current laws are not designed to cater for cohabitants as they are inadequate to most cohabiting situations. These mechanisms do not automatically apply but rather have to be specifically pleaded and proven. Cohabitants therefore remain vulnerable as they do not have a clearly determined legal status. As a result, the personal and proprietary consequences of cohabitation remain unclear in several legal scenarios that include (i) claims for adultery damages; (ii) sharing of property; (iii) intestate succession rights, and (iv) maintenance during the subsistence of the cohabitation and after its dissolution, to mention but a few.

Case law exposes the vulnerability of cohabitants. In a fairly recent case, *Nyamukusa v Maswera*32where an applicant sought distribution of property acquired during her cohabitation relationship with the defendant and customary union thereafter; the court clearly distinguished the entitlements of a cohabitant to that of a spouse of a registered marriage, the latter being in a better and more advantaged position than the former;

She seems to be mistaking her entitlements to those of a wife   
under a registered marriage as provided for in terms of the   
Matrimonial Causes Act [Chapter 5:13].She seems to forget that   
her claim is based on tacit universal partnership and/or unjust   
enrichment.

Therefore the law as it stands provides no assistance to cohabitants, especially women who are unable to assert their proprietary rights and are then left with only what their partner chooses to give them.

*2.2.1. Relevant Constitutional and Legislative Provisions*

As indicated earlier, in Zimbabwe there is no piece of legislation that specifically governs cohabitation relationships. The basic Statutes or Acts that provide for family protection by the State only recognise formal marriages and give rights to spouses within a formal marriage

30 1984(2)ZLR112(S)

31 such as mounting an action based on tacit universal partnership or unjust

enrichment

32 (HH) unreported case no 35/16 of 14 December 2015

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to the exclusion of cohabitants. The spouse-centred pieces of legislation that have provisions governing family relations in Zimbabwe to the exclusion of cohabitants include (i) Administration of Estates Act [*Chapter 6:01*], (ii) Civil Evidence Act [*Chapter 8:01*], (iii) Criminal Procedure and Evidence Act [*Chapter 9:07*], (iv) Customary Marriages Act [*Chapter 5:07*], (iii) Deceased Estates Succession Act [*Chapter* *6:02*], (iv) Maintenance Act [*Chapter 5:09*] and (v) the Matrimonial Causes Act [*Chapter5:13*]. Further to that, the types of marriages recognized in Zimbabwe are (i) the civil marriage contracted in terms of the Marriage Act [*Chapter 5:11*] which is monogamous; (ii) the registered customary law marriage in terms of the Customary Marriages Act [*Chapter 5:07*] which is potentially polygamous; and, (iii) to a limited extent an unregistered customary law union which is valid only for purposes of customary law and custom relating to the status, guardianship, custody and rights of succession of children born of such marriage.33

THE CONSTITUTION OF ZIMBABWE, 2013

Section 56(3) of the Constitution of Zimbabwe, 2013 provides that every person has the right not to be treated in an unfairly discriminatory manner on such grounds as include social status. It is submitted that non recognition in the context of cohabitation deprives cohabitants of the right to non- discrimination and the right to equal benefit and protection of the law as per section 56(1) of the Constitution. Every person must be given equal moral worth and systematic inequality and disadvantage must be eradicated by actively promoting substantive equality.

Section 46(c) of the Zimbabwean Constitution further states that a court, tribunal, forum or body must take into account international law and all treaties and conventions in which Zimbabwe is a party. Zimbabwe is a signatory to treaties which include the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), the Protocol to the African Charter on Human and Peoples Rights on the Rights of Women (Maputo Protocol), International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) which recognise the fundamental rights to equality and non-discrimination and further recognise different family forms. Section 326(2) of the Constitution

33 Section 3(5) of the Customary Marriages Act [*Chapter 5:07*]

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of Zimbabwe also provides that when interpreting legislation, courts and tribunals must adopt reasonable interpretation of legislation which is consistent with customary international law applicable to Zimbabwe. Thus the judiciary has a key role to play in protecting the family in line with customary international law.

*2.2.2. Statutory Provisions that Relate to Specific Areas of*   
*Marriage Law*

1. Property Distribution

There are no special rules governing property distribution between cohabitants upon breakdown of the relationship34. Whilst distribution of property upon divorce in marriage is governed by the Matrimonial Causes Act35, which addresses the mischief of injustice in distribution of property upon divorce by providing equitable principles, the Act does not apply to cohabitants36. A good example is section 7(4) (g) of the Act37 which requires courts to place divorcing spouses and children in the position they would have been in had a normal marriage relationship continued between them. Section 7(4) (*e*) also recognises the direct or indirect contribution made by each spouse to the family, including contributions made by looking after the home and caring for the family and any other domestic duties, which provisions do not apply to cohabitants.

Since a cohabitant cannot invoke the protective and adjustable measures available to spouses; he or she is vulnerable when the relationship ends. In a situation whereby property accrued during the existence of the relationship is registered in the name of one partner, that partner in whose name the property is registered is the sole owner. The common practice has been for the aggrieved cohabitant to seek remedy through proving their contribution in the cohabitation relationship. This is achieved through establishing the existence of a tacit universal partnership or alternatively claiming unjust enrichment against the unjustly enriched partner so as to achieve a fair distribution

34 The principles of sharing matrimonial property upon divorce namely “his”,   
“hers” and “theirs” as put out in *Takapfuma v Takapfuma 1994(2)ZLR103* may   
not apply to a cohabitation relationship

35 [Chapter 5:13]

36 Section 2 of the Act defines “marriage” to include a marriage solemnized in

terms of the Customary Marriages Act [*Chapter 5:07*]   
37 Matrimonial Causes Act [*Chapter 5:13*]

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of property. However recourse to these legal solutions is not automatic as outlined in statutory law. Rather one has to locate remedies within the law of contract and the general law of property.

*1.1. Tacit Universal Partnership*

This is an alternative remedy available to a cohabitant based on the Roman Dutch law of partnership, the *societas universorum quat ex* *quaestu veniun*t38where parties agree that all they may acquire during the existence of the partnership from every kind of commercial undertaking; shall be partnership property39. This specifically means that as partners entered into a universal partnership, through their conduct and joint endeavour, they jointly acquired and now own property under discussion for their joint use and benefit.

The principle of tacit universal partnership was discussed at length in the case of *Masimbe v Mungofa.*40Referring to *D v Wet N.O.*41 *and Ally* *v Dinath*42the court held that there is no obstacle to a woman who has lived with a man, as man and wife for a long time bringing this type of action, namely the tacit universal partnership. However, the cohabitant alleging the existence of such partnership has to fulfil certain requirements before property can be equitably distributed between the parties. In *Nyamukusa v Maswera* (supra) the court reiterated the requirements for a tacit universal partnership spelt out in *Mtuda v Ndudzo*43as follows:

a) Each of the partners must bring something into the   
partnership or must bind himself or herself to bring   
something into it, whether money or labour or skill;

b) The business to be carried out should be for the joint   
benefit of the parties;

c) The object of the business should be to make a profit; and   
d) The agreement should be a legitimate one.

In addition, the intention of the parties to operate as a partnership is also an important consideration. All these requirements must be met prior to the finding of a relationship as a tacit universal partnership.

38 A Latin expression literally translated to mean, *“dazzled as they come from*   
*the income of a society for all”*

39 *Butters v Mncora* 2014(3)All SA 259 (SCA)   
40 HH-96-94

41 1953(1) SA 612

42 1984(2)SA 451(TPD)

43 2001(1) ZLR 710 (H)@p176 F-G

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Sinclair44 points out the problems associated with the use of this legal concept. Proving existence of a tacit universal partnership is difficult since reliance is on an implied contract. Cohabitants seldom enter into written agreements, making it difficult to prove the terms and conditions of the implied partnership. This is more so when one considers that in these cases oral evidence is largely used. The situation is different if there is a contract present whose details and contents are spelt out with clarity in terms of frameworks used for the sharing of property and regulation of affairs. Unfortunately, most partners who cohabit seldom enter into written universal partnerships. The majority of cohabitants find themselves in a predicament when the relationship ends as they are left without anything of note.

*1.1. Unjust Enrichment Action*

This is the other alternative route available to a cohabitant who wants to claim equitable distribution of property upon breakdown of a relationship in the courts of law. The requirements for an action for unjust enrichment were laid out in *Industrial Equity v Walke*r45. This concept entails that the plaintiff has to prove contribution which if not shared equally will leave the defendant unjustly enriched at the plaintiff’s expense as stated in *Nyamukusa v Maswera*46*.* The requisites to be met are;

a) The defendant must be enriched;

b) The plaintiff must have been impoverished by the

enrichment of the defendant;   
c) The enrichment must be unjustified;

d) The enrichment must not come within the scope of one of   
the classical enrichment actions;

e) There must be no positive rule of law which refuses an   
action to the impoverished person.

This was successfully applied for in *Goncalves v Rodrigues.*47 The court stated that it is a generic conception of the composite event which gives rise to a claim for restitution. In *casu* after concluding that all requisites had been proved to its satisfaction, the court ordered the defendant to pay the plaintiff an amount equivalent to fifty-per centum

44 supra

45 1996(1) ZLR 269(H)

46 HH-35-16

47 (HH) unreported case no 197/03 of 7 January 2002 & 11 February 2004

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of present nature of the immoveable property or in default of doing so the property would be sold to the best advantage and the net proceeds divided equally between the parties.

Although these equitable doctrines work in favour of vulnerable cohabitants, at most all they do is merely alleviate the situation of cohabitants. In the majority of cases, cohabitants still suffer vulnerabilities that emanate from the stringent requisites which are often difficult to prove and inevitably lead to inequitable distribution of assets. Family law consequences ought to flow automatically from a cohabitation relationship that is stable and permanent, founded by two parties with the intention to found a family.

*1.1. Maintenance*

Maintenance has been defined as payment of money or material support that a person may be ordered by a court to pay so as to provide support of his or her dependants48. Whilst partners to a civil marriage in terms of the Civil Marriages Act49 and Customary Marriages Act50 can claim maintenance from their spouses by virtue of a fully recognised legal marriage in which either party is obliged to maintain the other, this does not apply to cohabitants. There is no reciprocal duty of support between cohabitants during the relationship or after its termination by death or otherwise51. The Maintenance Act52 at most acknowledges maintenance of spouses under customary law that is those in unregistered customary law unions to the exclusion of cohabitants. Section 6(3) states that husbands and wives under customary law are primarily responsible for each other’s maintenance. Since cohabitation is unknown under customary law, the legal entitlement is not extended to cohabitants. Cohabitants may only claim maintenance from their partners for their children but not for themselves. This is so because maintenance laws do not distinguish in as far as the maintenance of children is concerned.

It is argued however that if need is the determinant factor in awarding maintenance then it should not be a challenge to use the same

48 J.Win & L.O. Venekelasen t al, *Family Laws Customs and Practices in Zimbabwe*   
pg 99

49. [Chapter 5:11]   
50. [Chapter 5:07]   
51 Sinclair supra

52 [Chapter 5:09]

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approach for cohabitation relationships. This is because cohabitation relationships are normally dependency-producing ones and as such logic demands that maintenance be awarded to the partner who is in more need of such maintenance once it is established that the cohabitation union was akin to marriage. Whilst the law does not provide for such, the factual reality is that there is indeed reciprocal maintenance between cohabitants who live as husband and wife during the existence of the relationship which must not terminate with the dissolution of the relationship.

1.1.1. Opportunities for Change

The case of *Karambakuhwa v Mabaya (supra)* has provided a window of hope for law reform vis-à-vis maintenance for former cohabitants. In *casu* the parties had cohabited in a union which was neither registered in terms of status nor had lobola or roora *(*bridewealth*)* been paid to the woman’s family. The woman’s claim for maintenance was countered by the husband based on the assertion that he was not legally liable to maintain her as he was a mere ‘seducer’. It was alleged that since he had not paid nor promised to pay any roora for the woman cohabitant, he was a mere seducer and therefore he was not legally liable to maintain her.

The court referred to the *Katekwe versus Muchabaiwa* case53 and stated that it is settled law that the question of roora is no longer an essential element of marriage under customary law.54 The question of roora was completely disregarded in determining whether the respondent’s relationship with the appellant amounted to a customary union for purposes of the Maintenance Act. The adduced evidence pointed to the fact that the respondent had been accepted as a daughter-in law according to custom. Further to that, the union between the appellant and the respondent, viewed as that expected of a “husband and wife,” was characterized by reasonable stability similar to many registered marriages. By looking at the functional similarity between marriage and cohabitation, the court thus discarded the allegedly cast in stone approach which makes registration the only determinant factor in establishing a marriage relationship.

53 supra

54 The court in *Hosho v Hassisi (HH)* unreported judgement no*. 491/15* took a

different view stating that lobola remains the most cogent and valued proof   
and indication of a customary union.

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*1.2. Insurance Claims and other Claims for Loss of Support*

There being no reciprocal duty of support between cohabitants, it follows therefore that a cohabitant cannot make a claim for damages for loss of support after the death of his or her partner. If a cohabitant who is the bread winner and sole provider dies, the surviving partner cannot claim damages for loss of support due to him or her against the third party who has unlawfully caused the death of the breadwinner. This position governing cohabitation relationships is however different from that which previously has been adopted for unregistered customary law unions, the most popular example being the case of *Chawanda v Zimnat Limited* (supra) where it was stated that one can successfully institute a claim for loss of support arising from the unlawful killing of their breadwinner to whom they were married in terms of an unregistered customary law union.

In the absence of any significant uniform approach to the determination of cases emanating from cohabitants and those in unregistered customary law unions, dependent cohabitants have therefore continued to suffer untold hardships as they are often left unsupported financially when their partners who are principal breadwinners substantially contributing to their welfare die or neglect to maintain them during the existence of the relationship.

*1.3. Evidence and Marital Privilege for Cohabitants*

Marital privilege which protects communications between spouses from being divulged in a court of law does not extend to cohabitants since the privilege attaches to a legally recognised marital union. A cohabitant is therefore a compellable witness and can be compelled by a court of law to testify against his or her partner. Being called as a witness for or against a partner in both civil and criminal proceedings is socially undesirable as it disturbs harmony between the parties and is harsh on the partner compelled to give evidence. Yet the confidences exchanged between cohabitants are equally as intimate and confidential as that of a married couple55 entitling such to the same protection as that of a husband and wife.

Of particular relevance to this aspect is the Civil Evidence Act [Chapter 8:01]. Section 6 of the Act addresses competence and compellability of witnesses in civil matters. Subsection 3 of Section 6 states that no

55 Bromley supra

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person shall be compelled to disclose any communication, whether oral or in writing, made by him to his spouse or made to him by his spouse during their marriage. This applies whether or not the marriage has been subsequently terminated by death or dissolved or annulled by order of a court56. Such privilege however may not extend to cohabitants as they are not encompassed in the definition of a spouse in the Act.

Under Section 247 of the Criminal Procedure and Evidence (C.P. & E) Act [Chapter 9:07] or Criminal Code, the wife or husband of an accused person is not compellable to give evidence against his or her spouse (unless the crime is a grievous offence which in itself undermines the marriage institution). These include rape; aggravated indecent assault; sexual intercourse or performing an indecent act with a young person; sexual intercourse within a prohibited degree of relationship; kidnapping or unlawful detention of a child; bigamy and perjury. The wife or husband of an accused person is a competent witness, but is not compellable, to give evidence for the prosecution without the consent of the accused person where such person is prosecuted for an offence against the separate property of the wife or husband of the accused person57. All these provisions seem to exclude cohabitants. This means that if a cohabitation relationship breaks down, a bitter and vindictive partner may break confidences and broadcast information imparted and received on the shared understanding that it would not go further. Familial harmony is thus undermined and trampled upon.

*1.4. Intestate Succession and Matters to do with Inheritance*   
Cohabitants do not have automatic intestate succession rights. Unlike spouses within a formal marriage, cohabitants can only benefit from the estate of a deceased partner through testate succession. Laws of intestate succession do not encompass cohabitants. Hence if a partner dies without a valid will, there is no legal protection if the property in question is not registered in both the name of the deceased partner and/or the surviving partner. Absence of a valid will in favour of the surviving spouse therefore has dire consequences for the surviving partner because if a partner dies without a valid will there is no protection offered by the law.

56 section (6)4   
57 section 247(3)

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*1.5. Entitlements in Respect of the Matrimonial Home*

Unlike a spouse, a cohabitant holds no statutory right to occupy the quasi-matrimonial home, but is entitled to remain in it only as an owner or licensee. Section 3A of the *Deceased Estates Succession Act* *[Chapter 6:02]* provides that inheritance of the matrimonial home and household effects is vested in the surviving spouse. A cohabitant who is not the owner or lessee of the property has no special right to occupy the common home. This arises from the fact that for a cohabitant to then acquire the house; he or she must prove contribution or joint ownership. Difficulties in proving this exposes the surviving cohabitant not only to being evicted but also to property grabbing by relatives of a deceased partner.

*1.6. Adultery*

Adultery occurs when sexual intercourse is engaged in by two people whereby one of the parties or both are married to someone else at the time the act of sexual intercourse took place. Consequently, adultery damages are intended to compensate an innocent spouse for the injury inflicted upon him or her by the defendant who has had sexual relations with his or her spouse and also for the loss of consortium the plaintiff may have suffered by reason of the withdrawal of the comfort, society, love, companionship and assistance his or her spouse was providing58. In *Njodzi v Matione*59it was held that adultery is an injury occasioned to the innocent spouse because of the adulterous relationship. In that regard, the injured spouse can recover damages for loss of a spouse’s consortium as well as any patrimonial loss suffered and also personal injury or *contumelia* suffered by them, inclusive of loss of comfort, society and services.

Adultery has been discussed at length in the context of registered marriages as well as unregistered customary law unions but not in the context of cohabitation. In *Mukono v Gwenz*i60, it was held that a woman married in accordance with custom and whose marriage is registered under the Customary Marriages Act [Chapter 5:07] cannot claim damages against a woman who has committed adultery with her spouse. This is so because the customary marriage under the said

58 Ncube W, (1989) *Family Law in Zimbabwe* pg54 para3 59 (HH) unreported case no.37/16

60 1991(1) ZLR 119

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Act is potentially polygamous whereas a marriage under the Marriage Act61 is monogamous. In *Carmichael v Moyo*62 it was held that a husband in an unregistered customary law union has a legal right to sue in a court administering customary law for adultery committed with his spouse.

These personal consequences of marriage do not attach to cohabitation relationships. A cohabitant cannot institute an action for adultery damages against a third party who has engaged in sexual intercourse with his or her partner. This would seem to suggest that in the absence of a legally recognised marriage, no wrong is done since cohabitants are deemed to be free to engage in sexual relations with other parties without any consequence which obviously is not always the case. It is argued however that once a cohabitation relationship is established, the justice of the case would demand that in the event that one of the cohabiting partners is unfaithful and has sexual intercourse with a third party, the innocent partner must be awarded damages for the wrong done. This is because except for lack of registration, for all intents and purposes a cohabitation relationship is akin to marriage. One can actually compare the situation to the consequences that arise when parties breach a verbal or written contract with similar terms.

3. MARRIAGE UNDER THE INTERNATIONAL LEGAL FRAMEWORK

*3.1. The Recognition of Cohabitation as an Emerging Family*   
*Form*

It has always been one of the key arguments by researchers on the family, the most popular being Engels,63 that from time immemorial the family as a social unit has been in a continuously evolving state. A popular adage that has consequently emerged is that *“the family is*

61 [Chapter 5:11]

62 1994 (2) ZLR 176

63 Engels in “Origins of the Family, Private Property & the State” Available at:

<https://readingfromtheleft.com/PDF/EngelsOrigin.pdf> last accessed 08/30/   
2018

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*in a state of continuity and change.”*64 Engels65 cites from Lewis H. Morgan’s 1877 book,66 where he states;

...when the fact is accepted that the family has passed through   
four successive forms, and is now in a fifth, the question at   
once arises whether this form can be permanent in the future.   
The only answer that can be given is that it must advance as   
society advances, and change as society changes, even as it has   
done in the past. It is the creation of the social system, and will   
reflect its culture. As the monogamian family has improved   
greatly since the commencement of civilisation, and very sensibly   
in modern times, it is at least supposable that it is capable of   
still further improvement until the equality of the sexes is   
attained. Should the monogamian family in the distant future   
fail to answer the requirements of society it is impossible to   
predict the nature of its successor.

It has been the case that in other jurisdictions of the world especially Scandinavian countries (as discussed later in this article), cohabitation has been recognized as an emerging form of a marriage relationship despite its lack of some of the formalities currently viewed as essential for its validity e.g. registration.

*3.2. Identifying the Cohabitation Relationship as Constituting a* *Family Social Unit*

P.M. Bromley67 defines a family as a basic social unit constituted by at least two people whose relationship may fall into one of three categories. The first one being husband and wife or “two persons living together in a manner similar to spouses.” The current laws however are stagnant and seem not to embrace the fact that a cohabitation relationship is an undeniable family form. The argument here is that cognisance must be taken of this unique social phenomenon as deserving of legal protection similar to the conventional marriage.

64 Since Welshman Ncube’s 1997 publication entitled, *“Continuity and Change:*   
*The Family in Zimbabwe”* under the WILSA flagship, many other publications   
on the evolving nature of the family have emerged and flooded the internet.

65 Ibid; See page 85

66 L.H. Morgan, Ancient Society, or Researches in the Lines of Human Progress

from Savagery through Barbarism to Civilization, 1877 available at: [http://](http://www.gutenberg.org/files/45950/45950-h/45950-h.htm)   
[www.gutenberg.org/files/45950/45950-h/45950-h.htm](http://www.gutenberg.org/files/45950/45950-h/45950-h.htm) or [https://](https://www.marxists.org/reference/archive/morgan-lewis/ancient-society/index.htm)   
[www.marxists.org/reference/archive/morgan-lewis/ancient-society/index.htm](https://www.marxists.org/reference/archive/morgan-lewis/ancient-society/index.htm)   
[last accessed 10 September, 2018]

67 P.M. Bromley and N.V. Lowe, Bromley’s Family Law 8th edition, 1992, pg 3

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Following on that a key question arises, which is whether either registration of a marriage or intention to found a family is the yardstick of determining the validity of such relationships? If it is established that the manner in which parties to a cohabitation relationship lived together and that their intention thereof was to found a family, is it justifiable to deny the parties legal recognition and protection? It is hereby argued that cohabitants ought to be legally protected if it is established that they fit into the description of a family unit.

*3.2.1. Taking a Human Rights-based Approach to Recognizing*   
*Cohabitation Relationships as Family Units*

A rights based approach to development has been described as “a conceptual framework for the process of human development normatively based on international human rights standards and operationally directed to promoting and protecting human rights”68 It integrates the norms, standards and principles of the international human rights into the plans, policies and processes of development. The rights based approach does not describe situations simply in terms of human needs, or development requirements but further looks at the society’s obligations to respond to inalienable rights of individuals69. People are thus empowered to demand justice as a right and it gives a moral basis from which to claim international assistance where needed.70

Human rights are rights that accrue to a person simply by virtue of being human and are independent of any acts of law71. A salient human right is protection from discrimination and it is hereby argued that non recognition of cohabitation as a family form indeed discriminates between married and unmarried couples and amounts to unfair discrimination. Taking an approach that is human rights based effectively demands the establishment of a scheme that recognises everyone’s equal rights and judges the behaviour of every person on the basis of how people realise or violate those rights. It is more than an individual process but a collective system which calls for state intervention and cooperation of government with corporations and

68 Available at [*http://hrbaportal.org/faq/what-is-a-human-rights-based-*](http://hrbaportal.org/faq/what-is-a-human-rights-based-)   
*approach*, Accessed 24 April 2018

69 Available at [*http://ww.icva.ch/doc00000664.html*](http://ww.icva.ch/doc00000664.html)*>* Accessed 17 April 2018 70 ibid

71 S.Chirawu, G.Murungu et al, *Challenging the Status Quo-Gender, HIV/AIDS and*

*the Law in Zimbabwe: A Rights-based Approach*, (2007) *WLSA*

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individuals to redress this discrimination especially since cohabitation and marriage serve the same function and is becoming increasingly normative. State institutions cannot continue to ignore this social phenomenon.

In order to grasp the extent to which the family has evolved and continues to do so in a manner that is increasingly accommodative of cohabitation relationships, it becomes important to undertake a brief analysis of relevant provisions that accommodate cohabitation under the various international human rights conventions to which Zimbabwe is party.

*1. International Covenant on Civil and Political Rights (ICCPR)*   
*(1966)*

Article 23 of the ICCPR provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state. In paragraph 2 of its *General Comment No. 19* *on Article 23 of the ICCPR (The Family) Protection of the Family, the* *Right to Marriage and Equality of the Spouses*72 the UN Human Rights Committee takes note of the fact that the concept of family may differ in some respects from state to state or region to region within a state and thus it is impossible to give the concept a standard definition. The committee goes further to take note of various forms of family which include unmarried couples and their children. The Human Rights Committee takes the same stance in paragraph 27 of its General Comment No. 28 of 2000 on Article 3 on *“Equality of* *rights between men and women*”73

*2. Convention on the Elimination of All Forms of Discrimination* *Against Women (CEDAW) (1981)*

Stating that *“state parties shall take all appropriate measures to* *eliminate discrimination against women in all matters relating to* *marriage and family relations...”;*74 *‘Article 16.1 of the CEDAW* *contains both a general call for equal rights and responsibilities of*

72 available at: [*http://www.refworld.org/docid/45139bd74.html*](http://www.refworld.org/docid/45139bd74.html)[last accessed   
31 August, 2018]

73 available at: <http://www.refworld.org/pdfid/45139c9b4.pdf> [last accessed 31   
August, 2018]

74 See Article 16 of the CEDAW available at: <http://www.un.org/womenwatch/>   
daw/cedaw/text/econvention.htm [last accessed 08/31/2018]

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*spouses and a right to equality in property relations in particular,*’75 By necessary implication, it would follow that non-recognition of cohabitation relationships perpetuates discrimination against women in matters relating to marriage and family relations. In most instances the woman will be a housewife or earns a small wage whilst the man will be gainfully employed naturally placing the woman at an economic disadvantage when the relationship terminates.

*3. The Protocol to the African Charter on Human and Peoples*   
*Rights on the Rights of Women in Africa (Maputo Protocol)*   
*(2005)*

Despite the inarguable fact that Africa as a continent has its fair share of unregistered customary marriages some of which are nothing more than cohabitation relationships, it is to be noted that under the Maputo Protocol a hard line stance is taken against unregistered unions whereby Article 6 on Marriage in paragraph (d) states that, *“...every* *marriage shall be recorded in writing and registered in accordance* *with national laws, in order to be legally recognised.”* There thus exists a gap between the de jure and de facto status of marriages and what is recognized as a family on the continent inclusive of Zimbabwe which requires urgent redress.

*4. The African Charter on Human And Peoples’ Rights (ACHPR)*   
*(1981)*

Article 2 of the ACHPR provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status. It can be argued that the phrase “other status” encompasses cohabitants. One of the rights and freedoms guaranteed in the Charter is in Article 3 which provides that every individual is entitled to equal protection of the law. It therefore means that failure to offer legal protection to cohabitation relationships perpetuates unjustified inequality between formally married and cohabiting couples.

75 See A. Hellum and H.S. Aasen in *“Women’s Human Rights: CEDAW in*   
*International, Regional and National Law- A Study of Human Rights Convention”*   
(2000) at page 282

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*The Convention on the Rights of the Child (CRC) and the African* *Charter on the Rights and Welfare of the Child (ACRWC)*

Both the CRC and the ACRWC recognize the family as the fundamental basis of society and also the natural environment for the growth and well-being of all its members particularly children which must be afforded the protection and assistance necessary for the full assumption of its responsibilities within the community.76 Reference is made to “a family environment”77 which must be conducive for the child to grow up in an atmosphere of happiness, love and understanding. The term has been defined to mean different family structures arising from various cultural patterns and emerging familial relationships78 and this seems to encompass cohabitation relationships.

5. A COMPARATIVE ANALYSIS OF ZIMBABWE AND OTHER JURISDICTIONS: THE CASE OF AFRICA AND SCANDINAVIA

*5.1. Introduction*

Despite the general lack of protection for cohabitation relationships across the world inclusive of Zimbabwe there exists exceptional jurisdictions within which provisions have been put in place to eliminate the inherent insecurity of cohabitation relationships. This has been achieved by giving legal recognition and protection to cohabitants through acknowledging cohabitation relationships as a new family form different from marriage. Examples used in this article are South Africa, a country with a legal system similar in many aspects to Zimbabwe; Tanzania, an African country which has pro-cohabitation laws and Norway, a Scandinavian country which has the best practices insofar as it gives considerable rights to cohabitants.

*5.2. South Africa*

South Africa like Zimbabwe has no specific legislation which governs cohabitation relationships. It is characterized by rigid family structures centred on marriage. In *Volks No v Robinson and others*79the court had occasion to mention that it could legitimately distinguish between married and unmarried people and could accord benefits to married

76 see Preamble to CRC and Article 18 of the ACRWC

77 see Article 20 and Preamble to CRC and Article 18 ACRWC

78 UN Committee on the Rights of the Child,” Fortieth session: Day of General

Discussion, Children without Parental Care”, CRC\C\153, 17 March 2006   
79 2005 (5) BCLR 446 (CC)

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persons which it does not accord to unmarried persons80. However, certain statutes in South Africa recognise cohabitants which will be discussed below. South African courts like Zimbabwe have extended protection to cohabitants who can prove the existence of universal partnership.81 South African courts have further recognized contracts entered into by and between cohabitants as enforceable. Further to that, the Draft Domestic Partnership Bill of 2008 which has not been adopted as law to date would alleviate most of the problems cohabitants in South Africa encounter due to their non-recognition by the current South African marriages legal regime.

*5.2.1. Statutory Recognition*

Similar to the position in Zimbabwe, cohabitation in South Africa is recognised under the South African Domestic Violence Act of 1998. A domestic relationship is defined to include persons who are of ...or the opposite sex who live or lived together in a relationship in the nature of marriage, although they are not, or were not, married to each other, or are not able to be married to each other.82 The law thus provides maximum protection to victims of domestic violence. The Medical Schemes Act 131 of 1998 defines a dependant to include a ‘partner.’ Consequently, either partner in a cohabitation relationship may name the other as a beneficiary in a life-insurance policy. The nomination will, however, have to be clear because a clause in an insurance policy that confers benefits on members of the insured’s ‘family’ may cause problems.83 The South African Compensation for Occupational Diseases Act, 1997 also states that a surviving domestic partner may claim for compensation if their partner died as a result of injuries received during the course of work, provided that, at the time of the employee’s death they were living as ‘husband and wife.’

*5.2.2. Cohabitation Contracts*

South African courts have in the past recognised cohabitation contracts. These are contracts similar to an ante nuptial contract that regulates obligations during the subsistence of the relationship

80 for example duty of support, cohabitation and fidelity

81 *Ally v Dinath* supra , *Butters v Mncora* supra looks at indirect financial

contributions

82 Section 1 (vii)(b) of the Act

83 [*http://divorceattorneycapetown.co.za/living-together-law-cohabitation-*](http://divorceattorneycapetown.co.za/living-together-law-cohabitation-)   
*common-law-marriage-laws-of-cohabitation-common-law-marriage/ A*ccessed   
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and patrimonial consequences of termination. Whilst some have argued that they are contrary to public policy84, the argument proffered in this article is in support of taking an accommodating approach that does not view such contracts that create families as being contrary to public policy. The position of a cohabitation relationship in society is not likely to encourage people to cohabit who would not do so anyway and if two people do intend to live together, it is better that the law gives cohabitants a framework within which they should give some thought to their financial and other arrangements if the union should break down.85

In *Steyn v Hasse*86it was held that in South Africa cohabitation is a common phenomenon and widely accepted but cohabitants generally do not have the same rights as partners in a marriage or civil union. It was said that although no reciprocal duty of support arises by operation of law in the case of unmarried cohabitants, it does not preclude such duty from being regulated by agreement. This follows that if one partner refuses to follow the agreement; the other partner can approach a court for assistance. In most cases, a court will enforce the agreement provided the agreement is not illegal, against the morals of society or contrary to public policy.87 For example in Zimbabwe a court would not be able to enforce an agreement between two persons of the same sex purporting to be cohabiting because the relationship contravenes Constitutional provisions and is void ab initio.

*5.2.3. South Africa’s Domestic Partnerships Bill of 2008*

The 2008 Domestic Partnership Bill is an elaborate piece of draft legislation which seeks to provide cohabitants with an option to register their relationship as a domestic partnership and attaining similar rights and responsibilities as those obtaining within a marriage union. The draft bill provides for the legal recognition of domestic partnerships and the enforcement of the legal consequences of domestic partnerships. The mischief sought to be addressed is that there is no legal recognition or protection for opposite-sex couples in permanent partnerships. Everyone is equal before the law and has the right to

84 Hahlo supra

85 Bromley P.M. et al *supra*

86 A93/2013   
87 [*http://divorceattorneycapetown.co.za/living-together-law-cohabitation-*](http://divorceattorneycapetown.co.za/living-together-law-cohabitation-)

*common-law-marriage-laws-of-cohabitation-common-law-marriage*/accessed   
23 March 2018

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equal protection and benefit of the law. Rights of equality and dignity of the partners in domestic partnerships therefore must be upheld and family law must be reformed to comply with the applicable provisions of the Bill of Rights.

1. Requirements to be Met under the Draft Bill

Clause 4 of the draft bill outlines qualifications that have to be satisfied for one to be recognized as a cohabitant which includes the need;

• To be a partner in one registered domestic partnership at any   
given time.

• For one of the prospective partners to be a South African citizen. • Not to be formally married.

• Not to be within prohibited degrees of relationship to marry on

the basis of consanguity or affinity.88

• To be aged 18 years or older.89

Once the registration process is complete, the registrar issues to the partners a certificate which becomes *prima facie* proof of the existence of a registered domestic partnership between the partners and, where applicable, a certified copy of the registered domestic partnership agreement is attached thereto.90

2. Partners’ Duties and Entitlements under the 2008 SA Domestic   
Partnerships Bill

Various duties and entitlements flow from a domestic partnership or cohabitation relationship as provided for under the Draft 2008 Bill namely;

(a) Duty of support

Clause 9 of the draft Bill provides for the duty of support. Partners owe each other a duty of support in accordance with their respective financial means and needs. It is defined in clause 1 as the responsibility of each registered domestic partner to provide for the other partner’s basic living expenses while the registered partnership still exists. Maintenance after termination is provided for in clause 18 and maintenance after death in clause 19.

88 clause 4(5) 89 clause 6   
90 clause 6(6)

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(b)Right of occupation of family home

Clause 11 on the right of occupation of family home states that both registered domestic partners are entitled to occupy the family home during the existence of the registered domestic partnership, irrespective of which of the registered partners owns or rents the property. The registered partner who owns or rents the family home may not evict the other registered partner from the family home during the existence of the registered domestic partnership. Further to that clause 20 equates a spouse’s entitlements under the Intestate Succession Act to a registered domestic partner.

(c) Division of property

Clause 22 governs property division upon termination of a registered domestic partnership. A partner may apply to court for an order to divide their joint property or separate property, as the court may deem fit. A court must order the division of property in a manner it regards as just and equitable considering relevant factors which are outlined in the Bill. In dividing property, the court considers direct or indirect contributions made by a partner to the maintenance or increase of the separate property or part of the separate property of the other registered domestic partner during the existence of the registered domestic partnership.

(d)Unregistered Domestic Partnerships

In the 2008 draft Bill unregistered domestic partners are provided for under Chapter 4. A partner may apply upon termination of the partnership for an order for maintenance, intestate succession or a property division order91 within two years from the date of termination of the unregistered partnership.92 The court first looks at several factors which include the length of the relationship, degree of financial dependence or interdependence, and any arrangements for financial support between the unregistered domestic partners; the reputation and public aspects of the relationship, the degree of mutual commitment to a shared life and the relationship status of the unregistered domestic partners with third parties.

Despite providing expansive protection to cohabitants, the draft Bill has its own shortcomings. It has been argued that the bill is flawed in that it wrongfully presumes that upon termination of the relationship

91 clause 26 of the Bill 92 clause33 of the Bill

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individuals will have the knowledge and resources to engage with the courts to seek protection.93 Further to that the Bill has taken too long prior to becoming operational since it can only enter into operation when a date is fixed by the president of South Africa through proclamation in the Gazette.94 This is still to occur.

*5.1. anzania*

*5.1.1. Statutory Recognition of Cohabitation*

The Tanzanian law unlike Zimbabwe has an explicit provision which seems to address the insecurity of cohabitants by providing better protection for cohabitants’ rights. Section 160 (1) of The Law of Marriage Act Chapter 29 speaks of a rebuttable assumption which arises when a man and a woman have lived together for two years that they are married. In a situation where this presumption is rebutted in a court of competent jurisdiction, section 160(2) provides for the woman to apply for maintenance for herself and children, if any. In brief, the court is clothed with jurisdiction to make an order or orders for maintenance and upon application made therefore either by the woman or the man, to grant such other reliefs including custody of children, as it has jurisdiction under the Act to make or grant upon or subsequent to the making of an order for the dissolution of a marriage or an order for separation, as the court may deem fit. The requirements to be met for the presumption to apply are such that the plaintiff has to prove that though not officiated, the relationship was in the eyes of the community a lawful marriage and the two had lived together as husband and wife. In *John Kirakwe v Iddi Siko*95 it was held that to constitute a presumption of marriage three elements are necessary; firstly, the parties should have cohabited for over two years, secondly, the parties should have acquired the reputation of husband and wife and thirdly, there was no formal marriage ceremony between the said couples. In *Martine v Christopher*96it was held that there is a firm distinction between a formal marriage solemnized through some form of a ceremony and the rebuttable presumption of marriage under

93 De Vos, P.Stillout in the Cold? The Domestic Partnerships Bill and the   
(Non)protection of Marginalised Woman,in Sloth-Nielsen J. and Z. Du Toit,(eds)   
Trials & Tribulations, Trends and Triumphs: Developments in International,   
African and South African Child and Family Law, 2008

94 Clause 36 of the Bill   
95 [1989] TLR 215

96 Civil Appeal No.68 of 2003

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section 160(1) of the Act. Thus the appellant’s ground of appeal based on the fact that the court a quo distributed matrimonial assets before declaring that the marriage had irretrievably broken down was misplaced there being no marriage to dissolve. However, since the parties had cohabited for 10 years without any form of marriage ceremony, the presumption of being duly married was rebuttable but the respondent in *casu* was entitled to the same reliefs as any other woman upon dissolution of a formal marriage pursuant to what section 160(2) of the Law of Marriage Act Provides.

*5.2. Norway*

Norway has been described as an interesting example of the institutionalization of modern cohabitation as the country has gone full circle with regard to the regulation of cohabitation.97 Although there is no specific Act which regulates all the affairs of cohabiting couples in Norway, cohabiting couples enjoy considerable recognition in many aspects such that it has been said that cohabitation in Norway has been recognised in law in ways that blur the differences between cohabitation and marriage. This is discussed in detail below and particular reference is made to legislation which recognises and protects the rights of cohabiting couples.

*5.2.1. Property Matters*

The Norwegian Household Community Act of 1991 which applies also to two or more unmarried adults who live together in a household for at least two years, confers upon such persons a certain right to take over residence or household goods when the cohabitation ends due to the death of a member of the household or for any other reason. The distribution of the joint residence and household goods of cohabiting couples is operational when a household community ceases to exist. A partner can therefore have a right to purchase the common residence and household goods at a market value upon termination of the household98. It has been said that this inheritance right cannot be restricted by a will or an inheritance agreement99.

97 Syltevik, L.V. “Cohabitation from illegal to institutionalized practice: the case   
study of Norway 1972-2010” in 2015, Vol. 20, Issue 4, The History of the Family,   
515-529

98 Sverdrup, National Report on Informal Relationships: Norway (2015) available   
online at [*http://www.ceflonline*.*net/wp-content/uploads/Norway-Property*](http://www.ceflonline.net/wp-content/uploads/Norway-Property)   
[last accessed 10 Sept, 2018]

99 ibid

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Cohabitants can also establish co-ownership100 upon termination of a cohabitation relationship. This applies where it has not been agreed upon as to who is deemed the owner of particular items of property. If such co-ownership is proved, partners own an equal part unless facts of the case justify a different fraction of ownership. Co-ownership limits the exclusive right of a cohabitant to dispose an item co-owned and creditors may not dispose of the item as well. An unjust enrichment action can also be mounted upon termination of the relationship in exceptional circumstances.

*5.2.2. Inheritance*

The inheritance laws in Norway are favourable as they recognize the right of a cohabitant to benefit from an estate under intestate succession. The Norwegian Inheritance Act, 2009101 confers to unmarried cohabitants who have had; had or are expecting to have children, a right to either inherit approximately 40,000 Euros or to postpone the settlement and keep part of the deceased’s estate undivided. By allowing a surviving cohabitant to inherit or retain the undivided portion of the estate in certain circumstances, the law is adaptive to change and steps in to protect the economically vulnerable cohabitant.

The Inheritance Act defines cohabitation as two people who live together in a marriage-like relationship and are above the age of eighteen years as long as they are not married or registered partners or cohabiting with others. The yardstick is evidently not registration but determination of whether a certain relationship is “marriage like”. This is indeed a progressive piece of legislation. The two persons must permanently reside together but shorter periods of separation may not disqualify a person the right to inherit. However, certain persons are excluded from the definition of cohabitation that is two persons that are so closely related that they cannot marry.

*5.2.3. Adoption*

The Norwegian Adoption Act, 2014 provides that married and cohabiting couples have equal rights in as far as adoption is concerned. Section 5 of the Act states that a person who is married or is a cohabitant may only adopt jointly with his or her spouse or cohabitant, unless the spouse or cohabitant is insane, mentally retarded or is

100 In accordance with the Norwegian Co-ownership Act 101 section 28(b) and (c)

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missing. Section 5(a) defines the term “cohabitants” to mean two persons who live together in a stable, marriage-like relationship. Cohabitants can also adopt from each other but consent has to be given first by the partner concerned.102 The effect of adoption is that the adopted child retains the same legal status in relation to both cohabitants as if he or she were their joint child.103

*5.2.4. Similarities with Zimbabwe*

However despite the legal recognition of cohabitants in Norway, similar to the situation in Zimbabwe is the fact that cohabitants do not owe each other a legal duty of maintenance. There is no recognised legal duty which the law confers on cohabiting partners to maintain each other. However an agreement by the partners may stipulate issues of maintenance. The absence of symbolic aspects of marriage that include the ritual, public declaration and wedding which are very important social markers of the marriage relationship distinguish cohabitation relationships from marriage.104

6. CONCLUSION

*6.1. ntroduction*

A brief analysis of the jurisdictions discussed clearly shows that cohabitation relationships can be legally protected. An analysis of the progressive South African and Tanzanian legal frameworks has confirmed that “the African marriage covers a wider range of flexible relationships, performing various social functions, which reflect their specific socio-economic conditions.”105 Family law thus cannot be confined only to registered marriage relationships. The yardstick ought to be intention and not registration. Stable, intimate, dependence- producing relationships are worthy of the protection of the law. Lessons can thus be learnt from the progressive laws of Tanzania and Norway.

*6.2. A Summary of the Zimbabwean Situation and Suggested*   
*Solutions*

The position of cohabitation relationships as currently obtaining in Zimbabwe is highly unsatisfactory and needs redress as a family is not

102 Section 5(b) provided they are not of the same sex and the child originates   
from a foreign state which disallows such adoption

103 Section 13

104 Syltevik supra   
105 Amstrong et al supra pg 55

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created only through registration. The current family law in Zimbabwe unfairly discriminates between formally married partners and cohabitants by excluding the latter from protection guaranteed by these statutes. This is despite the fact that there exists a functional similarity between marriage and cohabitation with only a piece of paper distinguishing the two. Women are the most affected group as in most cases they are unable to assert their proprietary rights. Modern state intervention in family laws is critical to curb perpetuation of economic vulnerability of cohabitants. Whilst there is no single solution which completely addresses the situation of cohabitants in Zimbabwe, various reforms can be adopted as drawn from the international human rights framework and the very progressive grounding within Zimbabwe’s 2013 Constitution. Suggested below are some of the recommended solutions;

1. Law Reform

The role of law is threefold namely: to provide mechanisms and rules for adjusting the relationship between family members; to provide protection for individuals from possible harms suffered within the family and lastly to support the maintenance of family relationships106. Thus reform is vital in the context of cohabitation for law to fulfil its purpose as law does not exist in a vacuum. Its effectiveness is judged by its ability to fulfil these roles. There is need for home grown solutions which fully address the vulnerability of cohabitants in Zimbabwe because *“…if the law is to be a living force, it must be* *dynamic and accommodating to change.”*107

A comparative analysis of Zimbabwe to the selected jurisdictions has shown that cohabitation relationships can be protected by the state. South Africa’s draft bill on domestic partnerships is a comprehensive document which seems to address all aspects which need reform in as far as cohabitation relationships are concerned. Zimbabwe would do well to adopt the approach taken in the very progressive jurisdictions of South Africa, Tanzania and Norway.

*2. Cohabitation Contracts*

Another best practice which Zimbabwe can emulate from South Africa is the use of cohabitation contracts. The courts can give recognition

106 Eekelaar, Family Law and Social Policy,2nd ed (1984) 107 as per Gubbay CJ in Zimnat v Chawanda (supra)

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to and enforce cohabitation contracts entered into by cohabitants for lawful ends. These contracts will provide a mechanism for the sharing of property and regulation of other legal aspects of the cohabitation relationships. A cohabitation contract can encompass aspects such as ownership and occupation of the common home, ownership of household goods while the relationship lasts and after its termination, each party’s obligation to contribute to household and living expenses, and the ongoing duty of support.108

*3. Use of Judicial Discretion*

Another solution lies with the judiciary through its use of wide discretionary powers. Instead of looking at whether a registered marriage exists, a court may look at the function the relationship serves to fulfil. The intention of the parties in entering the relationship and their conduct may be helpful in this regard. Sinclair describes it as “flexibility through the extension of discretionary judicial powers.”109 Such an approach goes further than identifying if the formalities of a valid marriage have been met. The judicial process therefore has a vital role to play in moulding and developing the process of social change to meet the expectations of people in developing countries as stated in Zimnat v Chawanda (supra).

*4. Legislative Intervention*

The legislature may intervene by promulgating a law that legally recognises cohabitation relationships and provides legal entitlements to the partners during the existence of the relationship and upon its dissolution. Cohabitants will be able to rely on statute for redress of their family law based legal concerns. The statute may also provide for the registration of cohabitation relationships.

108 Sinclair supra 109 ibid

COLLUSION! IN DEFENCE OF FREE SPEECH IN SPORTS AND   
THE UNACCOUNTABILITY OF GLOBAL SPORTS   
ADMINISTRATION BODIES

BY LYNDON T. NKOMO1

ABSTRACT

*Global Sports Administrative Bodies are powerful and influential* *institutions. Sovereign States in their individual capacities struggle* *to deal with some of their rules and decisions. They also have direct* *jurisdictional authority over individual athletes. At the centre of* *their jurisdictional authority is their power to admit, suspend or* *expel both individual nations and athletes from participating in global* *sporting competitions. Athletes have to be careful about what and* *how to express themselves on and off the field because of restrictive* *rules on speech. Freedom of Speech in sports is, therefore, under* *serious threat because of multi-million dollar commercial interests* *in the form of sports sponsorships benefiting Global Sports* *Administrative bodies. Consequently, within the context of global* *sports administration some domestic constitutional freedoms such* *as freedom of expression rank below international rules set by these* *Global Sports Administrative institutions. Such conflict is not easy to* *resolve and it requires political rather than legal initiatives to resolve.* *Sovereign nations are unable to protect themselves and their athletes* *against some unfair decisions of global sports administrative bodies.* *Concerted efforts by groupings of nation states at continental or* *regional levels are an imperative in dealing with what appears to be* *administrative excesses of Global Sports Administrative Bodies.*

*Key Words: Global Sports Administrative Bodies, The Fédération* *Internationale de Football Association (FIFA), Court of Arbitration* *for Sport (CAS), International Amateur Athletics Federation (IAAF),* *Freedom of Expression, Doctrine of Prior Restraint, Commercial* *Sponsorships*

INTRODUCTION

On Saturday 26 June 2010 at 09.00am there was an extensive report on the Zimbabwe Broadcasting Corporation’s former SFM radio station

1 (LLB (HONS), LLM, MBA

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morning news bulletin on Zimbabwe Football Association (FIFA)’s ban on football players who celebrate scoring goals by pulling off their shirts to show religious messages inscribed on undergarments such as vests. The most common message was “I belong to Jesus.” The report went on to say that ZIFA had taken a similar measure on Evans Gwekwerere, a local football player. ZIFA imposed a ban on him for showing an undergarment vest with a similar type of message each time he scored a goal for his club, Dynamos. On 6 February 2014, a local newspaper *The Chronicle* reported that “HIGHLANDERS FC faces serious sanctions from the world soccer mother body FIFA if their coach Kelvin Kaindu continues to wear clothing with religious statements during matches. The Zambian mentor, a God-fearing man, has sometimes been spotted during official matches wearing a white shirt with the inscription, Joshua 1v5 or ‘It Shall be Well’.”2

The Vatican Sports Foundation was reported as having criticized FIFA for trying to ban religious expressions. According to the Catholic news agency website, the President of the John Paul II Foundation for Sports, Eddio Constantini “…severely criticised the president of the International Soccer Association Board (FIFA), Joseph Blatter, for seeking to prohibit religious speech during matches. Blatter’s action came after the Brazilian national team huddled for a prayer at the conclusion of the Confederations Cup”’3

The FIFA ban against any player displaying an undergarment with religious or political expressions emanate from FIFA Law 4, Clause 5, which states that “Equipment must not have any political, religious or personal slogans, statements or images. Players must not reveal undergarments that show political, religious, personal slogans, statements or images, or advertising other than the manufacturer`s logo. For any offence the player and/or the team will be sanctioned by the competition organiser, national football association or by FIFA.”4

2 Skhumbuzo Moyo, “It shall NOT be well: FIFA bans clothing with religious   
messages” *The Chronicle*, 6 February, 2014

3 “Vatican Sports Foundation Criticises FIFA for trying to ban religious expression”   
16 July 2009, [www.catholicnewsagency.com](http://www.catholicnewsagency.com) Accessed on 10 August 2010

4 FIFA LAWS OF THE GAME 2009/2010 <http://www.fifa.com/mm/document/>   
affederation/federation/81/42/36/lawsofthegameen.pdf. Accessed on 10   
August 2010 and the latest version is 2018/2019, [http://static-3eb8.kxcdn.com/](http://static-3eb8.kxcdn.com/documents/661/133139_290518_LotG_18_19_EN_DoublePage_150dpi.pdf)   
[documents/661/133139\_290518\_LotG\_18\_19\_EN\_DoublePage\_150dpi.pdf](http://static-3eb8.kxcdn.com/documents/661/133139_290518_LotG_18_19_EN_DoublePage_150dpi.pdf)   
Accessed on 19 July, 2018

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FIFA Law 4, Clause 5 expressly bans any form of speech on under- garments worn by footballers. It is wide in its scope of application and it *prima facie* infringes on the concerned footballers’ fundamental right to freedom of expression. This law has not materially changed since the World Cup in South Africa was held even though FIFA and the International Football Association Board regularly reviews the “Laws of the Game”

THEORETICAL FRAMEWORK

The theoretical justification for supporting protection of free speech in general has been thoroughly explained in literature and there is no need to repeat it. However, the general protection of free speech has been premised mostly on protection of political speech probably because it lies at the core of the circle of protection5 of free speech and although one of the fundamental justifications for protection of free speech is self-fulfilment or self-realisation6 which is inextricably linked to individual autonomy7. Self-fulfilment ordinarily underpins the intrinsic value of free speech more than its instrumental value, especially in defence of free speech in professional sports which are inherently associated with the desire for team or individual achievements. Thomas Emerson makes reference to self-fulfilment in his identification of four values underpinning the importance of free speech which are as follows:

1) assuring individual self-fulfilment; 2) advancing knowledge   
and discovering truth; 3) provid[ing] for participation in decision   
making by all members of society; 4) achieving a more adaptable   
and hence a more stable community, …maintaining the precarious   
balance between healthy cleavage and necessary consensus.8

Competitiveness in professional sports is inherently characterised by the desire for self realisation underlined by the hunger to succeed or upstage one’s competitor more than for its recreational purposes. The expressions that follow in the heat of the moment especially after a contest won or a goal in football scored, regardless of whether the team is on the losing end or not, demands tolerance. Lee Bollinger

5 Richard Moon *The Constitutional Protection of Freedom of Expression* University   
of Toronto Press, Toronto, Buffalo London, p 16

6 Thomas I Emerson “Towards a general theory of the First Amendment” 72 *Yale*   
*Law Journal* 877 1962-1963 p 878-9

7 Ibid   
8 Ibid

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introduces a new debate on this concept and argues that ‘tolerance’ equates to “showing understanding or leniency for conduct or ideas…conflicting with one’s own’ rather than as the ability to endure.”9 Tolerance thus underlines the intrinsic value of free speech which is inextricably linked to self-fulfilment or self-realisation. Thus, the emergence of success or a win in any competitive professional sports is the pinnacle of self-realisation or self-fulfilment which is usually denoted by certain individual expressions whether involuntarily or voluntarily done in response to a momentous achievement.

Therefore, this paper argues that speech which is ordinarily expressed by footballers especially in victorious moments; including the revelation of expressions written on undergarments deserve protection due to the intrinsic value of that articulation to the individual expressing it. Further that where such speech violates other people’s rights as defined by individual domestic constitutions of the affiliate members of FIFA, appropriate legal sanctions should then be imposed *post facto* rather than imposing pre-publication bans. Thus, protection of speech in sports should be premised ordinarily on the justification of self-realisation and tolerance of speech and this is advanced here as a basis against the denial of free speech rights of athletes by global sports administrative bodies like FIFA.

FREEDOM OF EXPRESSION UNDER ZIMBABWEAN LAW

Freedom of expression is guaranteed by Section 61 (1) of the Zimbabwean Constitution, which provides that:

“Freedom of expression and freedom of the media

(1) Every person has the right to freedom of expression, which

includes-

(a) freedom to seek, receive and communicate ideas

and other information   
And section 61 (5) provides that:

Freedom of expression and freedom of the media exclude;   
(a) incitement to violence

(b) advocacy of hatred or hate speech;

(c) malicious injury to a person’s reputation or dignity;   
(d) malicious or unwarranted breach of a person’s right

to privacy.

9 Bollinger Lee C. *The Tolerant Society: Freedom of Speech and Extremist Speech*   
*in America* Oxford: Oxford UP 1986

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Section 61 (1) constitutionally guarantees the right to free expression whilst section 61 (5) prohibits certain forms of speech as noted above. The speech that is banned by FIFA’s Law 4, Clause 5 is one that is generally protected under the Zimbabwean Constitution.

DEFINITION OF THE PROBLEM

The question that this paper seeks to answer is how then does one reconcile constitutional guarantees and the rules of sport without necessarily interfering with the efficient administration of sport? The problem with FIFA’s rule is that it bans all kinds of slogans and advertising on undergarments. The rules do not categorise what is acceptable and unacceptable speech but imposes pre-publication ban of forms of expression on undergarments. It is understandable that some forms of speech may impinge on the basic rights of other people and some commercial speech may conflict with the rights of corporates with exclusive rights to advertise at FIFA organised events and tournaments. Football is a source of livelihood for many professional footballers and, as such, it is presumed that care is needed through management to ensure the protection of the investment taken by major stakeholders in the sport. Most of the financing in football comes from the sale of television and radio broadcasting rights, and team and individual sponsorship endorsements. Nevertheless, the question remains as to whether the ban should be effected prior to publication or post facto or at all. *Prima facie*, any form of pre-publication ban of speech is censorship and it must be settled by our courts as to whether such justification is reasonably justifiable in a democratic society.

PRE-PUBLICATION BAN

The pre-publication ban of undergarment speech that is created by the provisions of FIFA’s Law 4, Clause 5, is drawn from the doctrine of prior restraint. This, as explained by Thomas J Emerson “…deals with official restriction imposed on speech or other forms of expression in advance of actual publication and its effect is to prevent communication from occurring at all.”10 Ariel L. Bendor argues that “in practice, it is possible to restrict a right through the use of criminal law, civil law, administrative law, or a combination of both. Rights may be limited by means of physical or normative prior restraint (action taken to prevent a given act from occurring), by means of subsequent

10 Thomas J Emerson ‘The Doctrine of Prior Restraint’ *Law and Contemporary*   
*Problems*, Vol 20 No. 4 (Autumn 1955), p 648

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sanctions (penalties imposed to create a disincentive to act in a certain way), or by combination of the two.”11

Violation of FIFA’s Law 4, Clause 5 by any footballer attracts sanctions which can either be a caution (yellow card) or expulsion (red card) from the football match and, in some grave circumstances, financial penalties. Prior restraint is, therefore, a form of censorship which is not concerned with the substance or content of the speech no matter how positive or harmless it may be. John Calvin Jefferies argues that “Any system of prior restraint of expression comes to court bearing a heavy presumption against constitutional validity.”12

The construction of Section 61 (1) (a) of the Zimbabwe Constitution *prima facie* makes the doctrine of prior restraint illegal unless, after balancing the provisions of this section with the rights of any other people in terms of section 86 (1) of the same Constitution, it is found that the limitation of speech by way of a prior restraint was reasonable and justifiable in a democratic society. Whilst freedom of speech is the cornerstone of human liberty and dignity,13 this fundamental right is nevertheless not absolute.14

FIFA’s intention is to protect its commercial interests through the sale of television broadcasting rights and attracting sponsorship from various corporates. Therefore, care is taken not to permit expressions or conduct likely to hurt the interests of the sponsors.

However, there seems to be some discriminatory application of the rules by FIFA and its affiliates because whilst written expressions on undergarments are prohibited, the same measure of restriction is not applied to other expressive displays such as dreadlock hair styles which may be regarded as a form of religious expression. The issue of dreadlocks is of particular importance because whilst some footballers wear them for fashion others do so as part of the Nazarene religious practice associated with the Rastafarian religious movement.15 Dianne

11 Ariel L Bendor ‘Prior Restraint, incommensurability, and the constitutionalism   
of means’ *Fordham Law Review* Vol 68 1999, p 294

12 John Calvin Jeffries, Jr ‘Rethinking Prior restraint’ *Yale Law Journal* Vol 92,   
No.3 (Jan. 183), p 409

13 Cohen v California 403 US 15, 24

14 Section 36 of the Constitution of South Africa

15 Dianne Gereluk ‘Why can’t I wear this?! Banning symbolic clothing in schools’

*Philosophy of Education* 2006 at p 107 [http://ojs.ed.uiuc.edu/index.php/pes/](http://ojs.ed.uiuc.edu/index.php/pes/article/viewFile/1522/262)   
[article/viewFile/1522/262](http://ojs.ed.uiuc.edu/index.php/pes/article/viewFile/1522/262) Accessed on 13 October 2010

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Gereluk argues that Rastafarianism is a religion and some who have been sanctioned for wearing dreadlocks in school have argued against the bans on the basis of freedom of religion. The Supreme Court of Zimbabwe in *re Enoch Chikweche*16 held that the status of Rastafarianism as a religion in the wide and non-technical sense had to be accepted and the applicant’s manifestation of his religion by wearing dreadlocks fell within the protection afforded by s 19(1) of the pre-2013 Constitution of Zimbabwe.17 The Court cited with approval the decision of Judge Posner in *Reed v Faulkner* 842 F 2d 960 at 962 where he held that Rastafarianism is a religious sect that originated among black people in Jamaica…’ It follows, that if wearing Rastafarian dreadlocks is regarded as a form of religious expression then why should FIFA discriminate against footballers who express their faith by wearing under-garments with religious messages printed on them?

The Tehran Times reported that FIFA attempted to ban female Iranian football players from wearing the hijab whilst playing football at the Youth Olympic Games notwithstanding their strict Islamic dress code.18 Lack of policy consistence on the part of FIFA regarding intolerance towards certain forms of expressions displays a selective ban of some forms of expression. Such bans deny both the intrinsic and instrumental values of individual forms of expression as expressed within the context of sport.

SPORTS AS A HUMAN RIGHT

A number of international instruments recognise participation in various sporting disciplines as a human right. Paragraph 4 of the Fundamental Principles of Olympism acknowledges that “The practice of sports is a human right”. Article 11 of the Convention on the Elimination of All Forms of Discrimination against Women makes reference to the provision of the same opportunities to participate actively in sports and physical education. Article 1 of the United Nations Educational Scientific and Cultural Organisation (UNESCO)’s Charter of Physical Education, Physical Sport provides in Article 1.1 that “Every human being has a fundamental right of access to physical education

16 995 (4) SA 284 (ZC)

17 Ibid at p 290 G

18 *The Tehran Times* ‘FIFA ban Iranian Women from wearing the Hijab in YOG’,

April 4, 2010 <http://www.tehrantimes.com/PDF/10836/10836-13.pdf> Accessed   
on 18 October 2010

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and sport, which are essential for the full development of his personality.” This proposition affirms the nature of human rights as a complex symbiotic web of social values that modern democratic states accord to all their citizens. Sport is, therefore, a medium of expression of talent, skills, intellectual art, ideas and thoughts through which successful participation brings joy and personal fulfilment to the individuals concerned. The joy may not be complete unless forms of expression are performed and any inhibition of such performances will be *prima facie* in violation of the individual footballer’s freedom of expression.

IMPORTANCE OF FREEDOM OF EXPRESSION

In re *Munhumeso & Ors*19Gubbay CJ observed that “The importance attaching to the exercise of the right to freedom of expression and freedom of assembly must never be under-estimated. They lie at the foundation of a democratic society and are one of the basic conditions for its progress and for the development of every man.”20 The judge further argued that “Freedom of expression, one of the most precious of all the guaranteed freedoms has four broad special purposes to serve; (i) it helps an individual to obtain self-fulfilment; (ii) assists in the discovery of truth; (iii) it strengthens the capacity of the individual to participate in decision making; and (iv), it provides a mechanism by which it would be possible to establish a reasonable balance between stability and change.”21

The Constitutional Court of the Republic of South Africa has made similar observations and acknowledgments as exhibited by O’Regan J’s views in *Fred Khumalo & Ors v Bantubonke Harrington Holomisa*22 that “Freedom of expression is integral to a democratic society for many reasons. It is constitutive of the dignity and autonomy of human beings. Moreover, without it, the ability of citizens to make responsible political decisions and to participate effectively in public life would be stifled.” 23

The value of freedom of expression is recognised in international instruments including the International Covenant on Civil and Political

19 1994 (1) ZLR 49 (S) 20 Ibid, at p56   
21 Ibid, at p57   
22 CCT 53/01

23 Ibid, at para 21

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Rights (ICCPR) (Article 19 (2)), the European Convention on Human Rights (ECHR) (Article 10 (1)), the American Convention on Human Rights (ACHR) (Article 13), and the African Charter on Human and People’s Rights (ACHPR).

IS FREEDOM OF EXPRESSION AN ABSOLUTE RIGHT?

It has been observed in *Khumalo and Others v Bantubonke Harrington* *Holomisa* (Supra) that “… although freedom of expression is fundamental to our democratic society, it is not a paramount value. It must be construed in the context of the other values enshrined in our Constitution.”24 A court seized with the duty to construe the scope and application of a fundamental right as against the rights of others must play a balancing act that ensures the right equipoise between recognition and enforcement of the right and the respect of the rights of other citizens.

In the exercise of one’s freedom of expression regard must be had to constitutional limitations. However, it must be noted that “Rights and freedoms are not to be diluted or diminished unless necessity and intractability of language dictate otherwise.”25 The test will not be complete unless a court answers the question whether it is reasonably justifiable in a democratic state to curtail a particular constitutional freedom as required by s86 (1) of the Constitution of Zimbabwe.

‘I BELONG TO JESUS’ CELEBRATION

The question which this paper attempts to answer in addition is how expressions such as ‘I belong to Jesus’ can be protected in international sports administered by International Sports Federations such as FIFA. Thomas Scanlon argues that “In order for any act to be classified as an act of expression it is sufficient that it be linked with some proposition or attitude which it is intended to convey”.’26 Therefore, the exhibition of an undershirt or garment with the inscription *‘I belong* *to Jesus’* is a religious expression acknowledging of the power of Jesus Christ which the athletes concerned probably link to their sporting success and it stands as a proposition which the footballers concerned intend to convey. Consequent upon this and on the basis of Thomas

24 *Khumalo & Ors* (Supra) at para 21

25 Thomas Scanlon ‘Theory of Freedom of Expression’ *Philosophy and Public Affairs*

Vol 1 Number 2, (Winter 1972), p 206   
26 Ibid

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Scanlon’s reasoning,27 this expression should be protected speech because of the intrinsic religious value it carries for some of the professional footballers.

RATIONALE FOR CENSORING EXPRESSION IN SPORT

Ray Tarnowski28 argues that censorship in sport is employed because professional leagues are run like businesses and, as such, authorities running a particular professional sport such as football have particular concern for the image they portray to the public. Therefore, they would not want to alienate public support for a particular sport29 which they administer. He further contends that “no sports league could prosper if its product — the athletes and coaches — offend the public.”30 In sports such as NBA basketball, financial penalties are imposed for breaking censorship rules even where a particular player self-criticizes or is critical of match officials. In football, a player is shown either a yellow card for minor offences or a red card for repeated or serious offences. John O. Spengler *et al*,31 argue that “Constitutional law usually is not applicable to professional sports for two major reasons. One, athletes in professional sports are parties to a collective bargaining agreement. When a player union agrees to a collective bargaining agreement, certain individual rights are relinquished, including freedom of expression. Secondly, professional Sports Leagues are not state actors but private entities.”32 Aleck Van Vaerenburg points out two issues that make it difficult for human rights to be taken as part of the Sports Administration, namely, contractual and lack of government involvement in the administration of sport. It must be noted that the second reason proffered by Spengler *et al* relates to the application of the United States of America’s Constitution which is to the effect that “The majority of the rights and protections afforded by the US Constitution and its amendments only apply to governmental or state action.”33

27 Ibid

28 Ray Tarnowiski ‘Shut Up and play: Censorship in major professional sports’

April 24, 2003, <http://wwww.unc.edu/-tarnowsk/shut.pdf> Accessed on 16 July   
2010.

29 Ibid, page 2   
30 Ibid, page 2   
31 John O Spengler, Paul Anderson, Daniel P Cannaughton and Thomas A Baker,

*Introduction to Sports Law*, p162

32 John O Spengler, Paul Anderson, Daniel P. Cannaughton and Thomas A Baker

*Introduction to Sports Law* p 162   
33 Ibid p 163

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The South African position differs as argued by Jonathan Burchell that “The Constitutional Court …has underscored the application of the Bill of Rights (Chapter 2 of the Constitution) to relationships between private individuals, as well as between State and the individual.”34 The Zimbabwean position is similar to that of South Africa by virtue of the provisions of s 45 (1) and (2) of the Constitution of Zimbabwe which stipulate the scope of application of the Bill of Rights. *Prima facie*, an individual sportsman whose constitutional rights may have been violated by a sports federation (which can be a private body) can, on the basis of the violated right, seek vindication of his or her rights.

ARBITRATION CLAUSES AND WAIVER OF CONSTITUTIONAL RIGHTS

FIFA’s constitution provides for dispute resolution mechanism through arbitration and its constitution which requires the inclusion of arbitration clauses as a form of dispute resolution mechanism in the constitutions of the national football associations/federations down to the professional football clubs’ statutes of governance for as long as they are affiliated to the national association which is a member of FIFA. Consequent upon this, it is the individual footballer who suffers in the event of any violation of his or her constitutional freedoms due to the restrictions that have to be included in club contracts preventing individual footballers from suing FIFA or their national association in domestic courts. The complexity of this issue is that football tournaments are organized either by the national association or the international federation and, as such, professional footballers are made to contract themselves out of their constitutional rights whenever they take part in their sport.

Louis M Benedict argues that *“... the broad truth is that within the* *international system States are much less important…”*35 mainly because they compete against each other on platforms established by private international bodies such as FIFA and the International Amateur Athletics Federation (IAAF). He further contends that *“…* *these major international bodies operate at a level of coherent global*

34 Jonathan Burchell ‘The legal protection of privacy in South Africa: A   
transplantable hybrid’ *Electronic Journal of Comparative Law* Vol. 13.1 (March   
2009) <http://www.ejcl.org> Accessed on 6 August 2010, p 4

35 Louis M Benedict ‘The global politics of sports: The role of global institutions   
in sports’ p 1-2.

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*power unknown to the aspirants in the field such as… human rights.”*36 The resultant effect is the emergence of States that are weaker in their ability to protect the civil rights of their citizens against such international sports bodies as FIFA and the IAAF. Attempts by some countries like Nigeria and Greece to interfere with the authority of some of these global sports administrations like FIFA have been vigorously resisted and taken as political interference in sport37. In respect of actions by Nigeria and Greece respectively, FIFA threatened to ban Nigerian football teams from all international tournaments that are organized by FIFA and suspended the Greek Football Association’s FIFA membership. As FIFA is an internationally recognized global football administration body and there is political leverage to be gained from participating in FIFA organized football events, particularly because of their popularity with the majority of the electorate, the threats of FIFA sanctions weakens a State’s ability to protect the civil liberties of its citizens. The popularity of the World Cup may be epitomized by an estimated audience of 700 million people who watched the FIFA World Cup Final in Johannesburg, South Africa in July 2010.38

Consequently, if the State is weak and athletes are also weak, the latter become commercial objects with little or no basic freedoms sacrificed on the altar of commercialisation of sports. These athletes are huge assets on their clubs’ balance sheets, not free to disengage themselves from their contracts and gagged from speaking to the media without authorisation for fear of antagonizing their sponsors or risking huge financial losses in penalties or loss of personal sponsorships. Athletes are required to conduct themselves in ways that do not alienate their leagues from their sponsors. Ethan Yale Bordman notes that “... in an effort to curb player comments about the game several years ago Cincinnati Bengals added an addendum to all contracts, allowing the team to terminate performance bonuses for players who criticise team mates, team managers, or game

36 Ibid.

37 ‘World Cup 2010: FIFA threatens Nigeria with ban over team’s suspension’

[www.telegraph.co.uk](http://www.telegraph.co.uk) Accessed 4 October 2010

38 Graham Dunbar *Associated Press*, ‘FIFA expects 700 million to watch World

Cup Final’ 11 July 2010, [http://www.thejakartapost.com/news/2010/07/11/](http://www.thejakartapost.com/news/2010/07/11/fifa-expects-700-million-watch-world-cup-final.html)   
[fifa-expects-700-million-watch-world-cup-final.html](http://www.thejakartapost.com/news/2010/07/11/fifa-expects-700-million-watch-world-cup-final.html). Accessed on 5 October   
2010.

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officials.”39 Sports leagues are run as businesses and, to prevent any possibilities of financial losses by way of sponsorship withdrawals, national leagues and global sports administrations are always quick to impose sanctions against ‘delinquent’ sportsmen.40 Ray Tarnowski argues that “playing a professional sports is a privilege and to enjoy this privilege you must follow the rules but how does one reconcile this with the internationally recognized right to take part in sports if it is a privilege.”41 It appears that the assertion that playing professional sports is a privilege is the basis upon which basic human rights are trammelled. This weakens a player’s ability to speak out and stand against any violations of basic human rights in the management of sport because of the fear of losing very lucrative professional contracts. The downside of this assertion is that it pays little attention to the athletes’ natural talents and abilities which in many cases attract sponsorships for the sports by creating platforms for commercial advertising due to the large audience, particularly for football, which is targeted by commercial sponsors. There is therefore an imbalance of value between the natural talents that attract lucrative sports sponsorships and the commercial rights on one part and the inherent basic rights of the athletes on the other.

Global sports administrations are sponsored by international businesses that are keen to preserve the sanctity of their global images by dropping certain leagues or individual sports personalities who may have conducted themselves in ways perceived to be offensive to some sections of the global community. For instance, the news of Tiger Woods’ infidelity led to withdrawal of his personal sponsorships by a number of commercial enterprises such as AT&T42 and Accenture. Stephanie Rice, an Australian swimmer. lost her Jaguar sponsorship for tweeting anti-gay sentiments43. Therefore, the most prudent way of protecting the commercial interests of global sports administrative

39 Ethan Yale Bordman ‘Freedom of speech and expression in sports’ *Michigan*   
*Bar Journal* September 2007, p 37

40 Note 9 (above) p 3

41 Ibid

42 ‘AT&T drops sponsorship deal with Tiger Woods’ <http://www.abs-cbnnews.com/>

business/01/01/10/att-drops-sponsorship-deal-tiger-woods Accessed on 10   
October 2010

43 ‘Gay slur costs Stephanie Rice Jaguar sponsorship deal’ September 07, 2010   
12:00AM [http://www.heraldsun.com.au/entertainment/confidential/gay-slur-](http://www.heraldsun.com.au/entertainment/confidential/gay-slur-costs-stephanie-rice-jaguar-)   
[costs-stephanie-rice-jaguar-](http://www.heraldsun.com.au/entertainment/confidential/gay-slur-costs-stephanie-rice-jaguar-) sponsorship-deal/story-e6frf96x-1225914998070   
Accessed on 6 October 2010

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bodies is by punishing what is perceived to be dishonorable conduct or speech with potential to alienate sponsors from the sport, regardless of the individuals’ constitutional rights.

It does not matter whether or not the speech/expression is offensive, for as long as it is perceived to be potentially harmful to the pecuniary interests of the global sports administration such speech will be banned. In fact, as noted above, FIFA exercises pre-publication censorship regardless of the nature of the content intended to be published thus, from simple birthday dedications to strong religious and political views, all have no place on soccer platforms convened by FIFA and its affiliates. The fact is that undergarment free speech lags subserviently to commercial interests.

Andre J Lang argues that

…the problem with the emergence of various global

administrative bodies is that their rules, procedures and internal   
organizations generally do not correspond with the procedural   
and substantive standards that have been developed for the   
exercise of power within the liberal –democratic nation states.44

There is lack of accountability on the part of global sports administrations as

[t]he global administrative space is characterized by lack of   
accountability towards individuals. In particular the rules and   
decisions adopted by GABs often do not observe the standards   
of fundamental rights protection that is required within the   
nation state.45

Therefore, there is a serious conflict between the interests of democratic States to protect the fundamental rights of their citizens and the commercial interests of global sports administrations that compromise the basic freedoms of footballers and other athletes.

The challenges are, therefore, how to hold the global sports administrations accountable for violation of free speech rights of sports people and how to create the right equipoise between protection of commercial interests and the right to free speech of professional players. The scales are currently tilted in favour of commercial

44 Andre J Lang ‘Global administrative law in domestic courts. Holding global   
administrative bodies accountable’ p 4

45 Ibid p 4

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interests because of the huge pecuniary interests that global sports administrations have in different sporting disciplines. Most football, athletics and cycling clubs are no longer social clubs but incorporated commercial enterprises. Businesses exist to make money for the investors and anything likely to hinder good returns is regarded as anathema to the business’ reason for existence. In this context, where finance is paramount, fundamental rights including free speech become secondary concerns.

STATUS OF FIFA

The status of FIFA makes it difficult if not impossible for the individual rights of football players to be protected or enforced against FIFA because according to Rule 64 (2) of FIFA Statute 2009, *“Recourse to* *ordinary courts of law is prohibited unless specifically provided for* *in FIFA regulations.”*46 FIFA is a voluntary association of football administrations responsible for organising football in their countries47. Membership to FIFA is on a voluntary basis and as such FIFA emphasises independence from political interferences in football thus steering away from accountability to any nation. Member Associations including football players and their agents are barred from suing each other in domestic courts which are mandated to interpret and enforce constitutional rights and freedoms derived from national constitutions.

To ensure that this requirement is implemented, Member Associations are obliged by FIFA Statutes to include

[a] clause in their statutes or regulations stipulating that it is   
prohibited to take disputes in their Association or disputes   
affecting Leagues, member leagues, clubs, players, officials and   
other Association officials to ordinary courts of law…48

These provisions thus incapacitate footballers from seeking to vindicate their rights against violations by FIFA and its affiliates. Ordinarily, individuals vindicate their basic constitutional rights in ordinary courts of law. FIFA and its affiliates or member associations are empowered to *“impose sanctions on any party that fails to respect this* *requirement and ensure that any appeal against such sanctions shall* *likewise be strictly submitted to arbitration, and not to ordinary*

46 Rule 64 (2) FIFA Statutes August 2009 47 Ibid, Rule 10(1)

48 Ibid, Rule 64 (3)

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*courts of law”*49 When a sportsman elects to be a professional footballer under FIFA or its affiliate members’ organised leagues they effectively contract themselves out of some of their basic human rights. The scheme of arbitration provided for in FIFA Rules is intended only to apply in the enforcement of FIFA regulations and football laws.

This places FIFA in the position of being an independent and unaccountable global sports administrative body. The challenge, therefore, is how to hold FIFA and other like sports federations accountable for their actions in accordance with the dictates of some domestic laws of their individual member association. FIFA may be calling for consistency in their decision making process and the rules that bind them but athletes should not be forced to sacrifice their basic constitutional rights in the service of the commercial interests of sports federations.

WAY FORWARD

Andre J Lang argues that *“[i]t should be the role of domestic courts* *to establish accountability mechanism towards those sports regimes* *whose internal rationality is focused on cleanliness and economic* *prosperity of sports.”*50 However, the difficulty with Lang’s contention is one of enforcement of the decisions of the court because most sports competitions are arranged under the auspices of the global administrative bodies. FIFA has powers under its statutes to ban, expel or suspend any member association which violates its statutes or whose national government interferes with the administration of football in that country. For instance, FIFA suspended the Greek Football Association’s membership after the Greek Government refused to pass a law that guaranteed that football matters could only be decided by the Greek Football Association.51 Thus, whilst a domestic court may vindicate an individual footballer’s constitutional rights, that footballer or the national association of the footballer’s country may either be banned or expelled from participating in competitions arranged by FIFA. Therefore, Lang’s argument may not be sustainable as FIFA statutes render decisions of domestic courts ineffective especially relating to enforcement against a non-resident international body.

49 Ibid

50 Andre J Lang (ibid at note 43) p 24

51 Gabriel Marcotti ‘Is football still above the law?’ <http://www.timesonline.co.uk/>

tol/sport/football/article621061.ece Accessed on 11 August 2010

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Perhaps, the best route is to learn from how the European Union reacted to the FIFA stance on one occasion. The European Commission took a unified stance against FIFA when it sought to introduce a rule that would potentially infringe on the freedom of movement and protection against discrimination within the European Community. In this regard, the European Commission in 200852 rejected a proposal by FIFA relating to the 6 + 5 Rule which entailed that *“…that 6 of the* *11 football players on the pitch have to be of the nationality of the* *country of the football club…”*53 The position of the European Commission was that professional footballers are workers, and therefore the right to free movement and the principle of non- discrimination applies to them. The 6+5 Rule would constitute a direct discrimination of the grounds of nationality.54 The European Commission further stated that European Member States were bound by the European Treaty and if any of the member states were to allow the enforcement of this rule in their country then the European Commission would take the Member States to court. This stance caused FIFA to stand down on its proposals. The action by the European Union indicates that if continental bodies such as the African Union are prepared to stand together and defend the basic rights that they have all agreed to protect through the African Charter of human Rights, then FIFA and other related Global Sports Administration bodies will be forced to revise some of their restrictive rules that infringe on basic human rights.

The argument from the European Commission was premised on potential violations of the basic rights to free movement and the right not to be discriminated against. These basic human rights fall into the same category as the right to freedom of expression. As has been argued above, there is no basic human right that assumes greater value than others and as such the right to free speech must be protected in equal manner to the right to free movement or the right against discrimination.

Pre-publication censorship of speech by FIFA should not be permitted. Sanctions should only be imposed on offending footballers if the speech is likely to incite violence, terrorism, war, or hatred among different

52 Commissioner Vladimir Spidal ‘The Commission shows red card to the 6+5 rule   
proposed by FIFA’ 28 May 2008, [http://ec.europa.eu/social/](http://ec.europa.eu/social/main.jsp?langid=en&amp;catid)   
[main.jsp?langid=en&catid](http://ec.europa.eu/social/main.jsp?langid=en&amp;catid) Accessed on 11 August 2010

53 Ibid   
54 Ibid

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people or groups of people in a particular country or region or if it promotes discrimination among different people on the basis of religion, colour, creed and such other associated factors *post facto*.

Ordinarily, international bodies intervene in countries where there are human rights violations on the premise that international peace and order are sustained better in an international system that consists of countries respectful of human rights. This proposition should, therefore, form the basis of continental intervention to defend the basic human rights of sport personalities. Only in circumstances where an athlete makes speech or other forms of expressions such as those prohibited should they be sanctioned by either FIFA or the National Association or the organizers of a competition that is run under the auspices of global administrative body. Whilst Global Sports Administrations have no national identity, they have significant influence in countries where they operate especially through their affiliate member bodies such as ZIFA or the appropriate body dealing with human rights violations complaints in a particular country such as the Zimbabwe Human Rights Commission.

The vigor with which international communities such as the EU and the UN speak out against human rights violations should be with the same strength demonstrated to engage FIFA and other related International Sports Federations to ensure their respect for fundamental human rights. Sponsorship withdrawals must not be used to muzzle sports personalities. If, as argued by David Kinley and Sarah Joseph, multi-national corporations such a Nike, Adidas and Coca Cola can sometimes be economically stronger than the State in which they are operating — particularly in developing countries — then mechanisms must be in place to ensure that both legal and quasi legal duties are imposed on them to ensure that they will always act in ways that seek to protect human rights55 and not to indirectly promote violations of basic human rights by threatening sports sponsorship withdrawals.

Some US courts have held that they have jurisdiction over particular international sports administrative bodies as in the matter of *Harry* *L. Reynolds, Jr v International Amateur Athletic Federation & Ors*56

55 David Kinley and Sarah Joseph ‘Multinational Corporations and Human Rights’   
*Alternative Law Journal* Vol (27) No.1, February 2002 at p 9

56 841 F. Supp.1444 (1992)

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wherethe issue before the court was whether or not the US court concerned could exercise personal jurisdiction over the IAAF. Using the Ohio long arm statute in the Ohio Revised Code which sets out the ground upon which a non-resident defendant may be sued in the Ohio courts57 the court found that it could exercise personal jurisdiction over the IAAF. The court noted that in *Flight Devices*, 466f.2d at224- 25 that the Ohio long arm statute was construed to extend the jurisdiction of Ohio courts to the constitutional limits.

Individual countries may need to formulate similar legislation in order to have jurisdiction over bodies such as FIFA in order to enforce judgments in areas where it has both direct and indirect activities.

CONCEPT OF PROPORTIONALITY

Whatever the methods employed to force FIFA and other global sports administrations to respect basic freedoms, the guiding factor in ensuring the proper interpretation and application of the scope of the basic freedom of expression should always be the concept of proportionality. This principle entails that the decisions of officials should be judged not just against the criteria of legality and rationality, but against a benchmark which maintains that limitations on the fundamental rights must be necessary to meet a legitimate end in a democratic society, and must not infringe a basic right to a greater extent than is required to achieve that end.58

The issue here is whether impugning of the fundamental rights such as the right to freedom of expression in sports is necessary to achieve a legitimate end? If so, what is the legitimate end? FIFA Statutes do not seem to set out the mischief aimed at by banning such forms of expressions and religious practices but one would assume that it may be to ensure orderliness in the administration of football. If that is the argument, then how does FIFA justify acceptance of certain forms of expression and discriminate against others when their objectives are similar. For instance, the dreadlocks associated with Rastafarianism are accepted whereas taking off a shirt to show religious expressions is prohibited. Some football teams gather together to do their war cries before the start of matches, yet praying together as the Brazilians national football team did after winning the Confederations cup was

57 Ibid, p 1449-50

58 ‘Note on the legal doctrine of proportionality’ *Children’s Rights Alliance*

February 2007

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prohibited59 as was the wearing of T-shirts with religious or political messages 60. FIFA does not seem to have a problem with footballers of catholic faith who are allowed to perform the crucifixion as a sign of celebrating their victories but the Iranian women were banned from playing football wearing the hijab61 until they forcefully pleaded with FIFA for this permission.

In English law, the test for proportionality was set out in *de Freitas v* *Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and* *Housing* in which the Privy Council set out a three pronged test to the following effect; whether:

The legislative objective is sufficiently important to justify   
limiting a fundamental right;

The measures designed to meet the legislative objective are   
rationally connected to it;

And the means to impair the right or freedom are no more than   
is necessary to accomplish the objective.62

The first issue is whether the objective of FIFA in restricting under- garment messages is sufficiently important to justify the limitation of freedom of speech. There is no evidence available on record to show that a player or players were hurt or harmed for expressing their religious or political opinions. The majority of football violence emanates from hooliganism perpetrated mostly by drunken football fans. The determination of appropriate thresholds or proportions of speech would therefore guide FIFA and any other country as to what is permissible speech in a particular society and avoid sanctioning footballers and other athletes for expressing speech that may not have any effect on sporting interests or commercial interest.

The proportionality principle is part of the European Court jurisprudence and in *David Meca-Medina and Igor Majcen v Commission* *of the European Communities*63 sport was deemed to be subject to

59 Note 2 above

60 Salvatore Landolina, ‘World Cup 2010: FIFA ban Brazil players from displaying

religious t-shirts’ June 12, 2010, [http://www.goal.com/enus/news/3296/brazil/](http://www.goal.com/enus/news/3296/brazil/2010/06/12/1972668/world-cup-2010-fifa-ban-brazil-players-from-displaying-religious-)   
[2010/06/12/1972668/world-cup-2010-fifa-ban-brazil-players-from-displaying-](http://www.goal.com/enus/news/3296/brazil/2010/06/12/1972668/world-cup-2010-fifa-ban-brazil-players-from-displaying-religious-)   
[religious-](http://www.goal.com/enus/news/3296/brazil/2010/06/12/1972668/world-cup-2010-fifa-ban-brazil-players-from-displaying-religious-) Accessed on 22 October 2010

61 Note 7 above

62 [1999] 1 AC 69 at p80 also referred to in *Regina v Secretary for the Home*

*Department* ex parte. Daly at para 25 per Lord Steyn   
63 C-519/04P

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community law in so far as it constitutes an economic activity and the judgement goes on to state that the courts will not intervene to interfere with rules that concern purely sporting interests.64 The task would be to come up with an appropriate equipoise that will ensure a balance between the protection of the interests of FIFA or any other international sports administrative body and the individual fundamental rights of the athletes as protected under the domestic laws of the country of domicile of the club or the athlete.

Alec Van Vaerenburg identifies two key issues that restrain domestic courts from intervening in sports disputes even where human rights issues have been violated. Regrettably most of the instances arise from doping cases. He noted that “... the sports regime only establishes a contractual relationship or at best regulates private matters between individuals”65 and does not normally involve the State. The court decision reached in *Gundel v I EF* was that “a penalty prescribed by doping regulations is one of the forms of penalty fixed by contract and therefore based on party autonomy”.

The reasoning was that parties to a contract are assumed by law to have equal bargaining power and as such are autonomous. This assumption may not be correct because the nature and structure of FIFA does not establish a platform for negotiation on its rules by individual football professional. The bargaining power of the individual players is weak as correctly noted by Van Vaerenburgh that

[a]thletes are forced to subscribe to the statutes of a private   
body if they want to compete. Those accession agreements lack   
the even handedness and arm’s length bargaining of ordinary   
contracts.

Professional football players cannot negotiate directly with FIFA regarding any football rules. Members of FIFA are football federations/ association that administer football in different countries. In the domestic scenario it may either be a professional league that will be affiliated to the national administrator or the football club that will be affiliated to the national association. FIFA rules and regulations are implemented and enforced by the national association. Again, the football players come at the tail end and have no right of audience

64 Ibid. Press Release dated 18 July 2006

65 Alec Van Vaerenburg ‘Regulatory Features and Administrative Law Dimensions

of the Olympic Movement’s Anti-doping Regime’ *Global Administrative Law*   
*Series*, IILJ Working Paper 2005/11 p 13

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at the national association.

Thus to contend that human rights issues in sports cannot be addressed in sports governance is to ignore the fact that the contract that enables a party to compete as a professional footballers does not permit direct negotiations with the rule makers and it is not autonomous as assumed in the matter of *Gundel v IEF*66. Thus if footballers are unable to autonomously negotiate their contracts and are constrained in their conduct on the field including what expression may be exercised by them then they start their negotiations from a very weak position. Domestic courts must find some grounds for intervening particularly where human rights are violated with the justification that State funds are sometimes used to fund the construction of stadiums — particularly in the under-developed world — and they are not private venues where speech may be restricted. Thus the fact that FIFA and its affiliates use public resources in pursuing their objectives must encourage domestic courts to intervene whenever there is a call against potential human rights violations by FIFA and other international sports federations.

Timothy Zick argues that *“…speech and spatiality cannot be completely* *severed from one another”*67 Football is played for enjoyment of fans and the cheering expressions of the fans are regarded as part of public discourse. However, footballers are banned from exhibiting either religious or political speeches on the same platforms. Implicit in and essential to freedom of expression is the need for adequate physical space in which speech can be without restraint.68

Whilst FIFA resents political intervention in the administration of football, it has itself taken political positions regarding certain political dispensations. It banned South Africa from participating in international football during the apartheid era until after 1994. FIFA’s position with regard to players exhibiting free speech of either political or religious nature may be construed as hypocrisy. In any case, the very nature of FIFA’s structures and operations is largely political. For instance, one of the essential pre-condition for a country to host the World Cup is that the bidding federation must secure government guarantee for its

66 Swiss Federal Supreme Court, March 15, 1993.

67 Timothy Zick ‘Space, Place, and Speech: The Expressive Topography’ (2006).

*Faculty Publications* Paper 276. [http://scholarship.law.wm.edu/facpubs/276](http://scholarship.law.wm.edu/facpubs/276or)   
[or](http://scholarship.law.wm.edu/facpubs/276or) *George Washington Law Review* Vol 74, 2006 p441

68 Ibid

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bid. It is, therefore, not surprising that the huge contribution of funds needed to support the preparation for the hosting of the World Cup tournaments are drawn from the national government treasuries of the hosting countries.

CONCLUSION

The importance of free speech in sports cannot be over emphasised. The administration of professional sports should not place unchecked prominence over fundamental human rights. What FIFA and other global sports administrative bodies may be avoiding is being held to account for their actions by national governments. Now is therefore the time for continental political bodies to confront FIFA head on and ensure that mechanisms are put in place to hold them accountable for human rights violations.

REFLECTING ON THE APPLICABILITY OF FREEDOM,   
SANCTITY AND PRIVITY OF CONTRACT IN ZIMBABWEAN LAW OF CONTRACT

BY INNOCENT MAJA1

ABSTRACT

*This paper examines the applicability of the long established* *contractual doctrines of freedom of contract, sanctity of contract* *and privity of contract in modern day Zimbabwean law of contract.* *It argues that even though the three doctrines are still applicable,* *there are instances where they have not be strictly adhered to and in* *some cases redefined.*

*Key words:* *freedom of contract, sanctity of contract, privity of* *contract, contract.*

1. INTRODUCTION

The doctrines of freedom of contract, sanctity of contract and privity of contract are foundational principles upon which Roman-Dutch law of contract was initially established. This article analyses the three doctrines and reflects on the extent to which these doctrines are still applicable in the current Zimbabwean law of contract.

2. FREEDOM OF CONTRACT

The doctrine of freedom of contract provides that one is free to enter (not to enter) into a contract without interference or restriction.2 A person has the freedom to choose with whom to contract, whether or not to contract, and on what terms to contract. In *Printing & Numerical* *Registering Company v Sampson,* the court underscored the doctrine of freedom of contract when it held as follows:3

If there is one thing more than another that public policy   
requires, it is that man of full age and competent understanding   
shall have the utmost liberty of contracting and that their   
contracts, when entered into freely and voluntarily, shall be

1. LLBs (Hons), LLM and LLD. Dean, Faculty of Law, University of Zimbabwe. 2. Maja, I *The Law of Contract in Zimbabwe* (2016) Maja Foundation, Harare. 3. *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 465.

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held sacred and shall be enforced by courts of justice. Therefore,   
you have this paramount public policy to consider — that the   
courts are not likely to interfere with this freedom of contract.4

It is interesting to note that in *Munyanyi v Liminary Investments &* *Anor,*5the court established that freedom of contract is not limited only to the freedom to make a contract but also freedom to vary the contract. The parties have the liberty to change their minds as many times as it suits them as long as at each time that they do so, they are acting in concert and their minds meet.6

In *Chanakira v Mapfumo & Anor,*7the court established that public policy upholds — as a fundamental principle — the freedom and sanctity of contract and requires that commercial transactions should not be ‘*unduly trammeled by restrictions on that freedom*.’

Inherent in the doctrine of freedom of contract is the acknowledgment that individual citizens and or corporations have delegated sovereignty that enables them to participate constantly in the law-making process. The consent of contracting parties embodied and expressed in a contract creates law. Viewed from this perspective, freedom of contract decentralises the law-making process. As a result, law is not only an order imposed by the state from above upon its citizens but also an order created from below.8

A critical look at the current law of contract shows that there are a number of circumstances where the doctrine of freedom of contract is not strictly applied. First, freedom of contract is limited by the requirement that all contracts should be legal. This means that any contract which is entered into freely and voluntarily but which contravenes some legal rule in statute or public policy in common law cannot be enforced at law based on illegality.

4. See also *Chanakira v Mapfumo & Anor* Limited S-86-06; *Tonderai Hamandishe*   
*& Anor v Maffack Properties (Pvt) Ltd* HH-160-10; and *International Trading*   
*(Pvt) Ltd* 1993 (1) ZLR 21 (H).

5. *Munyanyi v Liminary Investments & Anor,* HH-38-2010.

6. See Kessler, Friedrich, ‘Contracts of Adhesion-Some Thoughts About Freedom

of Contract’ (1943). *Yale Law School Faculty Scholarship Series*. Paper 2731. 7. *Chanakira v Mapfumo & Anor* HH-155-10.

8. 8See Cohen, M ‘The Basis of Contract’ (1933) 46 *Harvard Law Review* 553, 585;

& Note, E Mutuality in ‘Exclusive Sales Agency Agreements’ (1931) 31 *Columbia*   
*Law Review* 830.

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Second, an agreement entered into freely and voluntarily with a person without contractual capacity is deemed void in the law of contract. For instance, contracts entered into freely and voluntarily by minors, insane persons, intoxicated persons, prodigals, insolvents etc. cannot be enforceable at law. This limits freedom of the parties to choose the person with whom to contract.

Third, monopolies restrict the freedom of parties to choose with whom they want to contract. For example, in Zimbabwe the Zimbabwe National Water Authority monopoly on water and the Zimbabwe Electricity Supply Company monopoly on electricity limit the consumer’s freedom to contract with whosoever they please. Consumers are compelled to contract with these institutions only.

Fourth, covenants in restraint of trade also restrict freedom of contract. A contract in restraint of trade is one by which a party restricts his future liberty to carry on his trade, business or profession in such manner and with such persons as he or she chooses.9 Such contracts place restrictions upon the parties’ freedom to contract with whosoever they want and wherever they choose.10

Fifth, quasi-mutual assent potentially limits freedom of expression. Quasi-mutual assent binds a party to a contract — no matter what his or her real intention is — if (s)he conducts himself in a manner that makes the other party reasonably believe that (s)he has assented to the terms of a contract. This rule may lead to the imposition of non- consensual obligations and therefore restrict the doctrine of freedom of contract.

Finally, standard form contracts also limit freedom of contract. Examples of standard form contracts include bank account opening contracts, insurance policy contracts, air tickets, mortgage contracts, university enrolments etc. For practical reasons and cost considerations, it is more expedient for banks, insurance companies, airlines, building societies, and universities to couch their contracts in a standard manner thus limiting the freedom of contract on the part of the contracting client.

9. Seddon, N; Bigwood, R; Ellinghaus, M (2012) Cheshire and Fifoot’s *Law of*   
*Contract* 351.

10. See *Mangwana v Muparadzi* 1989 (1) ZLR 79 (S

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Clearly, even though the doctrine of freedom of contract is still part and parcel of the current law of contract, it has not been strictly applies in some instances.

3. SANCTITY OF CONTRACT

Sanctity of contract provides that once a contract is entered into freely and voluntarily, it becomes sacrosanct and courts should enforce it.11 According to Sir David Hughes Parry:12

When all persons interested in a particular transaction have given   
their consent to it and are satisfied, the law may safely step in   
with its sanctions to guarantee that right be done by the   
fulfillment of reasonable expectations.

A similar sentiment was echoed in *E. Underwood & Sons Ltd v B.* *Baker*13where the court held as follows:

To allow a person of mature age and not imposed upon, to enter   
into a contract, to obtain the benefit of it, and then to repudiate   
it and the obligations that he has undertaken, *prima facie* at all   
events, is contrary to the interest of any and every country.

In *Madoo (Pty) Ltd v Wallace*14the Court held that ‘*[o]ur system of* *law pays great respect to the sanctity of contact. The Courts would* *rather uphold than reject (contracts).’* The Zimbabwean case of *Old* *Mutual Shared Services (Pvt) Ltd v Shadaya*15 established that the doctrine of sanctity of contract holds in Zimbabwe. *Mwayipaida Family* *Trust v Madoroba and Others* buttresses this point by holding that *‘[i]t is the policy of the law to uphold, within reason, the sanctity of* *contracts*.’16

*Beale, Bishop and Furmston*17 argue convincingly that sanctity of contract has a double emphasis. The first emphasis is that if parties hold to their bargains, they are treated as masters of their own bargains and the courts should not indulge in *ad hoc* adjustment of terms that

11. Maja,I *The Law of Contract in Zimbabwe* (2016) Maja Foundation, Harare.   
12. Sir David Hughes Parry The Sanctity of Contracts in English Law (1959) *The*

*Hamlyn Trust Series* 1-2.

13. E. Underwood & Sons Ltd v B. Baker 1899 (1) CH 305.

14. 1979 (2) SA 957.

15. HH-15-2013.

16. S-22-04; 2004 (1) ZLR 439 (S).

17. Beale HG; Bishop WD & Furmston MP *Contract Cases and Materials* (2008) 58.

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strike them as unreasonable or imprudent. The second emphasis is that if parties must hold to their bargains, then the courts should not lightly relieve contractors from performance of their agreements.

A number of decisions have upheld the application of the doctrine of sanctity of contract in Zimbabwe. For instance, in *Mangwana v* *Mparadzi*18 the court held that, *‘[t]he principle that contracts are to* *be obeyed (i.e. that they are sacrosanct) takes precedence over the* *principle of freedom of trade.*’ In *Book v Davidson*19 the court held as follows:

I cannot see why a person, who has agreed to the restraint with   
both his eyes open, should be allowed to aver that the restraint   
was unreasonable without showing the courts the circumstances   
that make it unreasonable or unfair to him.

In *Meyers-Mbidzo N.O v Chipunza and Another,*20 the court took the view that poor business decisions and greed cannot be allowed to interfere with the sanctity of contracts and that courts should uphold sanctity of contract.21 Again, in *Warren Park Trust v Pahwaringira* *and Others,*22 the court established that sanctity of contract is upheld even by ensuring that termination of contract is done by following the mode of termination to the letter.23

A number of principles underpin the doctrine of sanctity of contract. First, there is the golden rule of interpretation of contracts whose major cannon is that contracts are interpreted using the ordinary grammatical meaning of words used. A case in point is *Total SA (Pty)* *Ltd v Bekker*24 where the court held that:

… [t]he underlying reason for this approach is that where words   
in a contract, agreed upon by the parties thereto and therefore   
common to them, speak with sufficient clarity, they must be   
taken as expressing their common intention.

18. Mangwana v Muparadzi *1989 (1) ZLR 79 (S)*

19. *Book v Davidson* 1988 (1) ZLR 365 (S).

20. HH-3-2009.

21. See Unilever South East Africa v Viewleen Investments (Pvt) Ltd HH 37-07. See

BP Southern Africa (Pty) Limited v Desden Properties (Pvt) Limited & Anor   
1964 RLR 7(G) 11H-I; 1964 (2) SA 21 25 G-H; Fisc Guide Investment v Tazarura   
& Ors HH-28-2005.

22. HH-39-2009.

23. See also Minister of Public Construction & National Housing v Zesco (Pvt) Ltd

1989 (2) ZLR 311 at 316

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The net effect of such interpretation is to preserve the sacrosanct nature of a contract.

Second, there is the parole evidence rule that empowers the courts to interpret express terms of a written contract within the four corners of the agreement without admission of extrinsic evidence except in limited circumstances. The assumption is that parties intended the written document to reflect all the express terms of the contract and courts should consider the written document sacrosanct. In *Nhundu v* *Chiota and Another,*25 the court held as follows:

When a contract has been reduced to writing, the document is,   
in general, regarded as the exclusive memorial of the transaction   
and in a suit between the parties, no evidence to prove its terms   
may be given, save the document or secondary evidence of its   
contents, nor may the contents of such document be   
contradicted, altered, added to or varied by parole evidence.

Third is the principle of *caveat subscriptor* that indicates that a signature appended on a written contract binds the signatory to the terms of the contract. *Muchabaiwa v Grab Enterprises (Pvt) Ltd*26 established that *‘[t]he general principle, commonly referred to as* *caveat subscriptor, is that a party to a contract is, in general, bound* *by his signature, whether or not he read and understood the* *document…’*. Implicit in *caveat subscriptor* is that once a person signs a contract the contract becomes sacrosanct and binding. This upholds sanctity of contract.

Interestingly, the current law of contract has some principles that limit the application of the doctrine of sanctity of contract. For instance, the legal principle that a covenant in restraint of trade is not enforced if it is contrary to public policy27 limits sanctity of contract. It follows, therefore, that a court can intervene and alter a term in a covenant in restraint of trade that it considers against public policy, thus curtailing sanctity of contract.

24. *Total SA (Pty) Ltd v Bekker* (1954) 35 ALR 434, at 437.

25. 2007 (2) ZLR 163 (S).

26. 1996 (2) ZLR 691 (S).

27. n Basson v Chilwans 1993 (3) SA 742, it was held that ‘[t]he contract in restraint

of trade is against public policy if it restricts a party’s freedom of economic   
activity in a manner or to an extent that is unreasonably judged against the   
broad interests of community and the interests of the contracting parties.’

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The doctrine of severability of some aspects of a contract — the blue pencil test — also limits the application of the doctrine of sanctity of contract. The blue pencil test allows the court to sever unreasonable parts and enforce only the reasonable parts of a contract. This was demonstrated in *Mangwana v Mparadzi*28 where the court shortened the time restriction imposed on the appellant from five years to three years and limited the restraint clause to Chinhoyi and not the rest of Zimbabwe on the basis that the restraint of trade was unreasonable. It is clear that the doctrine of severability of a contract limits the sanctity of the contract to the extent of the severability of the provisions deemed unreasonable.

The principle of severing illegal parts of a contract and enforcing legal parts impacts sanctity of contract. For instance, in *Niri v Coleman* *and Ors,*29as well as *Muleya v Bulle,*30the Court established that the charging of excessive interest prohibited by the law does not disentitle the lender to recover the debt together with lawful interest. This essentially replaces the illegal excessive interest with lawful interest and makes the contract with illegal sections enforceable to some degree. In *Sibanda v Nyathi and Ors,*31the Court held that a court has a power to sever an illegal part of the contract concerning a purchase price32 and declare the true purchase price to reflect the true agreement between the parties.

It is clear from the above that the doctrine of sanctity of contract is predominantly used in the current law of contract in Zimbabwe.

4. PRIVITY OF CONTRACT

The doctrine of privity of contract provides that contractual remedies are enforced only by or against parties to a contract, and not third parties, since contracts only create personal rights.33 According to Lilienthal,34 privity of contract is the general proposition that an

28. In16 above.

29. 2002 (2) ZLR 580 (H) 588.

30. 1994 (2) ZLR 202 (H).

31. 2009 (2) ZLR 171 (H).

32. In this case, $70 million was the illegal purchase price and $130 million was the

true purchase price.

33. See Bhana, D; Bonthuys, E & Nortje M *Students’ Guide to the Law of Contract*

(2009) 18.

34. Lilienthal JW ‘Privity of Contract’ (1887) 1 (5) *Harvard Law Review* 226.

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agreement between A and B cannot be sued by C even though C would be benefited by its performance. Lilienthal further posits that privity of contract is premised upon the principle that rights founded on contract belong to the person who has stipulated them and that even the most express agreement of contracting parties would not confer any right of action on the contract upon one who is not a party to it.

In *Gwanetsa v Green Motor Services,*35 the Court established as follows:

The general rule is that an agent may not depute another person   
to do that which he has himself undertaken to do. There is no   
privity of contract between the sub-agent and the principal.36

In the same vein, *Kennedy v Loyne*37held that:

… [t]he rule is that where an agent has employed another person   
to perform the duty entrusted to him, no action accrues to the   
principal against the sub-agent; but he must sue the agent, who   
on his part, must sue the sub-agent.38

Zimbabwean courts have been consistent in applying this doctrine where parties to agency contracts have sought to escape liability based on having engaged sub-agents. In such cases, the courts have insisted on placing liability on the contracting parties, thus upholding the principle of privity of contract. The test to determine whether there was privity of agreement or not is a factual one requiring a careful consideration of the factual matrix.39

There are a number of instances where the doctrine of privity of contract is not applied in the law of contract in Zimbabwe. First, privity of contract will not apply in cases of an undisclosed principal. For instance, if A has made a contract with B, C may intervene and take A’s place if he can show that A was acting throughout as his agent.40

35. HH-159-03.

36. *See Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co* (1915) AC 847 853.

37. 37 (1909) 26 SC 271, at 279.

38. 38 See *Ncube v Mpofu & Ors* HB-69-06.

39. *Terra Graphics (Pty) Ltd t/a Terra Works v MEC*: *Department of Police, Road*

*and Transport Free State Provincial Government and Anor* (3489/2012) (2013)   
ZAFSHC 11 (7 February 2013).

40. Inn 8 above 404. See also *Watson v Gilson Enterprises (Pvt)* Ltd 1997 (2) ZLR   
318-319.

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Second, privity of contract has limited application in trusts. A trust forms an equitable obligation to hold property on behalf of another. The law of trusts can enable a third party beneficiary to initiate action that will enforce the promisor’s obligation. Using the above example, if B had contracted with A in the capacity of trustee for C, C as beneficiary under the trust has enforceable rights. These rights arise because the law of trusts gives a beneficiary certain rights against a trustee. In the context of privity, if C is a beneficiary under a trust, C can bring an action against B, the trustee, which has the effect of compelling B to sue A for breach of contract. In formal procedural terms, C sues in an action in which B and A are joined as defendants. The use of trust law here does not give rise, in the strict sense, to an exception to the doctrine of privity. In conceptual terms, B pursues the action against A, albeit at C’s insistence.

Third, privity of contract is usually limited in instances where contracts are made for the benefit of third parties — commonly known as *stipulatio alteri. Astra Steel & Eng Supplies (Pvt) Ltd* v *PM Mfg (Pvt)* *Ltd*41 establishes that for a *stipulatio alteri* to exist, the stipulator and the promiser must intend to create a right for the third party to adopt and became a party to the contract. Until acceptance of the benefit by the third party takes place, the contract remains one between the actual parties.

Fourth, there are statutory exceptions to the doctrine of privity of contract. For example, the Road Traffic Act42 empowers a party injured in a motor accident to recover compensation from an insurance company once he or she has obtained judgment against the insured.

5. CONCLUSION

It is clear from the above analysis that even though the doctrines of freedom of contract, sanctity of contract and privity of contract are still applicable to the current Zimbabwean law of contract, there are areas where these principles have not been strictly applied.

41. HH-393-12.   
42. [*Chapter 13:11*].

SENTENCING OF SEXUAL OFFENDERS

BY GEOFF FELTOE

ABSTRACT

*This paper examines the complex issue of sentencing of sexual* *offenders against the backdrop of the recent calls for mandatory* *minimum sentences in cases of sexual crimes. Some countries have* *introduced mandatory minimum sentences but the paper points out* *some of the problems in deciding upon appropriate minimum* *sentences for the different sexual crimes. It demonstrates* *inconsistencies in the sentencing patterns in Zimbabwe for sexual* *offences and explores the alternative of setting of sentencing* *guidelines to achieve more consistency in sentencing levels.*

*Key words:* Sexual offences, mandatory minimum sentences, inconsistency in sentences

PART 1 — INTRODUCTION

SENTENCING

Sentencing in all criminal cases is a complex process as the penalty must fit the crime and the offender. Before coming to a conclusion on the appropriate sentence all the individual circumstances of each case must be considered. One very important factor which is perhaps not always given full weight is the impact of the offence on the victim. Justice demands that serious offences should not be trivialized by imposing sentences that are too lenient but, on the other hand, harsh sentence must not be automatically imposed without taking account of the specific circumstances of each case.1

SEXUAL OFFENCES

There are various sexual offences, the most serious of which are rape and aggravated indecent assault, both of which carry a maximum sentence of life imprisonment. The offence of so-called “statutory rape” carries a maximum sentence of imprisonment for ten years.

1 For a detailed analysis of the sentencing role of judges see *S v Mharapara* HH-   
26-17 p 4 and *S v Makucheche* HH-10-18 at p 12.

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This paper concentrates on the offences of rape and statutory rape of girls. It examines the current patterns of sentencing for these two offences and looks at the reasons for the recent demand for the setting of mandatory minimum sentences for these offences.

What can be safely stated at the outset is that rape is obviously a dreadful crime which deserves to be punished severely. Statutory rape can border on the crime of rape, if not sometimes cross the line into rape. Sexual exploitation by men of young girls should attract severe punishment. Young girls need to be protected against older men who sexually groom and entice them with promises of rewards to allow sexual relations to take place. Those men who use their power and authority to pressure girls into submitting to sexual relations should be charged with rape and not statutory rape. Thus a teacher who threatens to fail a pupil unless she allows him to have sexual relations with her should be charged with rape.

AGE OF CONSENT

Recently there has been a lot of debate about raising the age of consent for the purposes of the crime of rape. It is of interest to note that France is intending to raise the age of sexual consent to 15.

Presently sexual intercourse with a girl who is 12 or below is automatically rape as the girl is deemed to lack capacity to consent. A girl who is 13 but under 14 is rebuttably presumed to lack the capacity to consent until otherwise proved. If the presumption is not rebutted, the male who has sexual relations with her commits rape.

A girl who is 12 or older but who is not yet 16 can consent to sexual intercourse but the male who has sexual intercourse with her still commits the offence under section 70 of the Code of having consensual relations with a young person. This offence currently requires that the sexual intercourse be “extra-marital”. This needs to be amended deleting the word conditional “extra-marital” because in the *Mudzuru* case2 the Constitutional Court ruled that marriage to a person under the age of 18 is prohibited and thus the fact that the accused purportedly married the girl cannot be a defence.

It is suggested that the minimum age below which the girl will be deemed to lack capacity to consent should be raised to 14 from the

2 Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs & Ors   
CC-12-2015

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present 12 so that if a male has sexual intercourse with a girl under 14 he would be guilty of rape. It is also suggested that the upper age for statutory rape could be raised to 18.

MANDATORY SENTENCES FOR SEXUAL OFFENCES

The main justification for mandatory minimum sentences for serious crimes, such as rape, is to try to ensure that the sentences imposed fully reflect the gravity of these offences. By prescribing the maximum sentence only, the legislature has left it to the courts to decide on a case by case basis what sentence up to the maximum is appropriate. Where only maximum sentences are set, there are also likely to be inconsistencies in the sentences handed down by different judicial officers.

The clamour for mandatory sentences occurs when there is a public perception that some judicial officers are imposing woefully inadequate sentences for serious crimes, such as rape. The high incidence of rape and its devastating effects on victims has led to demands for far harsher sentences to be imposed for this crime and this then leads on to demands for minimum sentences. This has led various countries to introduce minimum sentences for sexual offences which sentences vary in accordance with the presence of certain specified aggravating factors. These include South Africa, Tanzania, Kenya and Lesotho. See Annexure 3 for details of the mandatory sentences that apply in these countries.

The courts tend to be resistant to mandatory sentences because they strongly believe that mandatory sentences deprive the courts of their discretion to decide upon appropriate sentences which take into account the wide range of various factors that may apply in different cases. This resistance remains even where the courts do not have to impose the mandatory minimum sentences where they find that there are special circumstances.

Opponents of mandatory sentences argue that these sentences have no additional deterrent effect and lead to overloading of the prisons with long term prisoners.3 What is more important in deterring criminals is to ensure that there is a high probability that they will be arrested and tried; the strong likelihood that they will be brought to book is more likely to deter them. In respect of rape, it is argued that we should encourage more reporting of such cases and we should also improve efficiency of investigation and evidence gathering to ensure

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a better rate of conviction. The use of DNA evidence would greatly help in this regard. We should also have a register of all sex offenders so that when they are released from prison they can be kept under surveillance to deter them from repeating their crimes and to ensure that paedophiles are not employed in places where they would have access to children such as schools and similar institutions.

On the other hand, mandatory lengthy prison sentences for sex offenders at least ensure that the public is protected against these sexual predators during the time they are locked up.

PROBLEMS IN DECIDING UPON MINIMUM SENTENCES

The setting of the level of mandatory sentences for the various categories of sexual offences is not easy and can turn out to be fairly arbitrary. The circumstances surrounding the commission of the offences can widely vary within the different categories of sexual offences. Care has to be taken when drawing guidance from other countries in the region on the levels of mandatory sentence that they have set because the nature of the crimes concerned may differ from country to country.

If we rush to impose mandatory sentences without giving proper consideration into what levels are appropriate, and the implications of imposing these may be, the whole enterprise may prove to be counterproductive as we may open the way to a succession of constitutional challenges to the new provisions. Mandatory minimum sentences have been ruled to be constitutional under the pre-2013 Constitution provided that a lesser sentence may be imposed if there are special circumstances.4 However, the reasoning in one of these cases suggests that although the legislature is best placed to decide what sentences are appropriate for serious crimes, it might still be possible to argue that a mandatory sentence that has been set is so excessive and disproportionate as to constitute an inhuman punishment in violation of the Constitution. Although mandatory minimum

3 In a lecture in 20174 Edwin Cameron, a judge in the Constitutional Court in   
South Africa cogently set outs the reasons why he opposes the imposition of   
mandatory minimum prison sentences. See “Imprisoning the Nation: Minimum   
Sentences in South Africa” Dean’s Distinguished Lecture Programme delivered   
at University of Western Cape on 19 October [2017.](http://2017.www.groundup.org.za/article/minimum-prison-sentences-must-go-says-constitutional-court-judge/)

[www.groundup.org.za/article/minimum-prison-sentences-must-go-says-](http://2017.www.groundup.org.za/article/minimum-prison-sentences-must-go-says-constitutional-court-judge/)   
[constitutional-court-judge/](http://2017.www.groundup.org.za/article/minimum-prison-sentences-must-go-says-constitutional-court-judge/)

4 See *S v Arab* 1990 (1) ZLR 253 (S) and *Chichera v A-G* 2005 (1) ZLR 307 (S)

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sentences have been upheld in South Africa5, the majority of the Constitutional Court ruled that it was unconstitutional to impose mandatory sentences on juveniles over 16 but under 18.6

SENTENCING COUNCILS

In some jurisdictions the alternative to minimum mandatory sentences imposed by the legislature has been to establish a Sentencing Council along the lines of the one in England. This Council is composed of judicial officers and lawyers and its function is to promote greater consistency in sentencing, whilst maintaining the independence of the judiciary. The Council produces guidelines on sentencing for the judiciary and criminal justice professionals and aims to increase public understanding of sentencing. The courts must follow these guidelines unless it is in the interests of justice not to do so.

PART 2 — RAPE

EFFECTS OF RAPE

Rape has been described as involving the ultimate invasion of a female’s body, her sexual autonomy and her privacy leading to extreme humiliation and degradation of its victims. This crime grossly violates many of the most fundamental constitutional rights of women, such as their rights personal security, bodily and psychological integrity, freedom from violence7 and inherent dignity8 freedom from cruel and degrading treatment9 and the right to equality and non- discrimination.10 Rape victims are terrorized by rapists. The rapist may enter the house or room occupied by a female and use physical force or threats against her life to rape her. He may waylay her in an open place, drag her into some bushes and forcibly rape her. Not only is the woman or girl subjected to the appalling ordeal of rape but she will often fear that her attacker will kill her after the rape. Where the rapist uses physical force to overcome her resistance, she will suffer bodily injury including vaginal injury which may result in later gynaecological complications. The rapist will often further terrify the

5 *S v Dodo* 2001 (3) SA 382 (CC)

6 Centre for Child Law v Minister for Justice and Constitutional Development

2009 (2) SACR 477 (CC).   
7 Section 52

8 Section 51

9 Section 53

10 Section 56

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victim after the rape by threatening to come back and kill her if she reports the rape to the authorities. The rape victim is at risk of contracting HIV and other STDs. She may also be impregnated and unless she is able to obtain emergency contraception to prevent pregnancy or a lawful abortion, she will then have to give birth to a child who is the product of rape.

But the dreadful effects of rape extend well beyond the act of rape itself. The long-term psychological effects of rape can last for the rest of the survivor’s life and can amount to a living hell for some survivors. These after-effects can include post-traumatic stress, depression, vivid flashbacks and recollections of the trauma, low self- esteem, difficulty in forming relationships with others and eating and sleep disorders. Depression may become so acute that she may become suicidal.

In *S v Phiri* HH 195-15 the court had this to say:

The general public has rightly demanded that rapists should be

severely punished. Rape is a crime of violence rather than   
passion. It dehumanises and traumatizes the victim. It is even   
worse when the victim is potentially exposed to the lethal   
infection of the HIV virus and other sexually transmitted   
infections. The courts should, in my view, play their role by   
punishing such offenders in a manner which acknowledges the   
serious nature of the offence and the interests of justice.

The long term damage done to a child who is raped can be even worse. According to one author:11

…childhood sexual abuse is considered one of the worst forms   
of trauma, and its effects, long term signs and symptoms are   
now found to span a large range of conditions. Sexual abuse is   
considered ‘soul murder’ as it literally robs the child victim of   
their innocence, severely disrupts their developing ego structure   
and sense of Self, and will later distort the then adult’s ability   
to function and form healthy relationships with others.

It has been found that the risk of lasting psychological harm to the child victim is greater if the perpetrator of the sexual assault on the child is a close relative such as a father or someone in a position of

11 Linda Callaghan *In rage: Healing Rage of Child Sexual Abuse*, Tyrone Hill   
Publishers, New Jersey 2007

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protector and guide, such as a teacher.. Victims of child sexual abuse may sometimes themselves become abusers in later life.

It is therefore vitally important in determining the appropriate sentence for rape to take full account of the nature of this crime and its short and long-term consequences. In England the sentencing guidelines for sexual offences have been amended so that the courts will fully consider the impact of sex offences on victims. As well as physical harm, the new approach reflects more fully the psychological and longer term effects on the victim, enabling courts to pay heed to the true extent of what the victim has been through.12

INADEQUATE SENTENCES FOR RAPE

Section 65(2) of the Code provides a non-exhaustive list of factors that the court should take into account in imposing sentences in rape cases. Unfortunately the lack of proper sentencing guidelines for this offence has led some regional magistrates to impose woefully inadequate sentences that fail to reflect the seriousness of this offence and generally their sentencing patterns for this offence are erratic and inconsistent. This is most apparent in cases of rape of children. Review and appeal courts have tried to correct these anomalies where they occur.

For instance, in *S v Phiri* HH 195-15 a 54 year old accused was convicted of 5 counts of the rape of his step-daughter, a 14 year old. All 5 counts were treated as one for sentence and the accused was sentenced to 16 years, 4 years conditionally suspended. The magistrate sentenced him to an effective sentence of imprisonment of 12 years. The review court said this was far too lenient and totally inadequate for his repeated transgression. An effective term of 20 years to 25 years imprisonment would have been appropriate.

GENERAL SENTENCING GUIDELINES IN RAPE CASES

There is one case which purports to give some general guidelines for sentencing in rape cases is that of *S v Ndlovu* 2012 (1) ZLR 393 (H). In this case a 43 year old man was convicted of five counts of raping his own daughters aged 4 and 7. The magistrate imposed a total effective sentence of 40 years imprisonment. Although he characterised rape

12 “New sex offence guidelines to overhaul sentencing” By Kathleen Hall in The   
Law Society Gazette 12 December 2013 [https://www.lawgazette.co.uk/law/](https://www.lawgazette.co.uk/law/new-sex-offence-guidelines-to-overhaul-sentencing/5039178.article)   
[new-sex-offence-guidelines-to-overhaul-sentencing/5039178.article](https://www.lawgazette.co.uk/law/new-sex-offence-guidelines-to-overhaul-sentencing/5039178.article)

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as traumatising, humiliating and abominable, the review judge reduced this sentence to a total effective sentence of 18 years. The judge said that the sentence for rape should not exceed the sentence ordinarily imposed for murder with extenuating circumstances and culpable homicide. Working from this comparison with homicide sentences, the judge concluded that a single count of rape should attract a sentence from 5 to 10 years. Only in a rare, very serious case should the sentence go beyond 10 years and the very worst cases should attract life imprisonment.

It is respectfully submitted that the crime of rape is of a very different nature to homicide and causes drastic immediate and long-term harm of a different character to that of homicide. It is a truly abominable crime. Surely a sentence well in excess of 5-10 years is appropriate for a single count of a young child rape by a father or a brutal rape of an elderly woman. Although the appropriate sentence must be assessed on the facts of each case of rape it is certainly arguable that the magistrate’s sentence in the *Ndlovu* case took into account properly the despicable nature of the offence committed by a father on his own very young daughters.

SOME HIGH COURT CASES

There are various cases involving adult men raping child victims where the High Court found the sentence imposed was too lenient or where it could be argued that the sentences imposed were too lenient or the reduced sentence was too lenient.

In *S v Ncube* HB-136-17 the appellant was convicted of two counts of rape upon a 12 year old after dragging her into some bushes and sentenced to 12 years imprisonment of which 4 years imprisonment was conditionally suspended, making an effective sentence of 8 years. His appeal against sentence was dismissed.

In *S v Mafuwa* HH-664-17 a 40 year old teacher raped a 4 year old pre- school after luring the girl to his office. After raping the complainant, appellant threatened to cut her head off with a knife if she disclosed the offence to anyone. He also told her that if asked by anyone she should say she was raped by school pupils. After the rape, complainant went home and reported to her mother that she was in pain, after which her mother examined her private parts and noticed bruising on her genitals and later the rape was reported to the police. The teacher was sentenced to 12 years imprisonment of which 3 years’

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imprisonment were conditionally suspended, making an effective sentence of 9 years.

In *S v Nemukuya* HH-102-09 the accused was 59 at the time of conviction. He raped his 12 year old grand-daughter.. Rather than protecting the child he took advantage of being in *loco parentis* over her. He overpowered the girl “without using much physical force”. The complainant suffered a lot of psychological trauma. The accused threatened her with death if she reported the rape. When she did report, her report was suppressed by the family. Only later was the matter reported to the police. The magistrate sentenced him to 18 years’ imprisonment of which 4 years were suspended. On appeal, the court substituted a sentence of 12 years’ imprisonment with 4 years suspended, which was an effective sentence of 8 years.

In *S v Murehwa* HH-41-2004 the accused was convicted of 2 counts of rape on a 9 year old school girl as she was coming from school. He was sentenced to 7 years imprisonment on each count. Of the total of 14 years imprisonment of which 4 years were conditionally suspended, making an effective sentence of 10 years. This sentence was confirmed on appeal.

In *S v Tafirenyika* HH-441-13 a 70 year old man raped an 11 year old girl. He was sentenced to 15 years imprisonment of which 7 years were conditionally suspended, an effective sentence of 8 years. The man was married to the aunt of the girl. She was staying at their house. After the rape he threatened that if she told anyone about what had happened he would throw into a crocodile infested pool. The appeal against sentence was dismissed.

On the other hand more severe sentences was handed down in the following cases:

In *S v Mpande* HH-43-11 appellant raped a 3 year old girl left in his care and infected her with syphilis. He was “in a protective relationship” with complainant. The appellant therefore abused the trust of both the complainant and her grandmother who employed the appellant. That together with the age of the child made this “a very bad case of sexual abuse.” He was sentenced him to 18 years imprisonment of which 3 years was conditionally suspended making an effective sentence of 15 years. The appeal was dismissed. The court commented that he was lucky not to get a harsher sentence.X

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In *S v Mukarati* HH-323-14 a prophet took advantage of a so-called cleansing ceremony of a 13 year old girl and was sentenced to 20 years imprisonment of which 2 years was conditionally suspended, an effective sentence of 18 years. This was a well calculated offence by a cunning appellant. Those who commit heinous offences of this nature must accept that they cannot avoid being removed from society for a fairly long period of time. Such sentences are a desperate response by these courts to the continued and almost unabated occurrences of such offences. The appeal against sentence dismissed.

In *S v Nyathi* 2003 (1) ZLR 587 (H) a man forcibly raped his 16 year-old daughter 10 times over a period of 18 months. The magistrate imposed an effective total sentence of 30 years’ imprisonment. The review judge considered this sentence to be excessive and reduced it to an effective total sentence of 18 years’ imprisonment.

In *S v Chirembwe* HH-162-15 the accused was convicted of 30 counts of unlawful entry into domestic premises and 21 counts of rape. On review the sentence was changed to a total of 73 years imprisonment of which 18 years is suspended, making an effective sentence of 55 years.

SURVEY OF REGIONAL COURT SENTENCES

The Legal Resources Foundation has surveyed recent rape cases in the regional courts from around the country. This survey has revealed considerable inconsistencies in sentences imposed in what appear to be very similar cases. Some of the sentences in serious rape cases involving rape of child victims by adult males appear to be too lenient. See Annexure 1 for a sample of sentences from the Harare Magistrates Court.

ADULT RAPE VICTIMS

The Legal Resources Foundation survey has also revealed considerable inconsistencies in sentences imposed in what appear to be very similar cases. The sentences in rape cases involving rape of adult women by adult males appear to be too lenient. See Annexure 2 for a sample of sentences from the Bulawayo Magistrates Court.

One particularly bad case which attracted a long term of imprisonment was that of *S v Ndebele* HB-131-10. In this case the appellant was convicted of 3 counts of rape and 2 counts of aggravated indecent assault on two heavily pregnant women, one of whom was 9 months

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pregnant. The complainants were walking with their 9 year old cousin in a bushy area. The accused man ordered the women to go behind a bush and when they resisted he assaulted them with a stick to get them to comply. Once in the bush, the man slapped the first complainant twice and forced her to lie down ordering her to remove her panties. He ordered the second complainant and the 9 year old boy to sit down nearby as he raped the first complainant once. When the man finished raping the first complainant the first time, he ordered the second complainant to suck his penis before raping the first complainant a second time. When the man finished raping the first complainant the second time, he demanded that she should thank him for what he had done which she did. He then ordered the second complainant to suck his penis the second time before ordering the first complainant to bend over and raping her for the third time. All this happened in the full view of the 9 year old boy who had been ordered to sit down a short distance away.

The court pointed out that this was an extreme case of rape and aggravated indecent assault where the Appellant exhibited callousness of the highest order and appeared to derive sadistic pleasure in abusing heavily pregnant women in the full view of a 9 year old child. He was sentenced to 18 years imprisonment for the 3 counts of rape and 15 years imprisonment for the 2 counts of aggravated indecent assault. Of the total 33 years imprisonment, 8 years imprisonment was conditionally suspended. The overall effective sentence was 25 years was confirmed by the appeal court.

In *S v Zakeyo* HH-142-12 a prophet had called a married woman to his house and had overpowered her and raped her. She was instructed not to tell anyone about the rape otherwise she would die or the severity of her illness would increase. Appellant was convicted on a charge of rape and sentenced to 17 years’ imprisonment, 4 years conditionally suspended, making an effective sentence of 13 years. The appeal against sentence was withdrawn.

In *S v Machingura* HH-236-12 a man raped a woman in his car at knife point. After the rape he threatened her with death and the death of her husband if she disclosed the rape. The court held that the sentence of 10 years of which 3 years was conditionally suspended, an effective sentence 7 years, was not too harsh.

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CHILD RAPISTS

A recent study into sentencing patterns in regional magistrates’ courts in Zimbabwe has disclosed that a significant percentage of rapes are committed by persons under the age of 18. This is a social problem that needs to be addressed urgently. Many of the offenders come from poor families and some have themselves been the victims of sexual abuse and have developed disturbed personalities. However, rape remains an extremely serious offence even though the offence has been perpetrated by a person under the age of eighteen. For this reason the courts are obliged to impose sentences that do not trivialise the serious crimes committed.

The courts have understandably been most reluctant to incarcerate children in ordinary prisons. The general policy has been to keep children out of prison wherever possible. The Constitution in section 81 provides that children accused of crimes should not be detained except as a measure of last resort and if they are detained, they should be detained only for the shortest period of time. In South Africa the Constitutional Court has ruled that mandatory minimum sentences for juveniles between 14 and 16 are unconstitutional: see *Centre for Child Law v Minister of Justice and Constitutional Affairs* CCT-98-08.

The problem here is the limited range of sentencing options available in such cases. The regional courts have usually adopted the expedient device of sentencing juvenile offenders to receive corporal punishment. There are two drawbacks of this approach. First, if the offender already has a disturbed personality, corporal punishment administered in the prisons may well make the youth more disturbed and more likely to commit further crimes. Secondly, this sentencing alternative may well become unavailable if the Constitutional Court upholds recent rulings by the High Court13 that this form of punishment is unconstitutional.

In a serious rape case such as where the victim is a very young child, a community service order is certainly not appropriate. What would be far more appropriate would be to order, on the basis of probation

13 *S* v *Chokuramba* HH-718-14 and *Pfungwa & Anor v Headmistress of Belvedere*   
*Junior Primary School & Others* HH-148-17. These decisions still await   
confirmation by the Constitutional Court according to section 175(1) of the   
Constitution.

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officers, that the offenders be held in institutions for the training and rehabilitation of juvenile offenders. However, the places in such institutions are very limited and there is currently a shortage of probation officers. This issue must be urgently addressed.

In *S v Tsingano* HH-279-11 a 17 year old juvenile first offender raped a 14 year old who had been asleep after throttling her. Disregarding the probation officer’s recommendation, the trial magistrate sentenced the juvenile to 9 years imprisonment of which 2 years were conditionally suspended. Whilst acknowledging that rape is a disturbingly prevalent serious offence and also that *in casu* the accused showed perseverance and determination in the commission of the offence, in view of accused’s age and personal circumstancesit was a gross error of judgment to sentence him to an effective term of imprisonment let alone one of 7 years. The accused was sentenced to 3 years imprisonment the whole of which was conditionally suspended.

In *S v Marufu* HH-298-11 a 17 year old was convicted by a regional magistrate on 4 counts of rape. He was sentenced to 12 years imprisonment of which 4 years were conditionally suspended. The appeal court substituted a sentence of 4 years imprisonment of which 2 years 8 months was conditionally suspended.

STATUTORY RAPE

What makes the issue of sentencing for this offence a complex matter is that there are a wide range of differing circumstances that fall within its ambit. This has been pointed out in various case such as *S v* *Mutowo* 1997 (1) ZLR 87 (H) at p 88 and *S v Tshuma* HB-70-13. There is, for instance, a vast difference between a situation where a 60 year old man entices a naïve 13 year old girl to have sexual relations with him by giving her money or gifts and a situation where a 17 year old youth and a 15 year old girl who is nearly 16 years old fall in love and mutually agree to have sexual relations after the girl tells him that she wants to have sexual relations with him. The problem is that between the most blameworthy and the least blameworthy situations postulated above there are many variations and different factors that have to be weighed in deciding upon the appropriate sentence.

ADOLESCENT SEXUAL ACTIVITY

It is inevitable that some teenage boys will have sexual relations with teenage girls with their consent. If they do not use protection, the result can be transmission of sexually transmitted diseases and

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pregnancy. Teenage pregnancy carries serious health risks and some pregnant girls may resort to dangerous illegal abortions. Because of this, the criminal law under section 70 thus tries to discourage boys over 16 from having sexual relations with girls under 16.

A boy who is only 16 or 17 years of age commits the offence under section 70 of the Code if he has sexual relations with a consenting girl who is only a few years younger than him. But in sentencing the boy the court must obviously take full account of the age of the accused. This will also apply to some extent to a male only a year or so over 18 who has consensual sexual relations with a girl of 15 where there is no evident sexual exploitation involved.

In the case of *S v Masuku* HH-106-15 a boy aged 17 had sexual relations with his girlfriend who was 15. This resulted in the girl falling pregnant. The judge said that the court must not impose unnecessarily punitive sentences for such boys. She was of the opinion that even a suspended prison sentence was inappropriate in the present case and instead decided that a direct sentence of community service would be “sufficiently rehabilitative and more in tune with a policy approach towards juvenile justice, which places emphasis on rehabilitation rather than branding such a youth as a criminal.” She then went on to observe that the law can only do so much to discourage teenage sexuality and prevent the dangers for girls that it poses. Society and policy makers need to accept the social reality of prevalent teenage sexuality and devise appropriate social interventions. She suggest interventions such as availing contraceptive protection and a more rigorous and open approach to sex education in schools. These interventions are necessary “since the dominant message of abstinence has obviously not succeeded in keeping the youth from having sex among their group.”

MALE SEXUAL PREDATORS

There should be common agreement that severe sentences must be imposed on men who sexually prey on young girls. Situations where older men induce immature girls to have sexual relations with them can be characterised as sexual exploitation. Where magistrates have handed down lenient sentences upon men who have sexually exploited girls, judges dealing with such cases on review or appeal have severely criticised the magistrates. Some of these judgements are summarized below.

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In *S v Virimai* 2016 (1) ZLR 533 (H), the review judge decried the prevalent practice of imposing inappropriately lenient sentences for this offence. In that case a 28 year old soldier had consensual sexual relations on a number of occasions with a girl aged 14 years. The magistrate sentenced him to a fine of $300 or in default of payment of the fine to 2 months imprisonment and in addition 2 months imprisonment wholly suspended on conditions of good behaviour. He also considered imposing community service but found that this would not fit in with the soldiers’ work schedule. The review judge concluded that the sentence imposed was both manifestly and shockingly lenient. She said the soldier had taken advantage of a vulnerable young girl. A substantial custodial term of imprisonment would have been appropriate with a portion of the custodial sentence suspended. The option of accused performing community service should never have entered into the mind of the magistrate for public policy reasons.

In *S* v *Nyirenda* 2003 (2) ZLR 102 (H) a 37 year old man had sexual intercourse with a 15 year old neighbour. The age difference between the two was regarded as an aggravating factor although the complainant’s closeness in age to 16 was held to be mitigatory. The sentence imposed was two years imprisonment of which 16 months was suspended on condition of good behaviour which meant that the effective sentence was a paltry 6 months’ imprisonment.

In *S* v *Mbulawa* 2006 (2) ZLR 38 (H) the accused was convicted of committing an immoral or indecent act with or upon a young person. He was aged 30 and the female complainant was aged 12.14 He had fondled her breasts, kissed her and fondled her private parts on a number of occasions over a period of a month. The court held that sexual abuse of children is viewed by the courts in a serious light and paedophilia has to be dealt with effectively. The courts have to drive home the message that such conduct will not be tolerated as it has grave consequences on the youths. Self-gratification of adults should not be at expense of debauching young persons. The accused had offended against morality by not only gratifying his own sensualities, but by also exciting, encouraging and facilitating the illicit gratification of the 12 year old complainant. The sentence should not be such that it gives the impression that the court is condoning sexual abuse of children. The accused’s moral blameworthiness was so high that an effective sentence in the region of two years was appropriate.

14 If the girl was indeed only 12 surely she was below the age of consent and the   
correct

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In *S* v *Girandi* HB-55-12 a male aged 23 had sexual intercourse with a form one girl aged 13. The accused person was sentenced to 14 months imprisonment of which 4 months was suspended on condition of not further offence committed and 10 months was further suspended on condition of performing community service. The review judge said that the sentence was disturbingly lenient and inappropriate. He said that this offence is prevalent and there was the need to send a signal to society that courts will descend heavily on child sexual abusers. The accused was an adult who was 10 years older that the girl and he had manipulated the girl to have sexual intercourse with her His moral blameworthiness was high and a non-custodial sentence was not reasonable under the circumstances. It trivialises the offence and rewards the offender. In this case sentence of not less than 2 years imprisonment should have been imposed.”

In *S v Matare* HH-410-16 a 36 year old married man had sexual intercourse with a 15 year old girl on several occasions and he was sentenced to 18 months imprisonment all of which was suspended for good behaviour and community service. The review judge concluded that the sentence was far too lenient. The accused showed no remorse but instead denied any wrongdoing and “quite incredibly” claimed that the girl had seduced him. The review judge said this and other factors should have outraged the trial court.

In *S v Banda, S v Chakamoga* HH-47-16 two accused, both of whom were over 30 years, were convicted, in unrelated trials, of having sexual relations with a young person. In both matters the girls were aged 15. They both impregnated the young girls. Fortunately, neither of the girls contracted a STI or HIV. The only difference was that one accused took the young girl for his wife. The other gave the young girl two small sums of money after he had had his way with her. In each case, the accused was sentenced to 24 months’ imprisonment, half of which was suspended. The review judge, Charewa J, said that “sentencing a man of over 30 to an effective 12 months imprisonment for having sexual intercourse with a young person of 15 can hardly be aimed at deterring other older men from preying on young and immature persons, who are swayed by the offer of $1 or $2, in these harsh economic times. The very fact that a young person ‘agrees’ to sexual intercourse with a much older man for such a paltry amount is clear evidence of her immaturity and incapacity to make an informed choice or decision. Nor can a promise to marry, or even eventual marriage of the child be mitigating.”

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At page 9 the judge pointed out:

It is up to judicial officers to show that the courts will not tolerate

predatory older men who prey on young persons by handing down   
appropriately severe sentences. The prevalence of these type   
of offences, the consequential incalculable damage they cause   
in preventing young persons from attaining their full potential,   
the damage to the social fabric, coupled with its impact on   
national development and the need to conform to international   
standards in the protection of children ought to be additional   
grounds for handing down deterrent sentences.

The judge advised that an effective sentence of not less than three years should be imposed in these cases, on an incremental basis for those accused who are twice the victims’ ages, are married with children of their own, and impregnate the girls or infect them with sexually transmitted diseases other than HIV.

All of these cases involved men who were considerably older than the girls and who were found to have exploited the young girls and who must or should have known that what they were doing was not only immoral but also unlawful.

There are thus a whole multiplicity of factors that can come into play in deciding the appropriate sentence on the specific facts of a case. These have been set out in a series of cases15 and are detailed in re *S* *v Tshuma* HB-70-13. Some of the stated mitigatory factors must be considered with caution. For example, the fact that the accused comes from a community where it is not well known that it is impermissible to have sexual relations with a girl under the age of 16 and was unaware that child marriage violates the constitutional rights of girls. In *S* v *Nyamande* HH-719-14 a 54 year old man had sexual relations with a girl aged 14 years over a period of 6 months resulting in the girl becoming pregnant. He was sentenced to a wholly suspended term of imprisonment. The accused said in mitigation that at his church they are allowed to marry as many wives as they want and he wanted the complainant to be his third wife. The court said that an effective custodial sentence was called for in this case. This was required to protect young girls from sexual abuse and to deter abusers who acted under the guise of marrying the girls when such marriages are now prohibited.

15 For instance, *S v Nare* 1983 (2) ZLR 135 (H)

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The weight to be attached to the fact that the girl is not a virgin and has had sexual relations previously also needs to be carefully considered. As is pointed out in the *Tshuma* case above the fact that the girl is sexually experienced is certainly not a defence and the offence is still committed. If a much older man sexually entices a girl of 14 to have sexual relations with him, the fact that the girl has previously had sexual relations on one occasion with her boyfriend should not detract from the seriousness of the offence.

The fact that the offender is married already should be treated as aggravating as a mature married man who seeks sexual gratification by enticing a young girl must be seen as irresponsible and he deserves to receive a severe punishment.

Sexual exploitation of girls under the age of 16 must be condemned by imposing severe sentences. Fines, wholly suspended prison sentences and community service orders are inappropriate for men who sexually prey on young girls. We also need a criminal offence to punish men who sexually groom young girls through the Internet so they can sexually exploit them or induce them to supply naked pictures of themselves. There should also be a sex offenders’ register which can be used to monitor the activities of paedophiles on their release from prison to try to prevent them from re-offending.

On the other hand, we should be careful about imposing mandatory minimum sentences for this offence because of the widely differing situations which can fall within the ambit of this offence. It would be better to compose detailed sentencing guidelines for magistrates to ensure that they impose appropriate sentences for the different types of this offence.

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ANNEXURE 1

Sample of Rape Sentences Imposed in Harare Regional Court 2016-2017 on Rapists at   
least 18 Years of Age Raping Children

NOTE

This sample reveals substantial differences in sentencing for what are apparently similar rape cases. Of course, to do a full comparison the individual facts of the case and the circumstances of the accused would have to be factored in. All these cases were listed as rape but it would need to be checked whether some of those involving children over 12 are not statutory rape cases.

Age of Age of

offender victim Actual sentence Effective sentence

35 11 30 years, 5 years c/s 25 years

27 5 12 years, 4 years c/s 8 years

19 9 18 years, 4 years c/s 14 years

30 6 8 years, 3 years c/s 5 years

20 8 8 years, 2 years c/s 6 years

24 8 18 years, 5 years c/s 13 years

30 9 20 years 2 years c/s (2 counts) 18 years

37 4 16 years 3 years c/s 13 years

22 3 12 months,6 months c/s 6 months

33 13 36 months, 12 months c/s 24 months

20 12 12 months 6 months c/s 6 months

26 14 6 years, 2 years c/s 4 years

32 13 7 months c/s 7 months wholly suspended

26 14 24 years, 4 years c/s (3 counts). 20 years

35 13 5 years, 2 years c/s 3 years

27 15 30 months, 10 months s c/s 20 months

33 15 2 and a half years, 1 year c/s 1 and a half years

28 15 24 months, 6 months c/s 18 months

18 14 24 months, 6 months c/s 18 months

20 13 24 months, 6 months c/s 18 months

24 15 4 years, 1 year c/s 3 years

50 15 30 months, 12 months c/s. 18 months

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ANNEXURE 2

Sample of Rape Cases 2016-2017 in Regional Court Bulawayo Involving Accused and   
Complainants over 18

Age of Age of Actual Effective   
Offence Offender Complainant sentence sentence

Rape 49 20 10 years,3 years c/s 7 years

Rape 45 19 7 years, 4 years c/s 3 years

Rape 35 21 12 years, 3 years c/s 9 years

Rape 29 21 5 years, 2years c/s 3 years

Rape 38 21 10 years, 3 years c/s 7 years

Rape 38 18 12 years, 4years c/s 8 years

Rape 26 18 9 years, 3years c/s 6 years

Rape 35 24 10 years, 2 years c/s 8 years

Rape 32 21 9 years, 3 years c/s 6 years

Rape 30 24 10 years, 4 years c/s 6 years

Rape 25 21 10 years, 5 years c/s 5 years

Rape 32 22 14 years, 4 years c/s 10 years

Rape 47 31 10 years, 5 years c/s 5 years

Rape 30 24 6 years, 3 years c/s 3 years

Rape 55 31 7 years, 2 years c/s 5 years

Rape 60 30 10 years, 4 years c/s 6 years

Rape 49 25 14 years, 4 years c/s 10 years

Rape 60 17 15 years 15 years

Rape 46 70 10 years, 4 years c/s 6 years

Rape 27 21 12 years, 3years c/s 9 years

Rape 23 18 7 years, 4 years c/s 3 years

Rape 32 24 12 years, 4 years c/s 8 years

Rape 32 21 15 years, 5years c/s 10 years

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ANNEXURE 2 (cont)

Sample of Rape Cases 2016-2017 in Regional Court Bulawayo Involving Accused and   
Complainants over 18

Age of Age of Actual Effective   
Offence Offender Complainant sentence sentence

Rape 50 21 13 years, 4 years c/s 9 years

Rape 44 26 6 years, 3 years c/s 3 years

Rape 45 21 10 years, 5years c/s 5 years

Rape 42 23 12 years, 2 years c/s 10 years

Rape 54 24 20 years 20 years

ANNEXURE 3

South Africa

Criminal Law Amendment   
Act 105 of 1997.   
Mandatory Minimum

Offence Penalty

Rape First offence: 10 years   
Second offence: 15 years

Third offence 20 years

Gang rape;

Where the complainant was raped more than once; Life imprisonment Complainant was under 16; (25 years)   
Complainant was physically disabled or mentally ill;

Where the accused knew that he was HIV positive at the

time of the rape.

Kenya

Offence Offence Mandatory

Sexual Offences Minimum Maximum

Act No 3 of 2001 Penalty Penalty

Rape § 3 10 years Life imprisonment

Attempted Rape § 4 5 years Life imprisonment

Acts which cause penetration or   
indecent acts committed within   
the view of a family member,

child or person with mental   
disabilities § 7 10 years

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ANNEXURE 3 (cont)

Kenya

Offence Offence Mandatory

Sexual Offences Minimum Maximum

Act No 3 of 2001 Penalty Penalty

Defilement §8 Age 0-11:   
Life

Imprisonment

Age 12-15: 20 years   
Age 16-18: 15 years

Gang Rape §10 15 years Life imprisonment

Indecent act with child or adult §11 Age 0-18:   
10 years

Maximum   
Adult: 5 years

Tanzania

Offence Penal code amended   
by Sexual Offences

Special Provisions

Act of 1998 Mandatory Minimum Penalty

Rape § 131 Against victim age 0-18:   
First offence: imprisonment

for two years and corporal   
punishment

Second offence: life   
imprisonment

Third offence and recidivism.   
Against victim age 19+: 30   
years, corporal punishment   
and fine

Gang rape § 131 Life imprisonment

Attempted rape § 132A 30 years with or without   
corporal punishment

10 years if rape attempt is   
based on false representations   
or deceit for purposes of   
obtaining consent

Defilement of wife under § 138 (1) 10 years the age of 15

Guardian Allowing defilement

of child under the age of 15

by her husband § 138 (2) 10 years

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ANNEXURE 3 (cont)

Tanzania (cont)

Offence Penal code amended   
by Sexual Offences

Special Provisions

Act of 1998 Mandatory Minimum Penalty

Sexual exploitation of children § 138B 5 years

Grave sexual abuses § 138 (1) Against victim age 0-15:   
20 years

Against victim age 15+:   
15 years

Sodomy and bestiality § 154 (1) Against victim age 0-10:   
Life imprisonment

Against victim age 10+:   
30 years

Incest by woman § 160 Against victim age 0-10   
30 years

Lesotho

Minimum Minimum   
Sexual Penalty Sexual Penalty for

Offences for first Offences second or   
Offence Act offence Act subsequent

offence

Offence of persistent sexual abuse § 32(a) 15 years 32(b) Life

of a child imprisonment

Unlawful sexual act where the § 32(a) 10 years 32(b) Life

convicted person was infected with imprisonment HIV or another life threatening

disease at the time of the offence

but did not at that time know or

have a reasonable suspicion of being

infected

Sexual offences against a child; § 32(a) 10 years 32(b) Life   
commercial Sexual exploitation of a imprisonment child; sexual offences against

disabled persons committed by a

person of age 18 or above

LABOUR RIGHTS UNDER ZIMBABWE’S NEW CONSTITUTION:   
THE RIGHT TO BE PAID A FAIR AND REASONABLE WAGE

BY MUNYARADZI GWISAI1, RODGERS MATSIKIDZE1 & CALEB MUCHECHE1

INTRODUCTION

A fundamental change introduced under s 65 (1) of the new Constitution of Zimbabwe2 is the enshrinement of the right of employees to be paid a fair and reasonable wage. It reads:

65 Labour rights

(1) Every person has the right to fair and safe labour practices

and standards and to be paid a fair and reasonable wage.

This provision marks a milestone in the labour law regime of Zimbabwe.

It brings Zimbabwean law in closer conformity with relevant regional and international instruments.

Although the philosophical basis of the Labour Act3 is pluralist, with the Act providing that its “purpose is to advance social justice and democracy in the workplace,”4 the regime covering wages has been decidedly unitarist. Hitherto neither statutes nor common law had prescribed the quantum of wages payable to employees. This, despite perhaps one of the most rallying demands of labour in the last two decades being the demand for a Poverty Datum Line-linked living wage. This is understandable, when one considers that by 2011, nearly 93 per cent of formal sector employees were earning wages less than the Total Consumption Poverty Line (TCPL), the generally accepted measurement of poverty.5 Thus, for most workers, a living wage remains a mirage. They are mired in dire and debilitating poverty.

1. Munyaradzi Gwisai lectures in Labour Law and Labour Relations, Faculty of   
Law, University of Zimbabwe, and Briggs Zano Working Peoples College. Rodgers   
Matsikidze, LLBS Hons (UZ), MPhil (UZ) is the Chairman of the Department of   
Procedural Law, UZ, and a registered legal practitioner. Caleb Mucheche, LLBS   
Hons (UZ), LLM (UNISA), LLM (UNILUS), is former Dean, Faculty of Law, ZEGU   
and a registered legal practitioner.

2. Introduced by Constitution of Zimbabwe Amendment (No. 20) Act 2013 (1/   
2013).

3. [*Chapter 28:01*].

4. Section 2A (1) of the Act.

5. ZimStat *2011 Labour Force Survey* (Zimstat, Harare, 2012) 53.

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The demand for a living wage, not surprisingly, has found echo in popular musical hits such as *Chinyemu* by Leornard Dembo and *Mugove* by Leornard Zhakata. Indeed, for a nation largely turned Christian, a demand with Biblical foundations.6

The conflicts over a living wage, became particularly intense in the post-dollarisation era after March 2009. On the one hand, labour felt it deserved a dividend for the immense sacrifices it made in the preceding period of economic collapse and hyper-inflation running into billions, which virtually wiped out wages. Employers on the other hand argue for wage restraints to ensure sustainable economic recovery. Unreasonable wage increments will kill the goose that lays the golden eggs, they argue.

This conflict spilled into the courts where differing positions emerged. One line of cases, starting from the premises of the interests of the business, took the approach that increments above the prevailing inflation rate, were grossly unreasonable and against public policy as in the *Tel-One (Pvt) Ltd v Communications & Allied Services Workers* *Union of Zimbabwe* decision.7 The other line, started off from the premises of the workers’ right to a living wage, and rejected the approach that saw such increments as unreasonable per se, as in *City* *of Harare v Harare Municipal Workers Union*.8

The new Constitution radically changed the situation by, for the first time in Zimbabwean constitutional history, explicitly providing for the right to “a fair and reasonable wage.” In this essay we dissect the implications of this new constitutional right on the law of remuneration, in the context of international human rights and labour law and contrasting philosophical and jurisprudential worldviews.

6. “Masters, give unto your servants that which is just and equal; knowing that   
you also have a Master in Heaven.” “Colossians 4 vs 1” in *Holy Bible,* King   
James version (Christian Art Publishers, 2012). Similar values are stated in   
“James 5 vs 4” in *Holy Bible* King (2012) “Behold, the hire of the labourers   
which have reaped down your fields, which is of you kept back by fraud crieth:   
and the cries of them which have reaped are entered into the ears of the Lord   
of Sabbath.”

7. 2007 (2) ZLR 262 (H); and *Chamber of Mines v Associated Mineworkers Union*   
*of Zimbabwe* LC/H/250/2012.

8. 2006 (1) ZLR 491 (H).

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THE LEGAL FRAMEWORK BEFORE ACT NO. 20 OF 2013

Prior to the new constitutional dispensation the principal methods for the determination of wages were under common law and relevant labour statutes.

Under the common law, the amount of wages to be paid is in terms of the agreement made by the parties under the contract of employment.9 What the employer pays for is the availability of the employee’s services and not the value of the product of the actual work done by the employee.10 Increments are at the discretion of the employer.11 Considerations of equity, fairness or reasonableness do not enter into the picture *per se*. Renowned author RH Christie puts it thus: 12

The starting point of the common law is that the courts will not   
interfere with a contract on the ground that it is unreasonable.   
In Burger v Central African Railways 1903 TS 571 Innes CJ said   
that:

‘Our law does not recognize the right of a court to release a contracting party from the consequences of an agreement duly entered into him merely because that agreement appears to be unreasonable.’

What is paramount is what the parties themselves see as reasonable as reflected in the terms of their contract of employment. The main responsibility of the courts is to enforce this contractual will of the parties and not seek to second-guess adult free persons.13 The emphasis is on the market as the principal and most fair manner of determining a reasonable wage. Hepple B captures it well:

The freedom of the employer and worker from the interference   
of the state in the labour market, the freedom of the contracting

9. *National* *Railways of Zimbabwe v National Railways Contributory Fund* 1985   
(1) ZLR 16 (S);*Gladstone v Thornton’s Garage 1929 TPD 116; A* Rycroft and B   
Jordaan *A Guide to South African Labour Law* 2nd ed (Juta, 1992) 67.

10. *Commercial Careers College (1980) (Pvt) Ltd v Jarvis* 1989 (1) ZLR 344; *Belmore*   
*v Minister of Finance* 1948 (2) SA 852 (SR).

11. *Chiremba* *(duly authorized Chairman of Workers Committee) and Ors v RBZ*   
2000 (2) ZLR 370 (S); *Chubb Union Zimbabwe (Pvt) Ltd v Chubb Union Workers*   
*Committee* S 01/01. Also: *Nare v National Foods Ltd* LRT/MT/38/02.

12. R H Christie *The Law of Contract in South Africa* 5th ed (LexisNexis, 2009) 14. 13. As put by *INNES* CJ in *Wells v South African Alumenite Company* 1927 AD 69 at

73: “No doubt the condition is hard and onerous; but if people sign conditions   
they must, in the absence of fraud, be held to them. Public policy so demands.

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parties and the freedom of private will to determine the content   
of the contract.14

The legal philosophy underpinning common law is clearly utilitarian and reflected in the theory of labour relations of unitarism. The individual parties, meeting in the free market, are the ones who know what is best for themselves. Allowing such individual parties maximum contractual freedom will derive not only maximum benefit for the parties but society at large.15 Unitarism is a theory that places a premium on the unity of interests and goals between labour and capital in the employment relationship, but within a framework in which capital enjoys undoubted superior status.16 Conflict is unnatural and dysfunctional.

This free market based conception underlies the decision in *Tel-One* *(Pvt) Ltd v Communications & Allied Services Workers Union of* *Zimbabwe*, *supra*. In such case, the arbitrator had awarded a 266% wage increment across the board. The employer made an application to the High Court to set aside the award on the ground that it was in violation of Zimbabwe’s public policy.17 It argued that it was grossly unreasonable as it would result in over 130% of its overall income going to wages. In setting aside the award, *HUNGWE* J, at 266A-C, ruled:

There is no doubt in my mind that the spirit of collective   
bargaining between employer and employee is to arrive by   
consensus or, if that fails, by arbitration, at what a fair wage is.   
The idea is to preserve the employer-employee relationship.   
The employee makes his labour available for a fair fee. The

‘If there is one thing which more than another public policy requires, it is that   
men of full age and competent understanding shall have the utmost liberty of   
contracting, and that their contracts when entered into freely and voluntarily   
shall be held scared and shall be enforced by courts of justice. Therefore, you   
have this paramount public policy to consider – that you are not lightly to   
interfere with this freedom of contract.’ (per *JESSEL M.R*. in *Printing and*   
*Numerical Registering Co. v Sampson* [1875]LR 19 Eq. 462 at 465).” See also: R   
Epstein, “In defence of the contract at will” 51 *Chi. L. Rev*. (1984) 947; A   
Rycroft and B Jordaan *op cite* 10 – 17.

14. B Hepple (ed) *The making of labour law in Europe* (Mansell, 1986).

15. J S Mill, “On Liberty”in *John Stuart Mill: A Selection of His Works* J M Robson

(ed) (Macmillan, 1966) 13 – 19.

16. M Finnemore *Introduction to Labour Relations in South Africa* 10th (ed)

(LexisNexis) 2009) 6.

17. Under art 34 (2) (b) (ii) of the Arbitration Act [*Chapter 7:15].*

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employer engages the employee on acceptable terms and   
conditions. The employer employs his resources to ensure that   
the goose that lays the eggs for their mutual benefit continues   
to do so. Society expects these mutually beneficial outcomes.   
The economy thrives and so does the community generally and   
its members in particular. An award that plunges the apple-cart   
over the cliff in my view could not be said to be in the best   
interest of the general good of Zimbabwe...

The court proceeded to place at the pinnacle of considerations to be made when determining whether a wage increment was reasonable, the ability of the employer to pay:

In all work situations salaries and wages are limited by an employer’s ability to pay. The courts and indeed all tribunals delegated with decisions of a financial nature would be failing in their duty if they were to will-nilly give awards whose effect would be to drive corporations into insolvency thereby destroying the economic fabric of the nation. Such awards would defeat the very purpose they are meant to serve. As such they are liable to be set aside as being in conflict with the public policy of Zimbabwe...

The Labour Court went further in *Chamber of Mines v Associated* *Mineworkers Union of Zimbabwe*.18 In that case the trade union had made a demand of 55% wages increment whilst the employer offered 5%, roughly the prevailing inflation rate. The Labour Court set aside the 20% increment by the arbitrator, as being outrageous. The court observed:

Thus it is high time the labour advocacy institutions migrate   
from the hang-over of the hyper-inflationary environment to   
the current multi-currency stable environment. This will ensure   
sustainability of the workers’ welfare and also ensure economic   
development… The inflation level obtaining in the country is at   
about 5% which should provide an essential guide for salary   
negotiations…

Whilst workers should be remunerated fairly, l do not believe it   
is reasonable to do so at the expense of the sustainability of the   
companies which pay them… I am satisfied that the Chamber   
has justified the setting aside of the arbitral award. Whilst it is   
necessary to raise the workers’ salaries, the raise should be in   
tandem with the inflationary levels, production levels, and other

18. LC/H/ 250/2012.

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costs. I am satisfied that a blanket raise by 20% is outrageous. A   
5 % raise meets the justice of the case*.*

In neither of the above cases did the court seek to balance or place in context the economic factor of the employer’s business interest with the other factors that are accepted under appropriate international labour standards.19 These factors include economic – social factors such as productivity, standards of living in the country and the average wages in the country as well as the needs of the worker and their family and the specified purposes of the Labour Act.

Given that Zimbabwe has ratified some of the important ILO instruments on wage-fixing, these should have been of high persuasive authority to the courts in determining what a grossly unreasonable wage increment was.20 It would have required a contextual and balanced approach, weighing the factors based on the interests of the business such as ability to pay and profitability and those in favour of the needs of the worker and their family such as the bread basket and PDL. In doing so the courts would have been guided by the fact that the specified objective of the Labour Act is to advance social justice in the workplace and that Zimbabwe has ratified regional and international instruments that provide for the employee’s right to

19. Zimbabwe has ratified important ILO conventions dealing with wages including:   
ILO 026 Convention: Minimum Wage Fixing Machinery (Manufacturing,   
Commerce, Domestic Sectors) (1928); ILO 099 Convention: Minimum Wage Fixing   
Machinery (Agriculture) (1951). There are also other relevant ILO instruments,   
which Zimbabwe has not ratified such as: ILO 131 Convention: Minimum Wage-   
Fixing (1970); ILO 135 Recommendation: Minimum Wage Fixing Recommendation   
(1970).

20. The Long Title of the Labour Act stipulates that one of the objectives of the   
Act is “*to give effect to the international obligations of the Republic of*   
*Zimbabwe as a member state of the international Labour OrganisationÉ*” The   
Labour Court has in other instances, correctly in our view, used relevant ILO   
conventions to help interpret provisions of the Labour Act as was done in:   
*Mavisa v Clan Transport* LC/H/199/2009 applying ILO 135 Convention: Workers   
Representatives Convention (1971); ILO 087 Convention: Freedom of Association   
and Protection of the Right to Organise (1948) to help interpret the provisions   
of s 14B( C ) and s 29 (4a) of the Act; and *Chamwaita v Charhons (Pvt) Ltd* LC/   
H/215/2009 applying provisions of the Termination of Employment Convention,   
1982 (C 158). Generally on the appropriateness of using principles under relevant   
international treaties – see section 15B of the Interpretation Act [*Chapter 1:01*]   
and *Kachingwe, Chibebe and ZLHR v Minister of Home Affairs and Commissioner*   
*of Police* 2005 (2) ZLR 12 (S) and *S v Moyo & Ors* 2008 (2) ZLR 338 (H) at 341E-

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“just and favourable remuneration.”21 In any case the courts should have been bound by the principle that the grounds on which an arbitral award can be set aside for contravention of public policy in particular unreasonableness, are of a very limited nature.22 The courts were clearly guided by a unitarist approach to labour relations yet one which is inconsistent with the specified objectives of the Act. This was obviously in tandem with the dominant ideological thrust during the Government of National Unity, which tended to emphasize free- market values. This was aptly captured in the 2010 Budget Statement of the then Minister of Finance, *T Biti*, wherein he stated:23

The review of the role of arbitrators in awarding wage   
adjustments that bear no relationship to the competitiveness   
of most industries and indeed the entire economy, is unavoidable.   
Failure to nip in the bud unsustainable wage awards will be   
swiftly punished in the global village as our products price   
themselves out of the market, both locally and in the export   
markets.

REGULATION OF WAGES UNDER THE LABOUR ACT AND PUBLIC SERVICE ACT

The regulation of wages under statutes had not gone too far beyond the common law. In the public sector wages and related benefits were set by the Public Service Commission with the concurrence of the minister responsible for finance.24 The Commission was required to consult the recognized public sector associations and organizations before setting the terms and conditions including remuneration, but failure to consult or to reach agreement with the associations did not invalidate any wage regulations so made.25 The Public Service Act does not provide for the right of employees to “a fair and reasonable wage” but only provides public sector employees to an enforceable

21. Article 23 (3) Universal Declaration of Rights; art. 14 (b) Charter of Fundamental   
Social Rights in SADC.

22. Discussed in detail, *infra* 7.

23. Cited in: 25 *Labour Relations Information Service* 3 (June – August 2012) 2.

The Finance Minister repeated the same sentiments in the November 2011   
Budget Statement stating: “Stakeholder submissions by industry as well as the   
labour movement acknowledge rising incidences of wage demands divorced   
from productivity by workers unions and arbitration awards that fail to take   
into account affordability at company levels.”

24. Section 19 (1) as read with s 8 (1) of the Public Service Act [*Chapter 16:01*]. 25. See section 20 (1) and (2) of the Public Service Act as read with s 73 (2)

Constitution of Zimbabwe 1979 (SI 1979/1600 of the United Kingdom).

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right to remuneration.26 The only major modification to common law is the requirement that salaries be fixed to by reference to, “academic, professional or technical qualifications or the attributes necessary for the efficient and effective execution of the tasks attached to the post.”27

The above provision is important in so far as it limits the arbitrary discretion of the employer to differentiate between wages of employees in different grades as would otherwise be allowed under the common law. Nonetheless, it does not advance the employee’s cause for a fair and reasonable wage.

The employment relationship in the private sector is generally covered by the provisions of the Labour Act [*Chapter 28:01*]. The situation was only marginally different from that under common law. The Act does not specifically provide for a right to “a fair and reasonable wage,” whether as a fundamental right, a specified fair labour practice or under its mandatory minimum wages regime.

Under Part 2, the Act provides for various fundamental rights of employees, including the right to fair labour standards. Section 6 (1) creates a fundamental duty of the employer to pay the prescribed remuneration, but the section does not expressly provide for a fair labour standard of fair and reasonable wages. It merely compels the employer not to pay a wage which is lower than that specified by law or agreement:

No employer shall pay any employee a wage which is lower than   
that to (sic) fair labour standard specified for such employee by   
law or by agreement.

Mandatory minimum wages may be set in terms of sections 17and 20 of the Act. Under section 17 (3) as read with section 17 (1)the Minister of Labour may, after consultation with the Wages Advisory Council, make regulations providing for, inter alia:

17 (3) (a) the rights of employees, including minimum wages,   
benefits, social security, retirement, and superannuation benefits   
and other benefits of employment;

26. Section 22, Public Service Act.

27. Section 20 (2) Public Service Regulation 2000 (SI 1/2000).

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Section 20 further provides*, inter alia*, that:   
20(1)The Minister may, by statutory instrument –

(a) In respect of any class of employees in any   
undertaking or industry –

(i) specify the minimum wage and benefits in   
respect of such grade of employees;

(ii) require employers to grant or negotiate   
increments on annual income of such minimum   
amount or percentage as he may specify;

and prohibit the payment of less than such specified   
minimum wage and benefits or increments to such   
class of employees;

(b) …   
(c) …   
(d) give such other directions or make such other

provision as he may deem necessary or desirable to   
ensure the payment of a minimum wage or benefits   
to any class of employees;

(e) provide for exemptions from paragraphs (a), (b), (c)   
and (d).

Where a minimum wage notice is issued in terms of these provisions every contract of employment or collective bargaining agreement has to be modified or adapted to the extent necessary to bring it into conformity with the minimum wages regulations.28 However, it is again noted that there are no specific minimum standards by which the Minister sets the minimum wages, including that the minimum wages be “fair and reasonable wage” or guarantee the employees “a decent standard of living.”

Another platform for regulation of wages under the Labour Act relates to statutory collective bargaining agreements made in terms of Part VIII and Part V of the Act. These may be industry-wide agreements made under a National Employment Council or a workplace agreement made under a Works Council. However, as with the ministerial wage regulations, there are also no prescribed minimum standards by which the agreements must adhere.29 Thus the parties are free to negotiate

28. Section 17 (3) of the Act.

29. See the bargaining agenda set in s 74 (3) of the Act which includes: “É*rates of*

*remuneration and minimum wages for different grades and types of*   
*occupation...”*

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what they deem fit as a fair or reasonable wage. The parties though, do not have absolute freedom. Firstly, reflecting the state corporatist origins of the Act, the Minister of Labour has residual power to direct the renegotiation of an agreement which the Minister feels has become:

(a) inconsistent with this Act or any other enactment or –   
(b) ….

(c) unreasonable or unfair, having regard to the respective

rights of the parties.30

The Act does not define the phrase “unreasonable or unfair.” The

discretion is left with the Minister. It may be argued though that the Minister may generally be guided by the objects of the Act specified in section 2A (1). The later though, can only take the argument so far, because neither s 2A (1) nor the Act in general provides for an explicit fair labour standard of a right to a fair and reasonable wage.

Secondly, a party aggrieved by an award made under compulsory arbitration can appeal to the Labour Court on a question of law,31 or if made through voluntary arbitration, make an application to the High Court to set it aside as being, *inter alia*, in contravention of the public policy of Zimbabwe.32 It has been held that an appropriate ground on which an award may be held to be in contravention of the public policy of Zimbabwe, is where the award is deemed grossly unreasonable.33 But the courts have generally held that the ground of “unreasonableness” is of very limited use in such applications or appeals and the party who seeks to establish this bears “a formidable onus”34 to show that the award made is “so outrageous in defiance of common sense and logic.”35 This is why the bar set in *Chamber of* *Mines v Associated Mineworkers Union of Zimbabwe*, *supra*, of using the inflation rate as the essential basis of judging reasonability or

30. Section 81 (1).

31. Section 98 (10). See *Chamber of Mines v Associated Mineworkers Union of*

*Zimbabwe*, *supra n. 7.*

32. Article 34 (2) (b) (ii), Arbitration Act [*Chapter 7:15*]. *Tel-One (Pvt) Ltd v*

*Communications & Allied Services Workers Union of Zimbabwe* 2007 (2) ZLR   
262 (H).

33. *Tel-One (Pvt) Ltd v Communications & Allied Services Workers Union of*   
*Zimbabwe* *ibid*; and *Chamber of Mines v Associated Mineworkers Union of*   
*Zimbabwe*, *op cite* n 7.

34. *Cargo Carriers (Pvt) Ltd v Zambezi & Ors* 1996 (1) ZLR 613 (S).

35. *Chinyange v Jaggers Wholesalers* SC 24/03; *Beazley NO v Kabel & Anor* SC/22/

03; *ZESA v Maposa* 1999 (2) ZLR 452 (S).

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otherwise of an award without regard to the specified objectives of the Labour Act and considering all other relevant factors such as the needs of the worker, was too low and inconsistent with case authority.

From the above it becomes clear that the Labour Act does not compel the employer to pay “a fair and reasonable wage,” let alone a living wage. At most s 2A(1), may be used as an interpretation tool to determine what is a fair and reasonable wage in relation to minimum wages notices decreed by the Minister, or directions by the Minister for renegotiations of collective bargaining agreements or in relation to wage awards made by arbitrators.36 However, the absence of an explicit inclusion in the Act of the employees’ right to a fair and reasonable wage whether as a fundamental right of employees or as a fair labour standard, makes the potential use of s 2A (1) as a basis for such right tenuous and unlikely. This is moreso in view of the already declared skepticism of the Supreme Court on the generalized use of this section.37

RIGHT TO FAIR AND REASONABLE WAGE AND APPROPRIATE INTERPRETATION MODEL   
The preceding survey of the legal framework prevailing prior to Act No. 20/2013 shows that Zimbabwean law did not provide for a fair and reasonable wage or a living wage. Not surprisingly the demand for the right to a fair and reasonable wage or a living wage was one of the primary demands of workers and trade unions in relation not only to labour law reform but constitutional reform as well.

This was aptly captured in the National Constitution Assembly Draft Constitution.38

This demand is manifest in s 65 (1) of the new Constitution. Although this section is clearly inspired by s 28 (1) of the NCA Draft Constitution

36. By reliance on s 2A (2) of the Act providing that the Act “ .*.. shall be construed*   
*in such manner as best ensures the attainment of its purpose referred to in*   
*subsection (1).”*

37. In *United Bottlers v Kaduya* 2006 (2) ZLR 150 (S) at 155B-C, *CHIDYAUSIKU CJ*   
observed in relation to s 2A says*“The section is not a wholesale amendment of*   
*the common law. The common law can only be ousted by an explicit provision*   
*of the Labour Act.”*

38. Section 28 (1), NCA Draft Constitution (2001), s 28 (1) providing: “Every worker   
has the right to fair and safe labour practices and standards and to be paid at   
least a living wage consistent with the poverty datum line.”See generally, M   
Gwisai *The Zimbabwe COPAC Draft Constitution and what it means for Working*   
*People and Democracy* (ZLC, 2012) 54.

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but not going as far as the later in providing for a living wage consistent with the poverty datum line, the enshrinement of the right to a fair and reasonable is still of profound significance. It has provided what has so far been the critical missing link in the legal framework, and which allowed the common law and unitarist based approach to reign with impunity.

For the first time in Zimbabwean labour history, statute law now provides for the regulation of wages based on normative values of fairness and reasonableness, something which is alien to common law and was omitted in the statutory framework. This is even done at the highest possible level, namely as an enshrined fundamental right under the Declaration of Rights. What had been missing as a directly specified fair labour standard in the purposes of the Labour Act under s 2A (1) is now provided for, but now as a constitutional right.

THE TEST FOR “A FAIR AND REASONABLE WAGE” UNDER INTERNATIONAL LAW   
Although the Constitution does not directly define the phrase “a fair and reasonable wage,” it provides clear guidelines to be used in interpreting the phrase. In the first instance in interpreting the Declaration of Rights, one is required to give full effect to rights provided in the Constitution and to promote the values that underlie a democratic society based on inter alia justice and human dignity.39 This is strengthened by s 46 (2) of the Constitution which requires that when any court or tribunal is interpreting an enactment and when developing the common law, it must promote and be guided by the spirit and objectives of the Declaration of Rights.40

Critically further, the courts and tribunals are required to “take into account international law and all treaties and conventions to which Zimbabwe is a party.”41 Of particular further importance are the provisions of s 327 (6) of the Constitution. This provides:

When interpreting legislation, every court and tribunal must   
adopt any reasonable interpretation that is consistent with any   
international convention, treaty or agreement which is binding   
on Zimbabwe, in preference to an alternative interpretation   
inconsistent with that convention, treaty or agreement.

39. Section 46 (1) (a) (b) of the Constitution.

40. Which is also reinforced in s 176 of the Constitution. 41. Section 46 (1) ( c ) of the Constitution.

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The phrase *“a fair and reasonable wage”* is in fact derived from international law instruments, most of which Zimbabwe has ratified. These must provide guidance on how it is interpreted by virtue of s 46 and s 327 (6) of the Constitution.

Firstly art. 14 (b) of the Charter of Fundamental Social Rights in SADC 2003, provides:

(b) Workers are (to be) provided with fair opportunities to   
receive wages, which provide for a decent standard of   
living; … (emphasis added).

Zimbabwe is also party to the Universal Declaration of Human Rights 1948, whose art.23 (3) provides:

Everyone who works has the right to just and favourable   
remuneration ensuring for himself and herself existence worthy   
of human dignity…

Zimbabwe has also ratified the International Covenant of Economic, Social and Cultural Rights 1966 whose article 11 (1) provides:

Everyone has a right to a standard of living adequate for the   
health and well-being of himself or herself and his or her family   
including food, clothing, housing, medical care and necessary   
social services…

The International Labour Organisation has several instruments dealing with minimum-wage fixing.42 Perhaps the most relevant are ILO 131 Convention: Minimum Wage-Fixing (1970) and ILO 135 Recommendation: Minimum Wage-Fixing (1970). In terms of article 1 of ILO R135, one of the key factors to be considered in wage fixing is the need to “… *to overcome poverty and to ensure the satisfaction of* *the needs of all workers and their families…”*

In terms of the specific elements to be considered when determining an appropriate minimum wage that realizes the above purposes, article 3 of ILO C131 states these as, subject to national practice and conditions:...43

42. See for instance: ILO 026 Convention: Minimum Wage-Fixing Machinery; ILO   
030 Recommendation: Minimum Wage – Fixing Machinery; ILO 099 Convention:   
Minimum Wage-Fixing Machinery (Agriculture) (1951).

43. ZimStat, “Appendix: Summary of International Labour Organisation (ILO) position   
on Poverty Datum Line in relation to wages and salaries” (ZimStat, 2013).

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(a) The needs of workers and their families, taking into account   
the general level of wages in the country, the cost of living,   
social security benefits, and the relative living standards   
of other social groups;

(b) Economic factors, including the requirements of economic   
development, levels of productivity and the desirability   
of attaining and maintaining a high level of employment.

Therefore under ILO instruments the decided bias in the fixing of minimum wages is the “human factor”, that is the needs of the worker and their family to live a poverty-free life but this done within prevailing “national practice and conditions” including economic and social considerations.

The influence on the above ILO conventions is a pluralist conception, at the centre of which is poverty reduction and collective bargaining as key factors. The instruments provide for two broad considerations to be made, encompassing both worker friendly and employer friendly factors, but with the specified fundamental purpose being poverty reduction and ensuring the satisfaction of the needs of the worker and their family. This frame-work allows flexibility in the determination of what is fair and reasonable wage, taking into account the concrete realities in each given country, with effective collective bargaining providing the yard-stick of what is appropriate national practice. The underlying theoretical basis is pluralism, especially the adversarial version. This has been defined as a theory of labour relations in which employers accept the inevitability and need for collective regulation of the employment relationship, in particular through collective bargaining.44

Following on the above international instruments, the concept of a just or fair remuneration has had major influence in recent constitutional reform on the continent and globally including, Kenya,45 Malawi46 and Mozambique.47 Perhaps the fullest expression is to be found in article 91 of the Constitution of Venezuela, which provides:

44. M Finnemore *op cite* 144-145.

45. The Constitution of Kenya, 2010 provides in s 41 (2) (a): *“(1) Every person has*

*the right to fair labour practices. (2) Every worker has the right – (a) to fair*   
*remunerationÉ..”*

46. See s 31 (1), Constitution of Malawi, providing: *“31 (1) Every person shall have*   
*the right to fair and safe labour practices and to fair remuneration.”*

47. Article 89 (1) of the Constitution of Mozambique provides: “*Labour shall be*   
*protected and dignified ... the State shall promote the just distribution of*   
*the proceeds of labour*.”

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Every worker has the right to a salary sufficient to enable him   
or her to live with dignity and cover basic material, social and   
intellectual needs for himself or herself and his or her family.   
The payment for equal salary for equal work is guaranteed, and   
the share of the profits of a business enterprise to which workers   
are entitled shall be determined… The State guarantees workers   
in both the public and private sector a vital minimum salary   
which shall be adjusted each year, taking as one of the references   
the cost of a basic market.

The Australian case of *Ex Parte H.V. McKay* 1907 provides perhaps the most elaborate statement of the test for a “fair and reasonable wage.” In that case the court had to determine what was meant by the phrase “fair and reasonable wages” in an enactment which provided duty exemption for Australian manufacturers paying such wages. The court held:

The provision for fair and reasonable remuneration is obviously   
designed for the benefit of the employees in the industry; and   
it must be meant to secure to them something which they cannot   
get by the ordinary system of individual bargaining with   
employers. The standard of ‘fair and reasonable’ must,   
therefore, be something else; and l cannot think of any other   
standard appropriate than the normal needs of the average   
employee, regarded as a human being living in a civilized   
community…

The court went on to state that whilst there is need to balance the different factors, the “first and dominant factor” in ascertaining a “fair and reasonable” wage for an unskilled employee are the “normal needs of the average employee, regarded as a human being living in a civilized community.” And that a wage cannot be regarded as fair and reasonable, “ *if it does not carry a wage sufficient to insure the* *workman food, shelter, clothing, frugal comfort, provision for evil* *days, etc as well as reward for the special skill of an artisan if he is* *one*.”

The Court stated that the standard is an objective one, which is not dependant on the profitability of the business, but rather the needs of the employee:

… the remuneration of the employee is not made to depend on   
the profits of the employer. If the profits are nil, the fair and   
reasonable remuneration must be paid; and if the profits are   
100 per cent, it must be paid. There is far more ground for the

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view that, under this section, the fair and reasonable   
remuneration has to be paid before profits are ascertained –   
that it stands on the same level as the cost of the raw material   
of the manufacture.

The same conclusion was reached in the American case of Morehead v New York ex rel. Tipaldo.48 Dealing with a similar provision the Industrial Court of Kenya held that:49

The terms fair and reasonable are to be interpreted in the   
context of the standards at a particular work place, the national   
labour standards and with due regard to international labour   
standards.

The concept of “a fair and reasonable wage” therefore encapsulates the concept of the bread-basket or a living wage that ensures a dignified or decent standard of living, as the starting and primary point. The most scientific method of measuring standards of living is the Poverty Datum Line (PDL). The PDL is a general measurement of standards of living and poverty. It represents “the cost of a given standard of living that must be attained if a person is deemed not to be poor.”50

To measure standards of living, two measures are generally used, namely the Food Poverty Line (FPL) and the Total Consumption Poverty Line (TCPL). The FPL “represents the minimum consumption expenditure necessary to ensure that each individual can, (if all expenditures were devoted to food), consume a minimum food basket representing 2 100 kilo calories.” An individual whose total consumption expenditure does not exceed the food poverty line is deemed to be very poor.

On the other hand the TCPL is derived “by computing the non-food consumption expenditure of poor households whose consumption expenditure is just equal to the FPL. This amount is added to the FPL.”51 An individual whose total consumption expenditure does not exceed the total consumption poverty line is deemed to be poor.

Therefore the human factor, in particular the need to prevent poverty is the key determinant of a ‘fair and reasonable wage.” This generally

48. 298 US. 587 (1936).

49. *VMK v CUEA* [2013] KLR in interpreting s 41 (2) (a), Constitution of Kenya,

2010, which provides: *“Every worker has the right – (a) to fair remuneration”* 50. ZimStat (2012) 53.

51. *ibid*.

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would be PDL-Linked. This is the ‘first and dominant factor.” Employers who seek to pay less than this wage, therefore have the onus to establish compelling reasons why this should be so, by for instance reference to the other factors such as economic and financial. But the burden is onerous and heavy because of the primacy of the human factor. Where incapacity is raised, there must be full financial disclosure by the employer. In Ex Parte H.V. McKay, *supra,* it was held that there is no general obligation on an employer to give full financial disclosure on its finances, but only if the employer is paying a fair and reasonable wage, otherwise it would have such duty.

The above conception of a “fair wage” is also aptly captured in the Marxist theory of labour relations as expressed by F. Engels. According to him a fair wage is one consistent with what he terms the Law of Wages, namely:52

Now what does political economy call a fair day’s wages and a   
fair day’s work? Simply the rate of wages and the length and   
intensity of a day’s work which are determined by competition   
of employer and employed in the open market. And what are   
they, when thus determined? …. A fair day’s wages, under normal   
conditions, is the sum required to procure to the labourer the   
means of existence necessary, according to the standard of life   
in his station and country, to keep himself in working order and   
to propagate his race. The actual rate of wages, with the   
fluctuations of trade, may be sometimes below this rate; but,   
under fair conditions that rate ought to be the average of all   
oscillations.

IMPLICATIONS OF INTERNATIONAL LAW ON ZIMBABWEAN LAW

The thrust of the above on the position in Zimbabwean law is profound. By virtue of sections 46 and 327 (6) of the Constitution, the phrase “fair and reasonable wage” in s 65 (1) must therefore be interpreted consistent with the above international law instruments which Zimbabwe has ratified and which give primacy to the human factor. In other words, by enshrinement of the right to a fair and reasonable wage in the Declaration of Rights there is a nod towards minimum wages being at least those that provide adequate food, clothing, shelter, healthcare, education of children, frugal comfort and social security taking into account the general standard of living and cost of living in the country by reference to the PDL.

52. F Engels, “A Fair Day’s Wages for a Fair Day’s Work,” *The Labour Standard* 7   
May 1881 in *Inqaba ya Basebenzi* 2 (Aug-Oct 1983) 7.

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The above means the approach followed in the *Chamber of Mines* case, *supra*, is decidedly no longer good or binding authority under the new constitutional dispensation. Such decision, which was based on the sole consideration of the inflation rate and interests of the business, cannot clearly stand in view of s 65 (1) of the new Constitution. In terms of the later, considerations of fairness require balancing both the business factors and the human factor but with first priority being given to the human factor.

ONUS AND EVIDENTIARY BURDEN

The above interpretation means that s 65 (1) of the Constitution has now set a general standard of remuneration by which all employees should be paid, but like all general rules, excerptions are applicable in appropriate circumstances. The onus though, lying on the party seeking to resile from the general rule to show compelling reasons why it should not.

This means in effect that the Constitution shifts the onus to the party who says it cannot comply with such standard to provide adequate reasons why it cannot. This means that where an employer seeks to pay less than a PDL-linked wage, the employer has the onus to prove compelling reasons why this should be so. If the employer pleads financial incapacity to pay fair wages, then it follows that the onus shifts to the employer to establish this and generally the burden is high because this is a justiciable right provided in the Declaration of Rights.

The employer has a duty of full disclosure. This may pertain to areas such as the overall pay-roll, in particular the distribution of salaries between the highest paid categories and the lowest paid ones, as was held required in the case of *City of Harare v Harare Municipal Workers* *Union*.53 Additional details of this duty are provided in Sections 75 and 76 of the Labour Act. Section 75 establishes a duty to negotiate in good faith whereby all parties to the negotiation of a collective bargaining agreement are required to disclose “all information relevant to the negotiation including information contained in records, papers, books and other documents.” Section 76 establishes a duty of full financial disclosure where financial incapacity is alleged. It reads:

(1) When any party to the negotiation of a collective bargaining   
agreement alleges financial incapacity as a ground for his

53. 2006 (1) ZLR 491 (H).

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inability to agree to any terms or conditions, or to any   
alteration of any terms or conditions thereof, it shall be   
the duty of such party to make full disclosure of his   
financial position, duly supported by all relevant   
accounting papers and documents to the other party.

In terms of the above, especially where there are allegations of astronomical salaries and benefits being paid to top management, the employers would have a duty to disclose details such as housing allowances; education allowances for managers’ dependants; vehicle and fuel benefits; club subscriptions and so forth. Similarly is the duty to disclose details of capital investment plans in the last few years and projections in the near future, details of the profits or otherwise made by the company; the dividend attributed to the owners or share-holders and so forth. This duty of full financial disclosure is already widely practiced in industry in relation to applications for exemptions, including with appropriate measures to protect confidentiality.

Alternatively or additionally, the employer may need to provide mitigatory measures, such as an increment for a shorter duration; subsequent cost of living adjustments; special bonuses on increased production or employee share ownership or profit-sharing schemes.

Failure to fulfill the above, means the employer would have failed to discharge the onus on it, and therefore must pay the PDL-linked living wage as was done in *City of Harare v Harare Municipal Workers Union*, *supra*, where *CHITAKUNYE J* upheld an award of 120% by an arbitrator and held:

The arbitrator carefully considered the interests of both parties   
as portrayed by the parties before him. The applicant’s argument   
of inability to pay was well considered… The substantive effect   
of the award was simply to awaken the applicant to the realities   
of today’s economy…Applicant argued that respondents should   
not concern themselves with what is being awarded to other   
employees or officers of the applicant. But surely, the   
respondents are entitled to point out that those categories of   
employees or officials are getting astronomical salaries which   
may in fact be eating more into the applicant’s revenue than   
the paltry salaries and allowances the lowly paid workers are   
getting. The applicant appeared not to be comfortable to deal   
with this and appeared content to brush it aside. But surely if   
you have an entity that pays astronomical salaries to its top   
heavy management and officers but that same entity is reluctant

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to pay its lowly paid workers a living wage, can such an entity sincerely cry bankruptcy if ordered to pay its lowly graded workers a meaningful salary? There was simply nothing to fault the arbitrator in arriving at the decision he gave on what was placed before him. At 494D-F

CONCRETE IMPLICATIONS ON CURRENT REVIEW OF WAGES

At this stage in Zimbabwe’s history it cannot be sufficient to only consider the inflation rate, when the prevailing minimum wages are still less than half of the PDL and in fact where only 6 percent of paid employees in 2011 were receiving an income above the TCPL as shown in Table 1.54

Table 1: Percent Paid Employees Aged 15 Years and Above Paid Cash Only or Both in Cash and in Kind by Type of Employment and Cash Received in the Month Preceding

the Survey, 2011 LFCLS55

Cash Received Informal Employment Formal Employment Total   
Male Female Total Male Female Total Male Female Total

US$100 and below 46.3 64.0 52.5 4.9 6.3 5.3 27.7 41.5 32.2

$101-$200 31.9 20.1 27.8 25.2 19.7 23.6 28.9 19.9 26.0

$201-$300 14.5 10.5 13.1 43.6 50.1 45.5 27.6 25.9 27.1

$301-$400 2.9 2.7 2.8 11.6 7.9 10.5 6.8 4.7 6.1

$401-$500 1.6 0.8 1.3 5.0 4.1 4.8 3.1 2.1 2.8

$501-$1000 1.5 1.0 1.3 5.6 8.9 6.6 3.3 4.1 3.6

$1001-$3000 0.7 0.5 0.6 2.8 2.3 2.6 1.6 1.2 1.5

$3001 and above 0.3 0.2 0.2 0.9 0.2 0.7 0.5 0.2 0.4

Not Stated 0.4 0.2 0.3 0.4 0.6 0.4 0.4 0.3 0.4

Total Percent 100 100 100 100 100 100 100 100 100

Total Number 712 815 538 611 100 100 100 1251 426

Nor can arguments of wage restraints hold water when employers

54. The estimated TCPL for May 2011 was US$497.84 for a family of five. ZimStat   
(2012) 53.

55. Zimstat (2012) 123.

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and senior management are paying themselves astronomical salaries way disproportionate to the starvation wages the lowest employees are receiving as was recognized in the *City of Harare* case. This was also dramatically revealed in the “Salarygate Scandal” showing the astronomical salaries being earned by top executives in state owned or state supported companies and local authorities, with the Premier Service Medical Society (PSMAS) taking top prize.56 Further details are provided in Tables 1, 2 and 3.

Table 2: Sector Comparison of Total Monthly Cash by IPC Level57

Quasi-   
IPC Manufac- Hospita- Govern- Tele-

Level turing Banking Insurance lity ment Mining coms

1 $10 842 $6 653 $9 185 $11 800 $8 436 $18 523 $10 586

2 $7 028 $4 772 $6 606 $4 916 $4 916 $12 867 $6 826

3 $3 073 $2 667 $2 969 $3 771 $3 451 $4 840 $4 919

4 $2 479 $1 331 $3 214 $2 924 $3 005 $3 633 $4 508

5 $2 008 $1 707 $2 161 $1 546 $2 322 $3 705 $2 893

6 $1 356 $2 062 $1 990 $1 196 $2 237 $2 259 $3 709

7 $1 483 $1 612 $1 063 $730 $1 319 $1 839 $2 334

8 $856 $849 $791 $573 $1 363 $1 234 $1 830

Table 2:(cont)

56. For instance at Premier Service Medical Aid Society (PSMAS), in 2012 of the   
total wage bill of US$33 413 373 – 00, almost half was paid to the top 14   
managers compared to over 700 other employees. Of these the Chief Executive   
Officer, Mr C Dube, earned a basic monthly salary of $230 000 – 00, (rising to   
$530 000-00 with allowances), followed by the Group Finance Manager at   
$200 000 – 00 a month and the Group Operations Executive at $122 000 – 00, a   
month. See P Chipunza “PSMAS shock salary schedule” *The Herald* 23 January   
2014 p 1. Other top earners were the 19 top executives of the City of Harare   
who “earned” a total of $500 000 every month, led by the Town Clerk, Dr T   
Mahachi at $37 642 – 00 a month followed by directors at $36 999 – 00 a month.   
See I Ruwende “19 City Council executives gobble US$500 000 every month”   
*The Herald* 28 January 2014. On the other hand the CEO of ZBC Holdings was   
reported to earn $40 000-00 a month and the General Manager of NSSSA was at   
$20 886.78 a month. “How they spend mega salaries” *The Herald* 5 April 2014.

57. Industrial Psychology Consultants (Pvt) Ltd (2011).

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Quasi-   
IPC Manufac- Hospita- Govern- Tele-

Level turing Banking Insurance lity ment Mining coms

9 $738 $555 $588 $312 $594 $927 $1 575

10 $757 $652 $616 $356 $837 $717 $1 129

11 $668 $644 - $724 $765 $425 $874

12 $539 $413 $364 $434 $1 060 $484 $1 458

13 - $725 $357 - $676 $516 -

14 $526 $500 $417 $253 $634 $567 $774

15-16 $318 $496 $451 $191 $455 $279 $636

The above figures have in fact recently been revealed to be an understatement by the Salary-Gate Scandal.

Table 3a: Salaries and Benefits of Executives in Parastatals and Local authorities

Benefits Comments

Fuel 250 litres to 350 litres per month for the CEO; 150 litres to 300   
litres per month for Executives below the CEO

Cell phone allowance $250 to $935 per month for the MD, $100 to $250 per month for   
the Executives below the MD

Medical Aid 100 per cent for all Executives ($450)

Pension 100 per cent for all Executives ($2 379)

Vehicle The type of cars include Mercedes Benz, Jeep for the MD. For   
the positions below MD the following cars apply, Isuzu KB, Mazda

BT50

School fees per term For the CEO, some companies pay between $1 500 and $2 500   
per child per term for two or three children. Some companies   
pay 100 per cent fees for Executives including University fees   
both locally and abroad. For line managers, some companies pay

a certain percentage of total fees incurred. This percentage   
ranges between 50 per cent and 90 per cent of the invoice.

Housing Allowance This ranges between $300 and $2 500 per month

Table 3a: (cont)

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Benefits Comments

Entertainment Some companies are offering entertainment allowances as per   
Executive’s request. Some companies offer a flat fee of between

$100 and $120 per month for entertainment   
Lunch allowance of 441 on average

Other allowances amount to 41 691 on average

Bonus Most companies offer bonuses equivalent to monthly basic salary.   
However, some companies use an option of profit sharing for

Executives.

Source: ZCTU 18 December 2013 *Daily News* 26

The enshrinement of the right to a fair and reasonable wage, compels the awarding of wage increments that move wages towards the PDL within the shortest possible time. By 2011 this would have meant on average net wages of at least $400.00 taking into account a maximum 20 percent contribution by a spouse working in the informal sector. The figure would have been higher in 2013, probably in excess of $450.00, given the increase in PDL and TCPL figures. In March 2013 the *ZimStat* PDL monthly figure was $541, based on a family of five, whilst that of the Consumer Council of Zimbabwe, based on a family of six, was $564.73 in June 2013.58 Given that about 87 percent of employees in the formal sector were, in 2011, being paid less than this, it means that increments merely based on the inflation rates would never achieve a PDL-linked wage. Such increments would merely freeze the very inadequate present. It being borne in mind that despite the real increases in wages since 2009, average wages as of March 2013 remained less than 45 percent of the PDL of US$541.00.

Section 46 (1) (b) of the Constitution states that interpretation of statutes must be such that *inter- alia*, it promotes justice and human dignity. Any interpretation that moves wages towards the PDL or a living wage cannot be said to be grossly unreasonable, even if it is above the prevailing inflation rate, for it gives the workers an income that helps them live a dignified life. If anything special reasons have to be shown by any employer wishing to pay wages less than the PDL why this should be so. Reference may also be had to section 24 of the Constitution, which states as one of the desired national objectives as “… *to provide everyone with an opportunity to work in a freely* *chosen activity, in order to secure a decent living for themselves and* *their families.”*

58. See ZimStat (2013) *supra*; Consumer Council of Zimbabwe (2013).

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It is an accepted reality that workers suffered the most in the hyper- inflation years, were the purchasing value of wages for ordinary workers who were chained by practice and law to the increasingly useless local dollar, was virtually wiped out.59 The performance of the economy improved considerably in the post-dollarisation period, and it is only fair that the benefits of such improvement be shared equitably, including through granting of PDL linked living wages. See Table 4.

Table 4: Economic overview since dollarisation

Revised   
forecast (*Mar*

Indicator /Year 2009 2010 2011 2012 2013 2014 forecast *2014 World*   
*(Dec-2013) Bank)*

GDP growth rate 5.7% 5.4% 9.3% 4.4% 5.5% 5.43 3%

GDP absolute   
(US$bn) 5.220 5.502 5.916 6.517 6.892 5.02

Inflation

(annual ave.0 -7-7% 4.5% 4.9% 3.9% 3.9% -2.47

Interest rates 30% 21- 10% 10% 10% 10%   
24%

Source: *Old Mutual Investment, December 2013 and March 2014*

TWO EARNERS ARGUMENT AND THE CHINA-FACTOR

Neither will the expressed constitutional purpose of fairness be realized by an argument that the PDL includes the income of two spouses and therefore the wage of the individual employee cannot be equivalent to that. In a situation where only 16 percent of the working population is in paid-permanent employment, and 75 per cent in “vulnerable employment” in the informal sector and communal, resettlement farming, most persons are earning a pittance.60 Estimates show that a good 64.0% of women in paid employment in the informal sector

59. Under the Exchange Control (Payment of Salaries by Exporters in Foreign   
Currency for Critical Skills Retention) Order 2008 (SI 127/2008) only those highly   
skilled employees and senior management could be paid in foreign currency on   
approval by the Reserve Bank of Zimbabwe, thereby protecting them from the   
ravages of hyper-inflation. For all other workers payment of wages in foreign   
currency was an illegal act. See section 4 Exchange Control Regulations 1996   
(SI 109/1996), *Matsika v Jumvea & Anor* 2003 (1) ZLR 71 (H).

60. ZimStat (2011) 51.

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earned $100 and below in 2011.61 This means that on average the contribution of a spouse employed in the informal sector was at most around 20 percent to the TCPL. In 2011 wages in the formal sector had to be at least a net of $400.00 to amount to a living wage consistent with the TCPL as provided by the national authorities. However, that figure is in fact an understatement given the high levels of unemployment and cultural factors. The employee in formal employment in reality not only looks after his or her nuclei family as provided under the Western-influenced nuclei family of five used to calculate the TCPL by ZimStat, but has a very large extended family responsibility.

Therefore into the foreseeable future, the wage of the earner in formal employment will provide the bulk of the earnings of the family, and thus minimum wages should be as close as possible to the PDL.

Equally unconvincing are employer arguments of competiveness, especially the so-called China-factor, the foci must remain Zimbabwe. Comparative regional and international wage comparatives are varied. Moreover, nominal wage figures may be misleading in so far as they do not take into account varied cost of living indexes from country to country. This is why the ILO instruments place focus on “national practice and conditions” as well as “the general levels of wages in the country.”62

In any case, from a public policy perspective, the above employer arguments are self-defeating in the long-term. Having wages so far below the PDL, means depressed demand for the products of industry and the likely continuation of debilitating labour migration.

It is submitted that in the current scenario, section 65 (1) of the Constitution compels arbitrators and courts to grant increments above the inflation rate in order to move to “fair and reasonable wages.” Whilst the actual rates of increment should take into account the specific circumstances of the given industry including, the economic and financial condition of the employers, the rate of inflation and comparative wages in other industries, the primary and dominant consideration must be the obligation to ensure that the lowest paid workers earn a wage as close as possible to the PDL, as described above. Increments for employees earning above this must be sufficient enough to reward the employees for their extra skills, including by

61. *Ibid* 123.

62. Article 3 ILO 131 Convention: Minimum Wage Fixing.

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comparison to other industries, productivity etc as was done in the *Ex* *parte H.V. McKay* case, *supra*.

Evidence from the ground indicate the recognition that increments cannot be constrained solely by the rate of inflation, with increments agreed or granted by arbitrators in 2013 generally being above the inflation rate.63

Where an employer is unwilling to pay a PDL-linked living wage and is also unwilling or unable to effect mitigatory and compensatory special measures, then such employer has no right to be in business, if all it can offer are wages that amount to semi-slavery. As noted by *HIGGINS* J, in *Ex Parte H.V. McKay*, *supra*, the payment of fair and reasonable wages, “*stands on the same level as the cost of the raw material of* *the manufacture.”* Without raw materials there can be no production or business. Even in the darkest ages of colonial primitive accumulation, there was a bar beyond which even the colonial courts were not prepared to go under. Thus for an employer who pleaded inability to pay wages because of the difficulties it was facing in its business, the court, in *R v Millin* SR 171, declared: *“No one has the* *right to exploit natives on a gambling venture of this kind.”*

LEGAL REFORM

The above described new constitutional regime also has significant implications on labour law reform, in particular in reference to the Labour Act and Public Service Act. These two principal labour statutes will need to be amended to bring them into conformity with the new constitutional standards.

In relation to the public sector, there is need to insert a proviso in the provisions dealing with salaries subjecting the Civil Service Commission’s power to set salaries not only to the collective bargaining process but also the employees’ right to a fair and reasonable wage.64

The same would apply in relation to the Labour Act. A modest start was made under section 13 of the Labour Amendment Act, 2015,65

63. Whilst in 2013 the annual inflation rate is less than 2%, several negotiated   
wage increments or arbitral awards have been significantly above this, including:   
10.5% in the NEC for the Commercial Sector; and 6% for the Collective Bargaining   
Agreement for the National Employment Council for the Printing, Packaging   
and Newspaper Industry, SI 69/2006 as amended.

64. Such as in s 22 of the Public Service Act and s 20 (2) of the Public Service   
Regulations, 2000.

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which expands the subjects of scope of collective bargaining under section 74 of the Act to include measures “to mitigate the cost of living.” But the general thrust of the amended section is focus are “measures to foster the viability of undertakings and high levels of employment.” More is required to ensure the Labour Act is constitutionally compliant. A starting point could be the insertion of the right to a fair and reasonable wage as a fundamental right of employees under Part 2 of the Act, possibly under section 6. Similarly the sections dealing with wage-fixing such as by the Minister under sections 17 and 20 or through collective bargaining under Parts VIII and Part V, must have amendments specifying that the minimum thresholds of wages is that which ensures the employees’ rights to a fair and reasonable wage. There can be further elaboration under both Acts of the factors to be considered as done in article 91 of the Constitution of Venezuela or in the ILO conventions and international human rights instruments with primacy given to the needs of the worker and their family to live a decent life worthy of human dignity.

CONCLUSION

The recent constitutional reform enshrining the employees’ right to a fair and reasonable remuneration is an important step forward in the march towards a fair and just society. However, even if that is achieved, it can only be the first step forward, for there can never be real social justice in work relations under a system based on wages and salaries alone, or ultimately industrial peace and political stability.

More enlightened bourgeois theories of labour relations have come around to this conclusion, in particular that of consultative pluralism and radical nationalist theories, whereby employees are entitled not only to fair wages but also a share of the company profits.66 Examples of the later include, previously under the Zimbabwean Indigenization and Economic Empowerment legislation wherein employees may be entitled up to 28% share-ownership of indigenized foreign firms.67

65. Act No. 5 of 2015.

66. M Finnemore *op cite* 145.

67. See the Indigenisation and Economic Empowerment Act [*Chapter 14:33*]; the

Indigenisation and Economic Empowerment (General) Regulations, 2010 (SI 21/   
2010) as amended by the Indigenisation and Economic Empowerment   
(Amendment) Regulations, 2010 (No. 2) (SI 116/2010) and the Indigenisation   
and Economic Empowerment (General) (Amendment) Regulations, 2011 (No.   
3) 2011 (SI 34/2011).

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This echoes the ZCTU Model Collective Bargaining Agreement proving that the “employer shall be required to allocate at least 20% of net profit at the end of each financial year to employees as a share of profits…”68 Similarly under the Kadoma Declaration reached by representatives of business, labour and the state, profit-sharing is declared to be one of the goals of Zimbabwean industrial relations.

Similarly South Africa has also provided for similar under its Black Economic Empowerment legislation.69 In advanced countries, such as the UK and Australia, many large corporations have since the early 1980s, been providing for broad-based employee profit sharing schemes, with some estimates putting the figure at 62 percent of all the large public companies.

The above reflects the recognition by liberal political science that sustainable liberal democracy is not possible where workers lack corresponding social justice and democracy in the workplace. Industrial democracy is a necessary condition for political democracy.

Even more fundamental is the position of the classical Marxist theory that the wage system, even where “fair and reasonable wages” are paid, is inherently unjust and exploitative. This is because wages do not express a proportionate share of the wealth or surplus value created by the worker, but are payment for the cost of labour power as determined by the labour market.70 As recognized by *HIGGINS* J in *Ex Parte H.V. McKay*, *supra*, the contest between labour and capital is an unequal one because the former is always under “the pressure for bread.” Or as Engels puts it, “the workman has no fair start. He is fearfully handicapped by hunger.”71

With wages at most being an amount equivalent to the average human needs of a worker and their family and not the surplus value created, it means, according to Engels, “that the produce of the labour of those who work, gets unavoidably accumulated in the hands of those that do not work, and becomes in their hands the most powerful means to enslave the very men who produced it.” In other words, the wages system is inherently exploitative against workers and in favour of the employer – capitalist class. Further that such unequal and exploitative

68. Clause 43 (1) ZCTU Model CBA.

69. See s 9 (1) Broad-Based Black Economic Empowerment Act No. 53/2003, whereby

employee-share ownership is granted a weight of 20 points out of a 100 credits. 70. Engels F, (1881) *supra.*

71. *Ibid.*

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relations of production also lay the foundations for an equally unjust, unequal and oppressive social superstructure of society at large in politics, law, culture and the intellectual aspects against the majority that labours and for a tiny minority that does not work but controls the means of livelihood.

In the circumstances of the above political economy, equity and fairness dictates that under the new Constitution a “fair and reasonable wage” can only be a living wage linked to the Poverty Datum Line or as the other *Leonard* pleaded, years after the first one, workers be paid “*Mugove Wavo*.”

BOOK REVIEWS

*The Struggle Over State Power in Zimbabwe Law And Politics Since* *1950* by G.H. Karekwaivanane (Cambridge University Press 2017)

BY GEOFF FELTOE

This excellent and important book opens by relating what happened at the trial in 1968 of four liberation fighters charged by the Rhodesian regime of possession of arms of war, an offence that carried the death penalty. The fighters refused legal representation, called no witnesses and openly admitted they had brought arms into the country. They proclaimed that they had committed no crime as they had legitimately taken up arms to depose an illegitimate and highly repressive colonial regime. They maintained that the court itself was illegitimate and had no right to try them. Their court “performance” allowed them to assert their political convictions and put on trial the colonial regime.

This book deals the interrelationship between politics and law in the colonial period between 1950 and 1979, and the post-Independence period from 1980 to 2008. It examines how law was used in many different ways at various stages.

The author points out that law was used by the colonial state to try to constitute state power and legitimise its rule and to implement its policies of protecting the interests of the settlers and marginalizing and exploiting the black majority; by colonized people to try to assert their rights as citizens; by lawyers to try to shield people who had fallen foul of increasingly repressive laws; and by persons tried under draconian laws to declare the complete illegitimacy of the colonial state and its courts. The regime adopted varying approaches to the application of customary law and the role of the chiefs. The author points out that previous studies have tended to concentrate on the coercive role of law and have not given sufficient attention to the diverse ways in which law was deployed by the regime at different stages and the differing responses to the law by the people affected by it.

The author then points out the different roles played by law in post- Independent Zimbabwe. He examines, for instance, how the government sought to transform the legal system, including its racial composition, effect radical reforms to gender rights and modernize

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the administration of customary law, although later traditional leaders were politically co-opted by the ruling party. He looks at how an increasingly authoritarian government made use of colonial laws for repressive purposes, and how black lawyers and the people affected responded to repression and played a key role in the development of a human rights culture and legal activism. The book ends with the observation that this evaluation of the history of legal struggles over the period covered “alerts scholars and activists alike to the rich repertoire of strategies and discourses that were employed and deployed in struggles against state repression in colonial and post- colonial Zimbabwe.”

This fascinating and meticulously researched book should be essential reading for anyone interested the legal history of pre-and post- Independence Zimbabwe.

*Provincial and Local Government Reform in Zimbabwe An Analysis of* *the Law, Policy and Practice* By T.C. Chigwata (Juta 2018)

This is an impressive piece of sustained scholarship. It is exhaustively researched, carefully structured and lucidly, meticulously and convincingly reasoned.

The main question posed in this book is whether the multilevel governance system in Zimbabwe is designed in a manner that promotes the role of subnational governments in achieving development, building democracy and ensuring sustainable peace.

The author defines development, democracy and sustainable peace and sets out the design features of subnational governance which are likely to stimulate development, build democracy and help to sustain peace.

He critically examines the present structures of provincial and local governance in Zimbabwe to determine whether they incorporate these essential design features. After careful analysis in great detail of the current structures, he concludes that the present Zimbabwean multilevel system of governance fails to comply with many of these design features. He argues these failings make it less likely that Zimbabwe devolved governance system will contribute optimally to development, democracy and sustainable peace. However, points out that the 2013 Constitution does provide a foundation for building a more effective system of multilevel governance, although it does not

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itself allocate significant powers to provincial governance structures. Throughout the work, he identifies features of the current provincial and local government structures which are inconsistent with the new Constitution and need to be changed. He contends, rightly, that more than mere alignment with the Constitution is required; what is needed is “the development of a new statutory framework that reflects the constitutional ‘spirit’ of multilevel governance and devolution of power.”

The author points to a variety of serious problems that have beset devolved governance in Zimbabwe. For example, he examines the negative impact of the ongoing national economic crisis upon local government’s revenue raising capacity and funding support from central government. He also points to the serious problem of the misuse of the almost unlimited powers of the Minister of Local Government, which powers have been used to undermine local government institutions run by opposition party supporters. He also makes observations on how the widespread problem of corruption at national level has infected many of the local government institutions.

This work therefore provides a series of very useful proposals for reforming multilevel governance system in Zimbabwe, drawing on a whole range of comparative material. He not only analyses what is demanded by the new Constitution, but also critically examines draft legislation for provincial and local governance that has been produced at the behest of the Ministry of Local Government and points to the deficiencies therein.

CASE NOTES

PER STIRPES PRINCIPLE VERSUS THE PER CAPITA PRINCIPLE   
IN INTESTATE SUCCESSION: A BRIEF OVERVIEW

Case Note on the Case of in Re Estate Late Bellinah   
Mhlanga

HH 816-17 HC 4168/17 DR 143/13

BY ELIZABETH RUTSATE1

1. INTRODUCTION

One area of law which has been a source of serious conflict particularly within families is the law of succession. Prior to delving deeper into the topic it is imperative that as a starting point the term ‘succession’ be defined. In defining the term ‘succession,’ Moses Bello J.P. a member of the Nigerian judiciary had this to say;

The Oxford Advanced Learner’s Dictionary,2 defines succession   
in the context of this topic to mean the act of taking over an   
official position or title. According to Kerry R., succession is   
concerned with the transfer or devolution of property on death.3   
Succession therefore can be loosely defined to mean inheritance,   
the right to inherit, the order in which inheritance is bequeathed   
and the condition precedent under which one can succeed   
another. The law of succession therefore is all about the transfer   
or devolution of property on the death of an owner to another,   
his heir.4 The law is the rule by which such devolution occurs.5

Subsumed under the law of succession are two principles that have clearly dominated the manner in which estates have been administered across the majority of jurisdictions in the region and abroad whether

1 Elizabeth Rutsate is a Senior Lecturer within the Private Law Dept. of the   
Faculty of Law at the University of Zimbabwe. Succession Law is one of the   
courses she lectures on at undergraduate level.

2 8th Edition, 2015

3 Kerridge R. Parry & Kerry: The Law of Succession, 12th Ed (London, Sweet &

Maxwell 2009) Pg.1

4 Ibid

5 M. Bello JP, Principles and Practice of Succession under Customary Law, 2015,

p.1

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under general law, common or customary law. These are *per stirpes* and *per capita* principles of succession. What is most peculiar about the per stirpes principle is that it is applicable under both testate6 and intestate7 succession whether under general or customary law. Due to Zimbabwe’s dualist legal system, intestate succession occurs under both general and customary law. In this case note the focus is on the implications of the two principles under intestate succession under general law. Taking particular note of this all encompassing element of the per stirpes principle, Mwayera J in the In Re Estate Late Bellinah Mhlanga case made the following comments;

Although the Human and Herold cases supra referred to testate   
succession the principle ofX*per stirpes*Xinheritance is equally   
applicable in an intestate estate...From the foregoing discussion   
it has been established that theX*per stirpes*Xprinciple is part of   
the common law of Zimbabwe and is applicable under general   
law. It is also applicable under customary law with equal force.8

Intestate succession occurs in three situations namely (a) if a person upon death does not leave behind a valid will; (b) if the beneficiary appointed in a will predeceases the testator and the latter does not substitute the predeceased heir with another prior to his/her own subsequent death, then that part of the will, will be dealt with under the law of intestate succession; and (c) where a beneficiary or heir appointed in a will cannot or declines to take up the appointment, that portion of his/her inheritance will automatically fall under intestate succession. Under Roman Dutch common law, it is also possible to have an estate that falls under both testate and intestate succession. This happens where a person dies partly testate and partly intestate.

6 Testate succession happens where a deceased person (testator) leaves behind   
a valid will stipulating how his/her estate will be distributed in strict accordance   
with their wishes as contained in their will. A testator can then indicate within   
the will whether after their death they wish their estate to be distributed in   
accordance with per capita or per stirpes succession.

7 If a person dies without having written a will or if the will is declared invalid,   
the estate will be distributed on the basis of intestacy i.e. a state of having no   
valid will. The intestate law of succession refers to theXdistributionXof assets in   
a deceased’s estate whereby the deceased would have died without leaving   
any valid will. It will be the duty of the executor dative in consultation with   
the Master of the High Court to decide on the most suitable type of intestate   
succession under the prevailing circumstances.

8 At page 6 of the unreported High Court judgment (both pdf and word versions)

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2. BACKGROUND ISSUES

Time and again a key question has arisen among estates administrators vis-à-vis what the two principles of per stirpes and per capita succession entail in intestate succession and the key difference between them. Another question which has been raised regards which of the two principles offers a fairer framework under which a deceased’s estate is distributed to his/her descendants, heirs or beneficiaries? The *per* *stirpes* principle came under spotlight in Zimbabwe in the High Court case of Estate Late Bellinah Mhlanga,9 a matter placed before Mwayera J whereby the court’s opinion was sought on the meaning and application of the *per stirpes* principle. Two contentious issues were placed for determination namely (i) whether or not the *per stirpes* principle applies under general law in intestate succession in Zimbabwe and under common law in the absence of a specific legal provision in statutory law and (ii) the legal interpretation of the *per stirpes* principle under general law and as set out under customary law in Section 68F of the Administration of Estates Act *[Chapter 6:01]*. Further to the two issues determined under the *per stirpes* principle in the Estate Late Bellinah Mhlanga case (supra), this case note seeks to make a brief comparative analysis of *per stirpes* and *per capita* principles prior to making a case justifying the decision taken by the executor in this case to opt for the *per stirpes* principle as being more appropriate under the circumstances; which decision was supported by the court as presided over by Mwayera J.

3. PER STIRPES SUCCESSION

Intestate succession can either be per capita or per stirpes. Per stirpes is a Latin expression meaning “by the roots. The word stirps refers to the singular while in plural form reference is made to a number of stirps or stirpes. A stirpis has also been defined as*;*

...a child of the deceased, or a predeceased child who left behind   
living descendants. A deceased person therefore has as many   
stirpes as he left living children or predeceased children with   
living descendants.10

A stirps is a line of descendants of common ancestry who form the roots. It includes every descendant of the deceased who survives the

9 HH 816-17

10 W. Abrie et al, Deceased Estates, 5th ed, ProPlus Publishers: Lynnwood Ridge,

2003

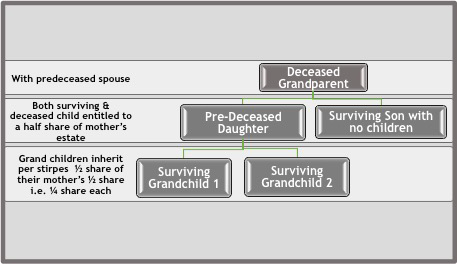
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deceased or a predeceased descendant of the deceased who leaves behind living descendants. Succession *per stirpes* means inheriting from an ancestor “by representation” or “by class.” Where beneficiaries are to share in a distribution *“per stirpes”* the living members within the generation closest in relationship to the deceased ancestor whose estate is being distributed receive an equal share. Since all children of a deceased person form a stirps; they all inherit an equal share of the deceased’s estate. However in cases where one child predeceases the parent and leaves behind children, upon the death of the grandparent, the predeceased child’s children jointly or severally share the share due to their parent in equal shares. This is what is referred to as succession *“by representation”* to what their deceased parent would have been entitled to. According to W.D. Rollison;11

Inheritance per stirpes signifies that the particular descendants   
(remote heirs) inherit such portion (share or interest) only as   
their immediate ancestor would have inherited if he had survived   
the death of the intestate. Thus, if the intestate has left a son,   
and the children of a deceased son, as his only lineal descendants   
and as the only relatives who are entitled to inherit his property,   
one-half of his property would be inherited by his surviving son   
and the other half by the children of the deceased son. The   
children of the deceased son, that is, the grandchildren of the   
intestate, inherit the same portion that their father (the son of   
the intestate) would have inherited if he had survived the death   
of the intestate...(which they share equally among themselves)

In the above quote reference is made only to sons, clearly reflecting the status of the law of succession at the time W.D. Rollison authored his article. This was a time (1935-6) when issues to do with the human right to equality and non-discrimination had not taken root and intestate succession was marked by the primogeniture rule of succession which preferred sons to daughters. If the above quote had been written recently, the words ‘son or daughter’ would have been used as was the case with the children born of Bellina Mhlanga in the Estate Late Bellina Mhlanga case who were equally entitled to succeed their deceased parent’s estate regardless of sex. Below is an illustration of intestate succession per stirpes;

11 See W.D. Rollison, Principles of the Law of Succession to Intestate Property   
(continued) in Notre Dame Law Review, Volume 11 Issue 2 Article 2, 1936, 136   
– 137. Available at: [https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article](https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4119)   
[=4119](https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4119) &context=ndlr Accessed 09/08/2018



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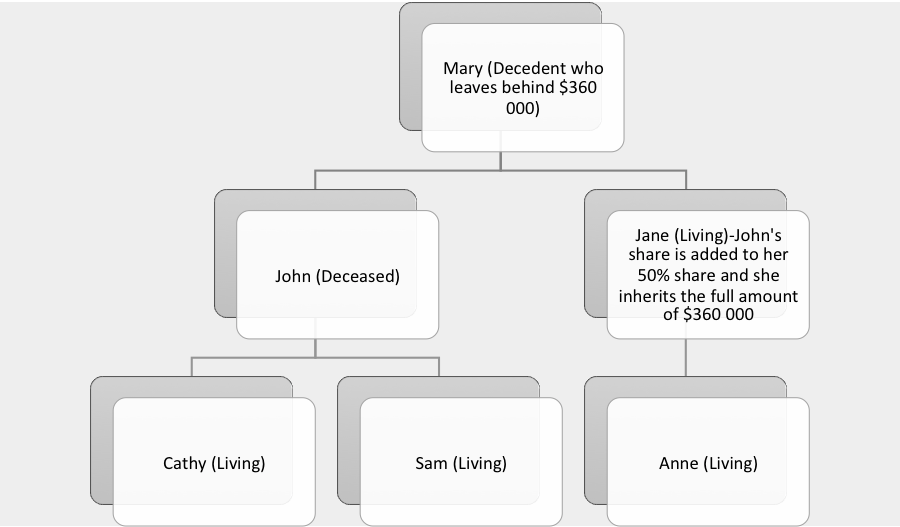


Figure 1: Illustration of intestate succession per stirpes

Figure 2: Illustrating Per Capita Intestate Succession

4. INTESTATE SUCCESSION PER CAPITA

Per Capita is a Latin maxim meaning, “by the head” or “headcount.” Hence per capita succession involves taking “by total headcount” all surviving heirs or beneficiaries across different generations or “by a

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total number of living individuals” within a particular generation. The succession can cover all living beneficiaries who are related to the decedent through blood ties (consanguineal), marriage ties (affinal), and adoption (fictive). The phrase kinship system refers to all of theXrelationshipsXbased on blood, marriage, and adoption that intertwines individuals in sets of rights and obligations. In practice this means that if the beneficiaries to an estate are to share in a distribution “per capita,” then all of the living members of the identified group or generation will receive an equal share. However, if a member of the identified group predeceases the decedent, then a share won’t be created for the predeceased member and all of the shares of the other members will be increased accordingly after they equally share the predeceased member’s share.

5. A COMPARATIVE ANALYSIS OF PER STIRPES OND PER CAPITA PRINCIPLES

As indicated earlier succession per stirpes refers to ‘allocation by class’ or ‘by representation.’ In any distribution per stirpes, all the living members within the class of beneficiaries who are closest in relationship to the decedent will receive an equal share. However in the event that one of these beneficiaries closest in relationship to the decedent has predeceased the benefactor but is survived by any descendants, then that deceased beneficiary’s descendants will take “by representation” what their deceased parent would have taken. On the other hand distributing an estate in a manner in which it is shared per capita involves ‘taking a total headcount’ or ‘the total number of living individuals’ within an identified group or generation who are entitled to inherit. These will share equally what is there. However in the event that a member of this identified group is deceased, then unlike in succession per stirpes a share won’t be created for the deceased member. Rather, that which would have been given to the deceased had they been alive is added to the total sum to be shared by the living beneficiaries resulting in an increase in the individual shares of those living beneficiaries.

In summary therefore, the difference between the per stirpes and per capita principles lies in the fact that while inheriting per stirpes would entail equal sharing of the inheritance among all of the decedent’s descendants (living and deceased) within the first line of generation; per capita succession only occurs among living descendants and other beneficiaries who may not be a decedent’s direct descendants but affinal and/orXconsanguineal kin within that particular generation closest in line to the decedent.

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Take for example a decedent called George who had three children Mary, Jane and George Junior. Mary predeceased George but left behind 3 children Amy, Sarah and Tom. Jane is also deceased but is survived by two children Jack and Jill. George Junior is still living and has one child Joel. The decedent George left behind $630 000 cash. If that amount would be shared per stirpes, George Junior would get one- third of the $630 000 which would amount to $210 000. Mary’s $210 000 entitlement would be shared equally among her 3 living children, each getting $70 000. This is inheritance per stirpes by representation. George’s son, Joel will not get anything since his father George Junior is still alive. Jack and Jill who are born of Jane will share their late mother’s share of $210 000, each getting $105 000 as they are representing their mother in the inheritance.

The same example will be used with the $630 000 shared using the per capita principle. Since Mary and Jane are deceased, their shares are added onto George Junior’s share and he inherits the full amount of $630 000 as he is the only living beneficiary within that first generation after George Senior. Mary and Jane’s children do not inherit anything as there is no representation under the per capita principle in intestate succession. For argument sake if George Junior and Mary are both living with Jane predeceasing George Senior, then Jane’s share of $210 000 will be shared equally between Mary and George Junior each getting a total share of $315 000. As indicated earlier, despite a deceased heir having living descendants, they will not inherit by representation as is the case with per stirpes because the per capita principle focuses on living beneficiaries within a particular generation closest in line to the decedent. In some cases however the per capita principle as used in testate succession has included all living heirs across several generations who have to equally share the inheritance despite one heir being the decedent’s child while another is a grandchild, great grandchild or nephew. In the case on hand, this would mean all the seven living heirs namely George Junior, his son Joel, Mary’s three children Amy, Sarah and Tom as well as Jane’s two children, Jack and Jill would equally share the $630 000, each getting $90 000 if indicated as such in a will. Most people have tended to prefer using the per stirpes principle rather than per capita as the former caters for all beneficiaries, both living and deceased (if only through their descendants by representation).

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6. IMPACT OF THE USE OF REPRESENTATION IN THE SUCCESSION PER CAPITA   
PRINCIPLE

It is important to note that within some jurisdictions, for example the American legal system, the distinguishing line between succession per stirpes and that which is per capita has increasingly become blurred with the modification of the per capita principle. There has been modification of the succession per capita principle to come up with the per capita at each generation and the per capita with representation principles which seem to echo the per stirpes principles.12 Strictly applied per capita succession ensures that if any of the decedent’s beneficiaries predecease the decedent, their share will not transfer to their descendants but will transfer to and is shared equally among the remaining surviving beneficiaries.

Using succession ‘per capita at each generation’ approach ensures that heirs of the same generation will each receive the same amount. The inheritance is divided into equal shares for the generation closest to the deceased with surviving heirs. These shares are equal in number to the number of original members either surviving or with surviving descendants. Each surviving heir of that generation gets a share. The remainder is then equally divided among the next-generation descendants of the deceased in the same manner. On the other hand, succession per capita by representation is such that, the predeceased beneficiaries’ shares at the same generation are divided equally between all their children. In other words the surviving descendants of predeceased beneficiaries of the same generation get to equally share what their predeceased ancestors would have inherited in equal shares. It would seem like the key aspect of succession per capita is collation13 at each and every generational level of succession.

12 The per stirpes principle is now referred to as the old English approach within   
the American legal system.

13 Succession law is underpinned by the Common Law requirement for collation.   
Under collation it is a requirement that all descendants of a decedent inherit   
equal portions and where one child has benefitted more through some loan or   
other benefit received from the decedent during their lifetime, the child who   
unfairly benefitted should pay back the advanced money so as to ensure all the   
children benefit equally from the decedent’s estate. These descendants include   
children born out of wedlock and adopted children, who have all the rights of   
flesh and blood.

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7. EXAMPLE SHOWING THE INTER-LINKAGES BETWEEN THE PER STIRPES AND PER   
CAPITA PRINCIPLES OF SUCCESSION AS DRAWN FROM REPRESENTATION   
Representation is the principle of law by which the children or their descendants of an heir to an estate, who dies intestate have a collective interest in the ancestor’s intestate share of the inheritance. This could either be through representation in per stirpes succession or per capita succession by representation. Taking for example a decedent Sam who was a widower at the time of death but who during his lifetime was married under general law and had two daughters Ann and Alice. He dies intestate leaving an estate worth $400 000 after the deduction of all duties, debts and other charges. Ann was never married and has no children. Alice who predeceased her father Sam left behind two sons Hillary and David whereby David also died a few days before the death of Sam, his grandfather. David leaves behind two children Peter and Pam. In sharing the $400 000, Ann and the late Alice are entitled to $200 000 each because the degree of their blood relationship to the deceased Sam is equal and so they share per capita or in equal parts what Sam their late father has left behind. However since Alice is no longer there to take up her share, her children Hillary and David are expected to succeed per stirpes to their late mother’s $200 000 share in equal shares of $100 000 each. While Hillary takes his per capita share of $100 000, David being deceased cannot take up his own per capita share. Being survived by Peter and Pam David’s per capita share is inherited by the two in equal shares of $50 000 each.

In the ultimate, Ann’s per capita share of $200 000 from her late father Sam’s estate remains unaffected; Hillary and David having an equal degree of relationship to Ann’s sister, the late Alice, were entitled to $100 000 per capita of Alice’s share but jointly inherited $200 000 per stirpes from Sam their grandfather. Peter and Pam also took per capita shares of what their late father David was entitled to per stirpes, hence the two inherited a share of their great grandfather Sam’s estate per stirpes. The degrees of consanguinity among Ann, Hillary, Peter and Pam are unequal since Ann is the late Sam’s child while Hillary is his grandchild and Peter and Pam are his great grandchildren hence they cannot have per capita shares. From Sam’s estate, Ann gets 50%, Hillary, 25% while Peter and Pam share the remaining 25% i.e. 12.5% each. Although they all inherit per stirpes from the late Alice’s share Hillary, Peter and Pam have unequal degrees of relationship to her whereby Hillary is one generation removed from Alice while Peter and Pam are two generations removed. Inheriting

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per stirpes, they cannot have equal or per capita shares across different generations. However strictly speaking all living descendants inheriting per capita should have equal shares despite having unequal degrees of relationship to the deceased ancestor. To cure the injustice of having all beneficiaries sharing an inheritance equally despite different degrees of consanguinity towards the decedent, the practice has been to allow per capita sharing among beneficiaries within the same generation or who are equally removed from the benefactor, for example grandchildren born of the decedent’s several children.14

8. BRIEF FACTS OF THE CASE IN RE ESTATE LATE BELLINAH MHLANGA HH 816-17 HC 4168/17/ DR 143/13

This matter was brought before Mwayera J in chambers for the determination of a question of law arising in terms of section 113 of the Administration of Estate Act *[Chapter 6:01].* Having had a difference of opinionon how the estate was to be administered, the Master of the High Court and the executrix dative in Re Estate Late Bellinah Mhlanga (supra). The key issues for determination by the honourable judge by way of judicial opinion were;

a) Whether or not the *per stirpes*Xprinciple applies under general   
law in intestate succession in Zimbabwe and under common law   
in the absence of a specific legal provision in statutory law.

b) What is the legal interpretation of theX*per stirpes*Xprinciple both   
under general law and as set out under customary law in the   
Administration of Estates Act Section 68F.

In *casu*, Bellinah Mhlanga, a widow (hereinafter called the decedent) died intestate on the 28th day of January 2010, in Harare as per the death certificate. The decedent during her lifetime had been married under the Marriages Act *[Chapter 5:11]* to one Amon Mhlanga who had predeceased her. All in all, the decedent had had six children Busisiwe, Lovemore, Dakarayi, Cynthia, Luwis and Eric of which Tapuwa

14 However this also depends on the number of surviving children in each family   
whose parent would have predeceased the grandparent with the estate being   
shared among descendants because if one deceased son had 2 children while   
another had 4 children, those grandchildren from the two families will have   
different allocations since in one family more children share the same pie e.g.   
each family shares $60 000 each from the $120 000 estate. Despite belonging   
to the same generation, in one family a grandchild will get $30 000 while in the   
other each will get $15 000.

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Caroline Mhlanga had predeceased her mother. However, Tapuwa Caroline was survived by three children namely Tafadzwa, Nyasha and Tatenda Chidyiwa who in other words were the decedent’s grandchildren. On 30 January 2013, the estate was duly registered by Cynthia Mhlanga a daughter of the decedent, through completion of a death notice. Having been married under the Marriages Act [*Chapter* *5:11*], general law applied to the administration of the decedent’s estate. The decedent was the registered owner of property, a house in the Glen View high density suburb of Harare.

In completing form M.H.C. 12 showing that one of the children of the deceased namely Tapuwa Caroline Mhlanga had predeceased the decedent, the duly appointed executrix dative of the estate, Slyvia Chirawu (as she then was)15 amended the account accordingly to award the share of Tapuwa Caroline Mhlanga to her three surviving children on the basis of theX*per stirpes*Xprinciple. It is on the basis of this award in terms of the per stirpes principle that a difference of opinion arose between the executrix dative and the Master of the High Court, the latter having directed that Tapuwa Caroline was not supposed to inherit since she had predeceased her mother. The Master was of the view that the *per stirpes*Xprinciple did not apply, hence Tapuwa Caroline’s children were not entitled to inherit from their grandmother’s estate by representation of their late mother. It would be my assumption that the Master was in favour of a strictly applied per capita succession approach which would cater only for the living children of the late Bellinah Mhlanga. The executrix dative on the other hand maintained that the children ought to inherit by representation of their mother through the succession per stirpes approach. It is due to the difference of opinion that the matter was brought before a judge of the High Court in Chambers.

9. BASIS FOR DECISION

The court after determining that the resolution of the matter hinged on the nature of law applicable in the deceased estate in question as well as the interpretation of theX*per stirpes*Xprinciple proceeded to interpret the law of succession in accordance with the facts that were placed before it as summarized below;

15 She is now a judge of the High Court of Zimbabwe

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*a) Supremacy of the Constitution*

As a starting point the court considered the supremacy of the Constitution of Zimbabwe Amendment (No 20) Act 2013 (hereinafter referred to as the Constitution) over all matters (law, practice, custom or conduct) and all persons, natural, juristic or otherwise in terms of section 2. Accordingly the administration of an estate was supposed to be in line with the constitution to the extent that an entitled beneficiary ought to be recognised and not discriminated against. It was considered as mandatory that emphasis should be on equality before the law especially where the entitlement was anchored on law.

*b) Continued applicability of Common Law*

In its determination, the court indicated that common law was still applicable in Zimbabwe and the statutory provisions that had been enacted did not oust common law but rather complemented each other. Closely looking at how the estate of one who dies intestate leaving no surviving spouse was disposed of under the Deceased Estate’s Succession Act [*Chapter 6:02*], the court indicated that resort has to be made to common law. In *casu* general law automatically applied to the estate since the decedent had been married under a civil marriage. However, despite having no surviving husband, the decedent was survived by children and descendants and hence common law in conjunction with general law had to be resorted to in the administration of her intestate estate. In its delineation of the common law position in Zimbabwe, the court made reference to the decision taken in the case of *Nzara and others*XvX*Kashumba NO and* *Others*16Xwhere it was held that by virtue of s 192 of the Constitution, Roman Dutch law remains also the common law of Zimbabwe. The applicable law as currently obtaining made provision for theX*per* *stirpes*Xprinciple under general law; intestate succession based on common law, and also testate succession.

In its interpretation of the law vis-à-vis succession to deceased estates, the court averred that theX*per stirpes*Xprinciple was clearly set out under both general and customary law in Zimbabwe. The customary law position of the per stirpes principle was said to be well captured in the Administration of Estates Act [*Chapter 6:01*] part 111A with particular reference to section 68 F.

16 HH 151-16

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It was also pointed out that despite the per stirpes principle applying to both testate and intestate estates under both customary and general law, this did not distort its general meaning since the common law of Zimbabwe was the one giving it meaning. The court proceeded to find the principle’s definition as outlined within theX*Advanced Oxford* *Learners Dictionary*17Xand that proffered by the court in *Rotmanskey* *and Another*XvX*Heiss.*18XIn that case, the court of appeal 1898 at p 634 described the terms stirpes and per stirpes as follows;

Stirpes is root of inheritance, it designates the ancestor from   
whom the heir derives title and it necessarily presupposes the   
death of the ancestor. When issue are said to take per stirpes, it   
is meant that the descendants of a deceased person take the   
property to which he was entitled or would have been entitled   
if living.

In the matter on hand, the court stated that the p*er stirpes*Xprinciple encapsulated inheritance by representation by the deceased person’s descendants. As such it became crucial to conceptualize what descendants were so as to fully appreciate the inheritance by representation principle of per stirpes. The court cited M.J. De Waal and M.C. Schoeman-Malan19 who state that, *“a person’s blood relations* *can be divided into three categories - a person’s descendants are* *those who descend directly from him for example, his children,* *grandchildren and great grandchildren.”* Further to that the court in identifying a deceased person’s heirs made reference to the case of *Dera*XvX*Chimari*20 where it was stated clearly that in dealing with the principle of vesting, heirs are determined once and for all at the time of death. Hence in inheritanceX*per stirpes*Xthe right of representation is determined by what was prevailing at the date of death of the deceased. The principle of vesting was deemed relevant in so far as it determined who predeceased the deceased and whether they left any descendants who could inherit by representation. It became common cause therefore that Tapuwa Caroline’s children should also inherit per stirpes because the fact that Tapuwa Caroline had predeceased her mother did not alienate her children’s rights as

17 The dictionary defines the per stirpes principle as referring to the acquisition   
of inheritance by a deceased person’s descendants in equal share.

18 89 Md 633 MD

19 M.J. De Waal and M.C. Schoeman-Malan,TheXLaw of Succession, (Juta and

Company Limited), 2013 (reprinted edition) at p. 16   
20 HH 177-13

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descendants who qualified as beneficiaries of their Grandmother Bellinah Mhlanga’s estate.

In its own words the court stated;

The definition ofX*per stirpes*Xcertainly includes surviving children

and descendants of predeceased children. It is succession by   
representation which in simple terms entails inheritance on the   
basis of blood relationship with a predeceased heir of the   
deceased, whose place the descendant fills. What occurs in per   
stirpes principle is that a descendant of the predeceased heir   
moves up into the place of the predeceased heir. The   
grandchildren are entitled to inherit by representation as they   
move into their parent’s place. In the case ofX*HeroldX*vX*Vissen*   
*and OrsX*1937 LPD 67 at 74 the court affirmed the principle set   
out inX*HumanX*vX*Human Executors*X1893 SC 172 wherein it was   
stated that only grandchildren from children who predeceased   
the testator must be included on the grandchildren to benefit   
under the estate. It was further made clear that grandchildren   
whose parent predeceased the grandparent were entitled to   
inherit and succeed by representation (success by   
representation) which is an acknowledgement of theX*per*   
*stirpes*Xprinciple. There is no legal bar to the application of   
theX*per stirpes*Xprinciple in the current estate of Bellinah   
Mhlanga...The death of their mother does not take away their   
blood line and descendant rights to inherit. As clearly   
discussedX*per stirpes*Xprinciple is not anchored by predeceasing   
the deceased but rather blood relationship of children and   
descendants. Even if there is no Will and last Testament the   
right to inherit by representation is based on the blood   
relationship line.21

*c) The role played by administrative rules of procedure in*   
*confirming inheritance per stirpes under the common law*   
*applicable in Zimbabwe*

In coming up with a decision in the matter on hand, the court also brought under scrutiny Form M.H.C. 12 filled in by an executor or executrix as required by the Master’s office prior to the office authorising the final distribution of an Estate. The scrutiny concerned Form M.H.C.’s import and purpose in the administration of deceased’s estates. It became apparent that to complete this form, detailed information was required with regards to the following issues;

21 At pages 6 and 7 of the unreported judgment, (pdf and word versions)

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• Identification of deceased’s relatives, their names and degree or   
nature of relationship.

• Address of each surviving relative and date of death of each   
deceased relative.

• Surviving spouse-date and place of marriage.

• Children of the deceased and dates of birth giving names of those

who may be dead, dates of their deaths and names of their   
children. If the predecessor’s children had no issue, this fact must   
be stated

• Father and mother of the deceased (need not be answered if the   
deceased left children)

• Brothers and sisters of the deceased stating whether full or half   
blood and their address and date of birth in case of half brothers   
and half sisters name of step parent should be stated only those   
brothers and sisters whether of full or half blood who survived the   
deceased are to be given in this answer. (Need not be answered if   
both parents survived the deceased or if the deceased left children.

• Names of brother or sister, stating whether full or half blood who   
may be dead giving their dates of death and names, addresses   
and dated of birth of their children. If predeceasedXbrothers and   
sisters had no issue, this fact must be stated (need not be answered   
if both parents survived the deceased or if the deceased left   
children).

Emanating from the detailed M.H.C 12 form, the court questioned the logic behind asking for the name of a child who predeceased the deceased parent; whether they had their own children; if so their names and details; if in the ultimate such grandchildren would not be eligible to inherit by virtue of their parent having predeceased the grandparent. Form M.H.C. 12 was ruled to be in conformity with the common law as imported from the Cape of Good Hope which in turn confirmed the applicability of theX*per stirpes*Xprinciple in intestate inheritance.

It was emphasised that the mere fact that Tapiwa Caroline Mhlanga had predeceased her mother did not disqualify her children, the grand children of Bellinah Mhlanga, who were rightfully entitled as descendants to inheritXunder the *per stirpes*Xprinciple. The court proceeded to define descendants and the per stirpes principle in a manner which confirms the definitions outlined earlier in this article. The court made reference to the definition and illustration of the per

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stirpes principle given by J. Jamneck and C. Rautenbach (eds), M. Paleker (et al) inXtheir book entitled “The Law of Succession in South Africa”22*X*whereby the authors defineX*stirpes*Xas a line of descendants of common ancestry, including every descendant of the deceased who survives the deceased or a predeceased descendant of the deceased who leaves living descendants.

*d) Best interests of the child, a key element*

In coming up with a decision in the *in Re Bellinah Mhlanga* case, the court also considered the fact that the interests of minor children were at stake. The court acknowledged its duty to protect the best interests of minor children particularly considering that in the case before it, the rights and interests of the late Tapuwa Caroline’s children were clearly sanctioned by the law. The court made reference to Section 81(2) and (3) of the Constitution of Zimbabwe on the rights of children which state;

(2) A child’s best interests are paramount in every matter   
concerning the child.

(3) Children are entitled to adequate protection by the courts,   
in particular by the High Court as their upper guardian.

In addition to the court’s citation of section 81, it is also important to take note of Section 19(1) of the same Constitution on children which also calls on the Zimbabwean State to adopt policies and measures that ensure that in matters relating to children, the best interests of the children concerned are paramount.

10. THE DECISION

Based on its interpretation of the law of intestate succession particularly concerning the applicability of the per stirpes principle for a decedent’s descendants born of a predeceased child, the court agreed with the approach taken by the executrix in the case by finding that Tapuwa Caroline Mhlanga’s children were legally entitled to inheritX*per stirpes* from the Estate of late Bellinah Mhlanga, their grandmother.XThe court order reads;

22 J. Jamneck and C. Rautenbach (eds), M. Paleker, A. van der Linde and M.   
Wood-Bodley The Law of Succession in South Africa (2nd edition), (Oxford Press-   
Southern Africa) 2012 at p. 13

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Accordingly it is ordered that:-

1. TheX*per stirpes*Xprinciple is applicable in all estates   
regardless of being governed by customary law or general   
law and or common law.

2. Tapuwa Caroline Mhlanga’s children are legally entitled to   
inheritX*per stirpes*Xfrom the estate of late Bellinah Mhlanga   
their grandmother.23

11. A CONCLUDING ANALYSIS

It is clear from the facts of the case concerning the estate of the late Bellinah Mhlanga that the approach taken by the executrix which was subsequently supported by the High Court was the best under the circumstances. This is because when the per stirpes principle of succession was applied, the outcome was just and fair to all the concerned parties because;

1) In line with a Constitutional requirement, the best interests of   
children were fulfilled since Tapuwa Caroline’s children’s rights   
and entitlement to inherit per stirpes from their deceased   
grandmother’s estate were protected by the High Court;

2) The use of the per stirpes principle ensures the protection of   
another key Constitutional provision within section 56 of the   
Constitution namely ‘equality and non-discrimination.’ Most   
interesting is the fact that the per stirpes principle of succession   
guarantees equality of a deceased parent’s children (both living   
and dead). There is no discrimination against those children who   
would have predeceased their parents particularly where they   
are survived by their own children. It is my own interpretation   
that the equality and non-discrimination principle is applicable to   
both the living and the dead children a deceased parent whose   
estate should be distributed equally among them particularly where   
the deceased children leave their own issue behind who in turn   
take up the latter’s share by representation.

On the other hand, assuming that the court had agreed with the approach suggested by the Master and the decedent’s estate had been distributed in accordance with strict per capita succession, the share due to the late Tapuwa Caroline Mhlanga (equivalent to one-sixth of the value of the estate) would have been shared equally among her

23 At page 7 of the unreported High Court judgment (word and pdf versions)

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surviving siblings thereby increasing their individual shares substantially to one-fifth for each.24

The use of the per stirpes principle of succession enabled Tapuwa Caroline’s three children to inherit per stirpes from their late grandmother’s estate with each getting per capita (in equal parts) a one-eighteenth share. For argument’s sake, if the house was valued at $54 000, each child’s share would be worth $3 000, while their late mother’s siblings would each have a share worth $9 000. This would meet the justice of the case rather than having each living sibling getting $10 800 and Tapuwa Caroline’s children getting nothing at all. In conclusion it is respectfully argued that application of the per capita principle of succession would have made sense if Tapuwa Caroline Mhlanga had died leaving no surviving children.

24 The surviving siblings of Tapuwa Caroline Mhlanga would have ended up having   
a one-fifth share each leaving Tapuwa’s three minor children with nothing, a   
great injustice indeed.

REPORTING A COURT CASE ARISING FROM FALSE SOCIAL   
MEDIA REPORT

Case Note on *Mushunje V Zimbabwe Newspapers* HH-47-17

BY G. FELTOE

THE FALSE SOCIAL MEDIA REPORT

The facts of the *Mushunje* case show how false and highly defamatory information published on a social media website can spread like wildfire and do enormous damage to the reputation of a person. In this case the damage was to a well-known professional model who was falsely accused of serious child abuse.

The events leading to an action for defamation by the plaintiff against the *Zimbabwe Newspapers* were as follows: a social media site published a decidedly damaging article about the plaintiff. It alleged falsely that the plaintiff was HIV positive and had injected her HIV tainted blood into the son of her boyfriend. She was also alleged to have made the child drink her urine and to have physically abused the child. Based on these publications, the mother of the child filed a complaint against plaintiff with the police. The social media site then published another article alleging that plaintiff had been arrested. Charges of child abuse were then brought against the plaintiff but she was acquitted on all charges after medical tests on both the child and the plaintiff showed that neither was HIV positive, nor did the child exhibit any signs of abuse.

THE *ZIMPAPERS* STORY

*Zimpapers* published a series of articles about this matter which were also posted on its website and this resulted in a number of international online sites re-publishing the same story. The newspaper articles dealt with the court case and the acquittal, and ended up pointing out the injustice to which the plaintiff had been subjected as a result of the false allegations levelled against her.

In addition to an action for defamation against the website which had originated the false story, the plaintiff sued *Zimbabwe Newspapers* for defamation based upon its reporting of this matter in its two newspapers, *The Herald* and *H-Metro*.

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Plaintiff alleged that newspaper articles were unfair, unbalanced and inaccurate and failed to make it clear in its reports that there were merely allegations against the plaintiff instead of presenting them as facts. The plaintiff said the defendant’s reporters had not approached the plaintiff to obtain her side of the story. The plaintiff also argued that the newspapers continued to report the allegations long after the results of the medical facts were already in the record.

The reporters of the defendant admitted that they had read the story on the social website but maintained that they had based their reports solely on the public court proceedings. The court accepted this. The reporters said they did not seek to interview the plaintiff during the court proceedings because this would have amounted to interference with court proceedings which were underway but, after the plaintiff was acquitted, they interviewed her and published what the plaintiff said in the interview.

WHETHER THE STORIES WERE DEFAMATORY

The court accepted that the articles were defamatory although, confusingly, later the judge said that she was “not convinced that the articles were unfair, unbalanced and inaccurate and are thus defamatory of the plaintiff as alleged.” (Emphasis added by case noter.)

DEFAMATION OF PUBLIC FIGURES

The court erroneously stated that in an action for defamation by a public figure such as a celebrity or a politician, the plaintiff must establish that the defamatory statement was made “with actual malice or reckless disregard for the falsity or otherwise of the statement.” The judge derives this requirement from the American case of *St* *Amant v Thompson*, 390 U.S. 727 (1968). This approach, which was originally enunciated in the case of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is squarely based on the emphatic freedom of the press guarantee in the First Amendment to the American Constitution. This extremely high burden of proof on the plaintiff has meant that defamation claims by public figures in America rarely prevail. The American approach has not been followed in Zimbabwe and it is not correct that in our law a public figure can only succeed in an action for defamation if it is shown that there was malice or reckless disregard for the falsity or otherwise of the statement by the press in publishing the statement.

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Indeed in South Africa, under South African common law, the press was strictly liable for defamation. However, in a series of constitutional decisions the South African courts have decided that there was a need to balance the right to untarnished reputation against the right to freedom of expression and the duty of the press to inform the public about matters of public interest. This has led the South African courts to modify the strict liability approach by providing that a newspaper is entitled to a defence where it publishes a story in the public interest believing it to be true after taking all reasonable steps to check the facts even if the story turns out to be false. In effect a newspaper will not be liable if it was not negligent. The courts have said that some latitude must be allowed to the press in order to allow robust and frank comment in the interests of keeping members of society informed about what Government is doing or has done and revealing abuses of power in the public and private sectors. Errors of fact should thus be tolerated, provided that statements are published justifiably and reasonably: that is, with the reasonable belief that the statements made are true.

This did not mean that there should be a licence to publish untrue statements about politicians. They too have the right to protect their reputations and publication of false statements in mass circulation newspapers can do enormous damage. See *National Media Ltd & Ors* *v Bogoshi* 1998 (4) SA 1196 (SCA); *Khumalo & Ors v Homilisa* 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC); and *Thembi-Mahanyele v Mail* *and Guardian & Anor* 2004 (6) SA 329 (SCA). There is considerable merit in this approach and it is strongly arguable that, under section 61 of the Constitution of Zimbabwe which guarantees the freedom of the media, the press should be entitled to similar protection to that which obtains in South Africa where a print or electronic media outlet publishes a story in the public interest reasonably believing its facts to be true. Section 61(5)(c) makes it clear that freedom of the media excludes maliciously injuring a person’s reputation. There is no clear ruling in Zimbabwe as to whether we will follow the constitutional rulings in South Africa that the press is entitled to raise the defence that it published facts in the public interest reasonably believing the facts to be true but which facts turned out to be false.1

1. In the *Garwe v Zimind Publishers (Pvt) Ltd* 2007 (2) ZLR 207 (H) at 231 the   
defendants contended that they genuinely believed in the truth of the statement   
they published. The court found that published facts were false and rejected   
the defence of justification.

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In Zimbabwe the position regarding the approach towards the *animus* *injuriandi* requirement remains somewhat unclear. Originally in *Smith* *NO and Lardner-Burke NO v Wonesayi* 1971 (2) RLR 62 (G) the court decided that subjective intention to defame is not required. However, later cases seem to have adopted the approach that some form of intention is required. In *Garwe v Zimind Publishers (Pvt) Ltd* 2007 (2) ZLR 207 (H) at 235 D-E the judge quotes Burchell to the effect that subjective intention to defame is required on the part of an individual as opposed to the mass media, but then proceeds to find that the newspaper, its editor and reporter had had the intention to defame.2 In the present case the judge also said that “persons who find themselves in the public eye must expect a certain amount of publicity and intrusion into their private and personal lives, including inaccurate statements as long as the publicity is not malicious or reckless in its disregard of truth.” This, she said, “is more so when they are public or famous figures where the happenings in their lives are, after all, news for the average citizenry. They should therefore not be thin skinned, belligerent or litigious, but ought to have the courage to take such social blows, which go with the territory, on the chin. They must understand that once they are in the public arena they become targets of pot-shots for real or imagined indiscretions, errors or failures. Therefore, unless the publications about them are malicious, or reckless in their disregard of truth, or clearly intended to tarnish their reputations, such persons should not rush to court to seek damages.” (Emphasis added by case noter).

Whilst public figures are in the public eye, in *Makova v Masvingo* *Mirror (Pvt) Ltd & Ors* 2012 (1) ZLR 503 (H) it was pointed out that the fact that the plaintiff is a politician and a public figure, whose life is necessarily in the public domain and open to criticism, does not divest him of protection against harm to his dignity and reputation. In particular, the defendant is not entitled to protection against defamation if it makes false allegations. See *Levy v Modus Publications* *(Pvt) Ltd* 1998 (1) ZLR 229 (S). It has not been accepted in Zimbabwe that a defendant is only liable for defamation of a public figure if it is proved that the statement was made maliciously. It is only when the defendant relies on the defence of qualified privilege that the issue of malice may arise as this defence can be defeated if the defendant acted maliciously.

2. Intention, the court said, can take the form of *dolus directus* or other forms of   
*dolus* like *dolus indirectus* or *dolus eventualis*. See p 235D.

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HEADLINES

The articles complained of and published in *The Herald* and *H-Metro* had headlines which portrayed as hard facts, rather than as allegations, that the model had injected her lover’s son with her HIV infected blood and had forced the boy to drink her urine. For example, one of these headlines read: “MODEL INJECTS HIV BLOOD IN CHILD…..Forces boyfriend’s son to drink urine.”

The stories following these headlines did, however, refer to allegations against the plaintiff made in court proceedings. The judge found that taken alone these headlines were clearly defamatory. However, the judge went on to state that reasonable readers do not go by the headline alone but will read the content of the story to obtain the true gist of the story. This, she said, is “more so when one is a ‘famous’ person where the headline is an effective bait to catch the eye of more readers.”

The judge agreed with the defendant that the headlines complained of are mere captions which indicate the nature of the story to follow so as to catch the readers’ attention to entice them to buy the paper and read the article. She said that if actions for defamation were to be based merely on newspaper headlines, then “there would be an onerous plethora of litigation.” She went on as follows: “In my view a headline is akin to the heading on any legal document, which does not create any substantive rights for the parties concerned but merely indicates what the legal document is all about. In the same way that one cannot sue for breach of a heading on a legal document, one ought not to be able to claim infringement or damage to reputation merely from a newspaper headline which is not supported by the substance of the article.”

It is submitted that the heading in a legal document is entirely different from a headline in a newspaper. A legal document is likely to be read carefully by the persons that it will bind or affect. On the other hand, the courts have accepted that the ordinary reader of a newspaper is not supercritical and does not read every item with meticulous care. Rather than engaging in a process of careful intellectual analysis, because of the mass of material the reader is likely only to form an overall impression of the material. See *Mugwadi v Dube & Ors* 2014 (1) ZLR 753 (H). Because this reality is recognised by the courts, it is important that the headline does not create a misleading impression. A headline should accurately sum up the contents of story that follows.

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It is advisable that where a newspaper is covering criminal allegations that have yet to be proven that its headline reflects the fact that these are allegations and not proven facts. There is a danger of misleading readers when sensational headlines are used to catch their attention.

THE DEFENCE OF QUALIFIED PRIVILEGE3

The defendant raised the defence of qualified privilege, contending that it had a duty to inform the public about these court proceedings and their outcome, and the public had a reciprocal interest to receive this information. It maintained that its coverage of the court proceedings from the initial remand to the dismissal of the charges was fair, accurate and balanced coverage.

The court set out the requirements for this defence in a rather confusing and somewhat inaccurate fashion.

The judge correctly states that for qualified privilege the person making the statement must have a duty or interest to communicate the information and the recipient of the statement must have a reciprocal duty or interest to receive the information.

The judge says that the defendant must show that the statement is true, adding that truth is an absolute defence to a claim for defamation. There seems to be some confusion here between the defences of justification and qualified privilege. The judge says that truth alone is an absolute defence. Truth is an essential requirement for justification but for justification the statement must not only be true but it must it must also be in the public interest to publish the true facts. A defendant is not allowed to dredge up and publish long forgotten true facts where it is not now in the public interest or for the public benefit to publish these facts.4

Typically the defence of qualified privilege will fail if the published statement is not true. Thus in the *Garwe* case the defence failed because the statement about the judge was false. However, it is not invariably the case that the statement must be true. The law recognises certain situations where a person has a right to make a statement

3. The requirements of the defence of qualified privilege is set out clearly in the   
*Garwe* case at 230 and in *Chinamasa v Jongwe P& P Co (Pvt) Ltd* 1994 (1) ZLR   
133 (H) 163-165 and *Musakwa v Ruzario* 1997 (2) ZLR 533 (H).

4. See J Burchell *The Law of Defamation in South Africa* pp 212-214.

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even though the statement turns out to be untrue. Thus in *Musakwa v* *Ruzario* 1997 (2) ZLR 533 (H) the court held that where the defence of qualified privilege is raised it is not necessary to establish that the defamatory statement is true. The degree of truth in the defamatory statement is only relevant to the issue of whether the bounds of privilege have been exceeded or the statement was motivated by malice.

Another requirement for the defence of qualified privilege, the judge says, is for public figures there must be no malice or reckless disregard of the truth of statements complained of. In fact our law does not draw any distinction between public figures and other persons: malice will defeat qualified privilege in both cases.

A further requirement, the judge says, is that the plaintiff’s reputation is not damaged. The correct position is that the defence of qualified privilege allows the defendant to publish what amounts to a defamatory statement where it has a duty to do so and the recipient has an interest in receiving the information. With press reporting of court cases, the press is entitled to report the start of a criminal case but it is then expected to report later developments in the case, especially if the accused person has been acquitted.

Finally the court says that a defendant may raise either absolute or qualified privilege, pointing out that the defence raised in the present case was qualified privilege. What the judge omits to mention is that absolute privilege only applies to statements made by members of parliament during parliamentary proceedings.

The court found that the reporting by the defendant was a “quite” fair and balanced and “largely” accurate account of what had occurred when the matter was going through the courts and that the defendant did not act maliciously or with reckless disregard for the truth. As the report dealt with allegations of child abuse, this was clearly a matter of public interest upon which defendant had a duty to report to the public.

CONCLUSION

The court made rather heavy weather in dealing with what should have been a relatively straightforward matter of whether the newspaper reports were defamatory and, if they were, whether they fell within the protection of the defence of qualified privilege. Once the court found that the newspapers had not based their reports on

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the malicious and false report on the social website, the sole issue was whether its reports of the court proceedings fell within the ambit of the defence of qualified privilege. The newspapers were entitled to report the criminal court proceedings against the plaintiff provided they did so fairly and accurately and in a balanced fashion, and provided that they did not report in a manner that showed that they were actuated by malice in relation to the plaintiff.

In the present case, although the somewhat sensational headlines used did not make it clear that these were mere allegations, the content of the stories made it clear that criminal allegations had been made. The fact that the plaintiff was a public figure was only relevant to establishing the public interest that the public would have on receiving information about this matter. But even if the plaintiff was not a public figure the public would have still had a right to know that she was being prosecuted on serious allegations of child abuse.

The outcome in this case, of course, would have been different if the defendant had simply reproduced the totally false and highly damaging story contained in the social media. By carrying this false story in its newspaper, it would have been guilty of spreading further this scurrilous story and the defence of qualified privilege would not have applied.

A TIMELY AND WELCOME DECISION ON EMPLOYER   
LIABILITY FOR PENSION ARREARS UNDER SECTION 13 (1) LABOUR ACT *[CHAPTER 28:01]*

Case on *Misheck Ugaro v African Banking Corporation*   
SC 298 17 [REF – LC/H/681/16]

BY MUNYARADZI GWISAI1

FACTUAL BACKGROUND

The decision of the Supreme Court in the case of *Misheck Ugaro vs* *African Banking Corporation* SC–298 17 concerning employers’ liability for arrears accrued *viz* pension contributions for their ex-employees is an important decision for the benefit of one of the most vulnerable sections of workers: pensioners. The court affirmed in an order by consent the liability of employers under s 13 (1) of the Labour Act to pay arrears for pension contributions accrued during a former employee’s employment.

In doing so, the court also provided a timely clarification on a matter that has caused much suffering for former employees, as lower tribunals like National Employment Council Designated Agents and labour officers have been declining to hear disputes concerning pension arrears by employees. They declared that they lacked jurisdiction and argued that such disputes did not qualify as unfair labour practices under s 13 of the Labour Act and that the former employees had to sue the pension fund and not their former employers.

Consequently former employees were restricted to initiating action against pension funds in the civil courts. Court action is not only costly but involves cumbersome and sophisticated procedures requiring legal representation which is beyond the reach of most workers and pensioners. Even then, the obstacle that confronted litigants was that the Pension Fund would plead that it could not grant a full pension benefit because the employer had not remitted the necessary contributions.

1. Munyaradzi Gwisai is a registered legal practitioner and lectures in Labour Law   
and Labour Relations, Faculty of Law, University of Zimbabwe, and Briggs Zano   
Working Peoples College.

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This is exactly what happened in the instant case. Appellant was a former employee of Respondent who joined in 2002 and resigned on 31 December 2014. A dispute arose over, *inter alia*, his pension entitlements. Appellant argued that Respondent was in arrears with contributions for the period 2002 to 2009, resulting in undue prejudice to him. In terms of the contract of employment, Appellant was obliged to be a member of the employer-specified pension fund, the African Banking Corporation Zimbabwe Pension Fund. In terms of rule 5.1 of the Fund Rules the employer was obliged to effect deductions equivalent to 6% of the employee’s annual salary and make employer contributions to a total equivalent to 15% of the employee’s salary and remit such contributions to the Pension Fund on a monthly basis. The employer had failed to effect deductions or remit contributions and did so belatedly after the employee’s resignation. A dispute arose as to the pension benefits that the former employee was entitled to; details of which are not relevant for this article.

The employee referred the dispute to a labour officer in terms of s 93 (1) of the Labour Act alleging an unfair labour practice by his former employer. Conciliation failed and the dispute was referred to an arbitrator. The arbitrator ruled in favour of the employee holding that the employer was liable under the Labour Act to effect pension contributions arrears to the Pension Fund for the period in arrears.

The employer appealed to the Labour Court submitting that the award was a nullity because an arbitrator acting under the Labour Act lacked jurisdiction to hear the matter, as the dispute did not qualify as an unfair labour practice under section 13 (1) of the Labour Act. It was argued that the proper party to be sued was the Pension Fund, which was a separate legal entity, and the ex-employer merely an agent for the pension fund.

*MUSARIRI* J upheld the appeal and reversed the award on the basis of two grounds. First, that the arbitrator erred in holding the employer liable for pension claims, whereas the proper party to sue was the pension fund. He held:

The Fund being a legal entity, is itself answerable for pension   
claims made against it. Its Rules clearly say so. Thus the arbitrator   
fell into grievous error when he held the appellant accountable   
instead of the Fund. In the normal course the employer acts as   
the agent for the Fund. Certainly that is so during the currency   
of the employment contract. But once the contract is terminated   
as in casu, the employee should deal directly with the Fund. As

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it turns out the appellant obtained an account from the Fund on   
behalf of the respondent. If the respondent was dissatisfied   
therewith he ought to have confronted the Fund directly.”[page   
2 of the Unreported Judgment].

The second reason was that a former employer was not liable under s 13 of the Labour Act because the section deals with the liability of the former employer concerning wages and benefits upon termination of the employment contract, but does not deal with the liability of a pension fund. He rejected the submission that a former employee had option to sue both the former employer and the Pension Fund. He held:

I pressed the respondent’s attorney to explain why they did not   
deal with the Fund. He sought to argue that the employer and   
the Fund have joint liability. In such scenario the employee can   
opt to claim from either of the two. He referred to section 13 of   
the Labour Act ... However, none of the six subsections was   
cited. My reading of all of them indicates that they deal with   
the employer’s liability concerning wages and benefits upon   
termination of the employment contract. None deal with the   
liability of a pension fund.” [page 2, Unreported Judgment].

Appellant appealed to the Supreme Court citing two grounds. First, that contrary to the judgment of the Labour Court, an ex-employee has the right to sue his ex-employer for failure to remit contributions to a pension fund in terms of s 13(1) of the Labour Act, as such failure amounted to an unfair labour practice. Secondly, that contrary to the Labour Court’s judgment, pensions arrears were elements of terminal benefits that an ex-employee could sue his ex-employer for under s 13 (1) of the Act. The Supreme Court upheld the appeal by consent ordering:

IT IS ORDERED BY CONSENT THAT:

1. The appeal be and is hereby allowed with each party

bearing its own costs.

2. The judgment of the court a quo be and is hereby set

aside.

3. The matter be and is hereby remitted to the Labour Court

for it:

To determine the actual period during which the appellant was

employed by the respondent and in respect of which the respondent was contractually obliged to remit pension contributions to the relevant Pension Fund.

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To compute the exact amount of the contributions payable in respect of both employer’s and employee’s contributions, less the amounts already paid by the respondents for the period of actual employment determined in terms of paragraph (a) above.

The decision of the Supreme Court is significant and welcome for two major reasons: namely, in relation to the *locus standi* of former employees to sue their former employers for pension arrears under the Labour Act and secondly as a guide to the kind of terminal benefits covered under s 13 (1) of the Labour Act.

*LOCUS STANDI* OF EX-EMPLOYEES TO SUE EX-EMPLOYERS UNDER THE LABOUR ACT

The first significance of the Supreme Court decision is that it affirmed that an ex-employee has the right to sue their former employer as regards unpaid or unremitted pension contributions under s 13 (1) of the Labour Act as an unfair labour practice and is not restricted to only suing the appropriate pension fund. Section 13 (1) provides:

13. Wages and benefits upon termination of employment   
1. Subject to this Act or any regulations made in terms

of this Act, whether any person;

(a) Is dismissed from his employment or his

employment is otherwise terminated; or   
(b) Resigns from his employment; or

(c) Is incapacitated from performing his work; or   
(d) Dies;

he or his estate as the case may be, shall be entitled to the wages and benefits due to him up to the time of such dismissal, termination, resignation, incapacitation or death as the case maybe, including benefits with respect to any outstanding vacation and notice period, medical aid, social ,social security and any pension, and the employer concerned shall pay such entitlements to such person or his estate; as the case may be, as soon as reasonably practicable after such event, and failure to do so shall constitute an unfair labour practice.”(my emphasis).

Although an order by consent without reasons, the Supreme Court order effectively affirms earlier decisions that the effect of s 13 (1) of the Act is to render continuation of the employment relationship between the employer and former employee for the specific purposes specified under the section, beyond termination of the contract.

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The continuity of the employer-employee relationship was well enunciated in the case of *Nyanzara v Mbada Diamonds (Pvt) Ltd*2 where it was held:

The relationship of Employer/Employee can loosely be said to   
continue after termination of employment as envisaged in s 13(1)   
of the Labour Act is only for the purposes of giving effect to or   
enforcement of payment of terminal benefits.

The *Ugaro* decision has reaffirmed the above line of cases by the Superior Courts.

SECTION 13 (1) OF THE ACT COVERS BROADER TERMINAL BENEFITS THAN “WAGES AND BENEFITS.”

The second significance of the *Ugaro* case lies in that the Supreme Court has effectively affirmed that the terminal benefits protected under s 13 (1) of the Act are not confined to “wages and benefits” as had been held by the Labour Court. The ambit of terminal benefits covered under s 13 (1) of the Act is broader than wage arrears or benefits which should be paid directly to the former employee as part of her/his terminal benefits. But the section is broader and encompasses other terminal benefits which may not necessarily be paid directly to the former employee but to contributions which the former employee/employer should have paid to relevant third party service providers in terms of the contract of employment. The section specifically mentions *“medical aid, social security and any pension.”* Thus where an ex-employer has failed to remit necessary contributions, the employer commits an unfair labour practise under s 13 (1) of the Act, entitling the ex-employee to initiate proceedings in terms of s 93 (1) of the Labour Act seeking an order compelling the former employer to pay the arrear contributions.

The Labour Court had adopted an unnecessarily restrictive approach to s 13 (1) which subverted the purpose of the section and that of the Labour Act under s 2A (1) and (2). The Supreme Court endorsed the broader purposive approach required under s 2A (2) of the Act. This provides that

2. HH–63–15. See also, *PTC V Zimbabwe Posts Telecommunications Workers Union*   
*& Ors* 2002 (2) ZLR 732 (S) AT 727 D-E; and *African Banking Corporation*   
*Zimbabwe Ltd v Karimazondo & Ors* SC-368-15.

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(2) This Act shall be construed in such manner as best ensures   
the attainment of its purpose referred to in subsection   
(1).

In terms of s 13 (1) of the Act, an employer has a duty to pay its former employees “such entitlements” as are due to him or her, as soon as reasonably practicable after the termination.

The entitlements referred therein are provided at the start of the paragraph, namely,

... the wages and benefits due to him up to the time of such   
dismissal, termination, resignation, incapacitation or death as   
the case maybe, including benefits with respect to any   
outstanding vacation and notice period, medical aid, social   
security and any pension*...*

The employer has an obligation to pay the former employee their other terminal benefits besides the wages. Such benefits may include medical aid, social security and pension benefits. This paragraph must be interpreted in a manner that is reasonable and attains the objectives of the Act. Section 13 (1) is clearly meant to ensure that the former employee gets their entitlements in relation to wages and any other benefits accrued as a result of the contract of employment. Such benefits may include medical aid, social security and pensions.

The overwhelming industrial practice is that for social security or social insurance schemes, it is not the employer who provides the direct benefit but benefits are provided by a third-party service provider, on payment of the necessary contributions and premiums by the member/employer.

Where an employee is entitled or obliged to be a member of such a scheme, his/her “entitlement” or “benefit” is that the employer makes the necessary contributions and remits them to the third-party service provider, so that the employee can subsequently access the benefits provided by the third party. In that case, the employer has a separate and independent liability to that of the third party service provider. The employer’s liability is to remit the deductions it would have made on the employee’s salary, to the third party service provider. The deductions are actually part of the employee’s remuneration.

The liability of the Pension Fund is separate and distinct. It is to provide the benefits in terms of the applicable Fund Rules. A member has a separate and distinct cause of action as a member against the third party service provider if it fails to provide the service. But where one

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has failed to meet their obligations, such as failure to pay the necessary contributions, a member has no right to sue the third service provider for the benefit. He or she has to clean their “dirty hands” by making up to date payments of contributions to the third party service provider.

The above is what the former employee in the *Ugaro* case sought to do by forcing the ex-employer to effect the payments to which it was contractually obliged. The interpretation to s 13 (1) of the Act that had been adopted by the Labour Court of denying such ex-employees *locus standi*, led to absurd and unjust results which were contrary to the clear legislative objective underlying s 13 (1) of the Act. It would allow employers not to pay deducted contributions for pensions, NSSA, medical aid, funeral policies, which duties they have directly under the contract of employment, but the former employee would have no cause of action under the Labour Act to challenge such unlawful conduct by the former employer.

Yet in the case of contributory schemes like pensions, medical aid, funeral schemes and so forth, the deductions made by the employer would be actual deductions on the salary of the employee, which salary is guaranteed under s 6(1) (a) of the Act. But the restrictive position adopted by the Labour Court would not allow the former employee to claim for this as an unfair labour practice under s 13 (1) of the Act. Nothing could be further from the clear intention of s 13 (1) and the Labour Act, in general. Such an interpretation and approach does violence to the established cannons of interpretation of statutes and to the Labour Act in particular.

The cardinal rule of interpretation of statutes is that words must be given their ordinary grammatical meaning except where that meaning leads to an “absurdity so glaring that it could never have been contemplated by the legislature.” 3

Interpreting the word “entitlements” in s 13 (1) as excluding pension contributions deducted from the employee’s salary, would clearly lead to absurd and unjust results to former employees. Even if it was assumed that the term “entitlements” is capable of more than one meaning, the same result would apply by operation of appropriate maxims of interpretation of statutes. In particular, the presumption

3. Venter v R 1907 TS 910 at 915. Also, NEC Catering Industry v Catering and   
Hospitality Industry Workers Union 2008 (1) ZLR 311 (S) at 316B-D; and G E   
Devenish Interpretation of Statutes JUTA 1992 at 177

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that the legislature does not intend that which is harsh, unjust or unreasonable. Where there is ambiguity, or doubt or where more than one interpretation is possible, “it is obvious that the intention which appears to be the most in accordance with convenience, reason, justice and legal principles, should … be presumed to be the true one.”4

The above presumption is consistent and has been codified under s 2A (2) of the Act. One of the specified purposes of the Labour Act is the promotion of fair labour standards. Section 6 provides specified labour standards, which include the right to be paid a wage or in terms of an agreement under the law or an Act.

In *casu*, the employee’s contract of employment provided him with a right to participation in a pension scheme and for the employer to make deductions to be remitted to the appropriate pension fund. The employer breached such duty, not as an agent but a party to the contract and an employer under the Labour Act. It was therefore correctly held liable.

CONCLUSION

It is only right that the Supreme Court in the *Ugaro* case put right a major injustice done against some of the most vulnerable members of society \_ pensioners \_ especially considering the historic injustice that this group suffered at the dawn of dollarization in February 2009, when pension funds and employers made arbitrary and unfair conversions of Zimbabwe Dollar pensions into paltry US Dollar pensions. One hopes that the case marks the beginning of justice for these marginalized members of society.

4. P St Langan Maxwell’s Interpretation of Statutes 1969 at 199. See also, Borcheds   
NO v Rhodesia Chrome and Asbestos Ltd 1930 AD 112 at 121; Dadoo Ltd & Ors   
v Krugersdorp Municipal Council 1920 AD 530 at 552.

ACTIONS AGAINST THE POLICE: UNREASONABLE OBSTACLES   
TO OBTAINING REDRESS

Case Note on *Nyika & Ors v Minister of Home Affairs &*   
*Ors* HH-181-16 (“The Nyika Case”)

BY G. FELTOE, J REID-ROWLAND AND R. MATSIKIDZE

INTRODUCTION

The police force plays an important role in our society. Under section 219 of the Constitution the Police Service’s functions include—   
• detecting, investigating and preventing crime;

• preserving the internal security of Zimbabwe;

• protecting and securing the lives and property of the people;   
• maintaining law and order; and

• upholding this Constitution and enforcing the law without fear or

favour.

All these functions should be executed within the framework of

relevant legislation governing the exercise of these functions and in accordance with the constitutional rights of citizens.

The police are given extensive legislative powers to carry out its legitimate functions. The problem is that their far-reaching powers are open to abuse or misuse and, not infrequently, police officers have abused or misused their powers resulting in serious violation of the rights of citizens.

As pointed out in the *Nyika* case, the police interact with the public on a daily basis and it is typically ordinary citizens who are the victims of violations of their rights arising out of abuse or misuse of police powers. Victims of police abuse will often be seeking redress for violations of some of their most fundamental human rights, such the right to life, liberty, bodily integrity, dignity and protection of their property. The claims may include actions for unlawful arrest and detention, malicious prosecution, unlawful assault, unlawful causing of injury or death, unlawful deprivation or destruction of their property and other human rights violations.1 Given the serious nature of these

1. The shortened prescription period also applies to other legal actions against   
the police (such as delictual actions for injury caused by negligent driving) and   
actions for breach of contract.

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claims, it is vitally important that these matters are dealt with by the courts, the police are held accountable for such abuses and appropriate redress is given to victims.

The aggrieved parties have a legal right to bring delictual claims against the offending police officers and, where the police officers commit the delicts in the course of their employment as police officers, they can also claim against the Ministry in charge of the police on the basis of vicarious liability.2 Suing the individual police officers responsible and making them pay damages acts as a deterrent against such misconduct on the part of police officers. These cases serve to alert the police to the legal consequences of abuse or misuse of their powers and show the public that such misconduct will not be tolerated by the courts.

Although the legal right to obtain redress exists on paper, many victims may not be aware of their right to sue the police and even if they are aware, they may lack the financial resources to engage lawyers to bring actions and may not be able to obtain state legal aid which is limited in its scope. The civic organisations offering legal assistance to victims of police abuse do not have the capacity to offer such assistance to victims all around the country. Victims may try to bring their cases to court without legal assistance but they face often insurmountable obstacles because of ignorance of the complex procedural and technical requirements for such claims.

What the *Nyika* case clearly establishes is that no unreasonable further obstacles should be placed in the paths of litigants seeking remedies for these wrongs. It deals with whether the special legislative provisions stipulating a shorter period of prescription for actions against the police create unfair barriers for persons seeking redress and whether these provisions violate fundamental constitutional rights of litigants.

EXTINCTIVE PRESCRIPTION

The *Nyika* case revolves around an aspect of extinctive prescription. Tsanga J points out that if a debtor successfully raises the defence of

2. Recent cases in South Africa have expanded the scope of liability of the State   
for actions on the part of police officers. For instance, in the case of *K v*   
*Minister of Safety and Security* 2005 (6) SA 419 (CC) a woman was brutally   
raped by three uniformed policemen who had given her a lift. With reference   
to constitutional provisions relating to the functions of the police the   
Constitutional Court found the State delictually liable for the crime committed   
by the police officers.

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“extinctive prescription” in legal proceedings, the claim against him or her is made permanently unenforceable. Once the prescription period has expired the court has no discretion to admit the claim on the basis that the claim is legally well founded and even that there is irrefutable evidence proving the claim, or there were valid reasons why the claim was not brought within the prescribed period. To interrupt the running of prescription requires the service of the summons; the issuing of the summons does not suffice.

The main justifications for setting a prescription period is to create legal certainty and finality in litigation. It encourages claimants to bring their claims in a timely fashion and before the evidence turns stale. It protects debtors from facing claims which have been existed for such a long time that it is unfair to expect debtors to defend themselves against these claims. But extinctive prescription can be a trap for unwary claimants and legal practitioners representing claimants must ensure that the claims are brought before the prescription period expires. Legal practitioners are guilty of actionable negligence if they carelessly allow their clients’ claims to prescribe.3

The periods of prescription for delictual actions are laid down in the Prescription Act [*Chapter 8:11*]. In s 2 “debt” is defined so as to include a delictual claim and then in s 15 the prescription periods for debts are set out. Three years is the usual period for prescription for a delictual action.

SPECIAL PROVISIONS IN POLICE ACT

There are special provisions in the Police Act [*Chapter 11:10*] dealing with the period of prescription for claims arising out of delicts committed by police officers. Section 70 provides that in a civil action instituted against the State or a member of the police force “in respect of anything done or omitted to be done under this Act shall be commenced within eight months after the cause of action has arisen, and notice in writing of any civil action and the grounds thereof shall be given in terms of the State Liabilities Act [*Chapter 8:14*] before the commencement of such action.”

3. See, for instance, *Erasmus Ferreira & Ackermann & Ors v Francis* 2010 (2) SA   
228 (SCA); *Manase v Minister of Safety and Security & Anor* 2003 (1) SA 567   
(Ck); *Moatshe v Commercial Union* 1991 (4) SA 372 (W) *Slomowitz v Kok* 1983   
(1) SA 130 (A); *Manyeka v Marine & Trade Insurance Co Ltd* 1979 (1) SA 844 (SE)

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Under s 6 of the State Liabilities Act [*Chapter 8:14*], 60 days’ written notice must be given of an intention to claim money from the State. The notice must set out the grounds of the claim and, where appropriate and possible, give details of officials involved and have copies of documents relating to the claim attached to it. The 60 days is incorporated into the eight month period under which the claim is to be brought under the Police Act. The courts have the power to condone failure to give the required notice where there has been substantial compliance with the section or where there has been no undue prejudice to the State or to the officer being sued.

THE *NYIKA* CASE

In the *Nyika* casetwo army officers had been badly injured when police officers shot at them, apparently mistaking them for robbers and despite the fact that the army officers had complied with the instruction to get out of their vehicle and raise their hands. The army officers then sought to claim delictual damages from the Minister of Home Affairs4, the Police Commissioner-General and the police officers involved in the shooting.

Summons had been issued but the claim expired as the summons had not been served on the defendants within the mandatory eight month period. The court found that the failure to issue serve summons with the prescribed period was apparently “largely a result of tardiness on the part of their legal practitioner.”

Counsel for the army officers then brought an application in the High Court seeking a declaration that the provisions in the Police Act requiring that the action be brought within eight months and that notice of 60 days be given before commencing action are unconstitutional. Respondents counsel argued that the shortened period of prescription was legally justified and was not unconstitutional.

4. The lawyers for the applicant had originally incorrectly cited the Ministry instead   
of the Minister. Counsel for the respondents raised the issue of the mis-citation   
at the outset of the application seeking a ruling on the constitutionality of the   
shortened period of prescription for actions against the police. The High Court   
took cognizance of the error in citation and altered the citation to read the   
Minister. This was done without applicant’s counsel making a formal application   
for correction of this mis-citation.

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ARGUMENTS OF APPLICANT’S COUNSEL

The applicants argued that not only the eight months’ period was unreasonable but also the 60 day notice period incorporated therein was also unreasonably short.

The applicant’s counsel argued that the justification relied upon for the shortened period of prescription is illogical and untenable and the preferential treatment of the police in terms of the time period for bringing a claim violated the constitutional right to equality before the law and equal protection and benefit of the law (section 56 of the Constitution). Computers and e-governance now allow for efficient handling of cases by large State institutions. There are many other large institutions, such as the Central Intelligence Organisation and big private corporations, which do not have a special prescription protection like that for the police.

Counsel for the applicant argued that the shortened period of prescription was also a violation of the right of access to justice. This right is encapsulated in section 69 of the Constitution which gives the right to have access to the courts and to have their civil rights determined before a court within a reasonable time. Counsel relied heavily on the South African case of *Mohlomi* v *Minister of Defence* 1997 (1) SA 124 (CC). In this case the court had to decide whether a provision obliging claimants to bring claims against the Ministry of Defence within six months incorporating a one month notification period was justifiable. The Constitutional Court decided that this provision infringed the right of access to court because it did not afford claimants an adequate and fair opportunity to seek judicial redress for wrongs allegedly done to them. In reaching this conclusion the court took into account socio-economic conditions in the country, namely poverty, illiteracy, cultural and language differences and the inaccessibility of legal assistance. This meant that for the majority poverty, illiteracy and inequality adversely impacted on the ability to access the law. Legal illiteracy in particular abounds and many people who may have been injured may simply be unaware of their rights in light of limited availability of legal aid. The court held further that the infringement of the right could not be justified in terms of the limitation section of the Constitution because it would be possible to satisfy the State’s legitimate objectives through means less stringent and detrimental to the interests of claimants. The test derived from this case, as applied in later cases, is whether the litigant has the opportunity to exercise the right to judicial redress and whether the limitation is reasonable in terms of time.

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ARGUMENTS OF RESPONDENTS’ COUNSEL

Counsel for respondents argued that the eight month prescription period for actions against the police was reasonable and justifiable and was not unconstitutional. Counsel cited *Minister of Home Affairs* v *Badenhorst* 1983 (2) ZLR 248 (S) at p 253A-B in which Gubbay JA referred with approval to the following observations in an early South African case:

A police constable may have to deal with a great number of   
cases, the details of which would probably be evanescent, and   
if a plaintiff was not under an obligation to bring an action within   
a period, recollection of the proceedings would probably vanish   
from the mind or become obscure; therefore provisions of s 30   
seem to be only reasonable.5

The respondents’ counsel maintained that, because of the large size of the police force and considerable volumes of cases handled by police officers, there were good reasons for ensuring that actions against the Ministry of Home Affairs and police officers were disposed of quickly before memories of the facts of individual cases were forgotten. This justified the shortened period of prescription for such cases.

DECISION OF THE COURT

Tsanga J found that the provision for the shorter period of prescription for actions against the police violated s 69(2) (on the right to a fair hearing before a court within a reasonable time) and s 56 (1) (on the right to equality before the law and equal protection and benefit of the law).

She agreed with the approach in the *Mohlomi* case. In Zimbabwe there was also a right of access to justice. She pointed out that knowledge of the law is necessary to access justice and in Zimbabwe lack of knowledge of the law is widespread and legal aid is limited. The State does little to disseminate legal information and the geographical reach of non-governmental organisations providing legal information is hampered by financial constraints. Put in this context the shortened time frame for bringing actions against the police “can only but deny ordinary people the right to access courts.” She then concluded:

5. *Hatting* v *Hlabaki* 1927 CPD 220 at 223E

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Therefore, if the critical test for reasonableness of a time limit   
such as the eight months in the Police Act, is whether it permits   
sufficient or adequate time to exercise the right of access to   
the court, then undoubtedly for the vast majority of our populace   
who face the challenges alluded to, the resounding answer is   
that it simply does not.

The learned judge pointed out that other legal systems have dispensed with restrictive protections for the police and other State institutions by way of shortened periods of prescription. For instance, following the ruling in the *Mohlomi* case in South Africa the period of prescription for actions against the police was changed to three years by legislation.

The judge therefore decided that there was no reason why the general prescription period for ordinary debts as contained in s 15(d) of the Prescription Act should not govern claims against the police. The 60 notice period, however, allowed the police enough time to respond to the claim and decide whether or not to settle the claim and the provision allows for condonation of the non-compliance with the time period and extension thereof for good cause shown.

Tsanga J found that it is “precisely in the everyday role of police as public servants that ordinary citizens generally encounter challenges with members of the police force which they expect the police to be held accountable for. Moreover, human rights standards have influenced the outlook on time limits as stipulated in the guiding recommendations to the implementation of the International Covenant on Civil and Political Rights to which Zimbabwe itself is a party.”

In more general terms, she pointed out that the arena of constitutional challenges to legislative provisions has tended to be dominated in the past by cases brought by political elites relating to high-level abuses, such as those arising from electoral provisions, public order and security laws and media laws. Those bringing such actions obviously have the capacity to pursue these matters. She says that it the court’s vigilant scrutiny of constitutionally deficient legislation should not be confined to such cases but must encompass cases such as the present one where abuses are suffered at the everyday level by ordinary citizens.

The judge referred this matter to the Constitutional Court in terms of s 175(1) of the Constitution for its confirmation or otherwise of this constitutional ruling. When the matter came before the Constitutional Court for confirmation, the court struck the matter off the roll on the

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basis that the High Court had erred in correcting the erroneous citation of the Ministry instead of the Minister without a proper application being made for the amendment by the applicant’s counsel. The applicant’s counsel then made a successful chamber application before the High Court to correct the mis-citation. The matter has now been referred back to the Constitutional Court and is awaiting a hearing of the matter and a decision.

It is respectfully submitted that the Constitutional Court had also the opportunity to allow for filing of the application for the correction of erroneous citation. The constitutional jurisprudence should always lean towards disposing a matter on merits as opposed to technical aspects. This is precisely the purpose of the provisions of rule 5 of the Constitutional Court Rules which allow departure from the rules in the interests of justice. In this case, clearly the case in question had public benefit and interest. There was no prejudice that would be suffered if the Constitutional Court had allowed the matter to be postponed *sine die* to allow the amendment. The amendment at this point would not prejudice any of the litigants as the Minister had always been represented since the commencement of proceedings. Thirdly, even if there was a prejudice, the importance of the case far outweighed the importance of the case to the litigants and the public.6

GENERAL COMMENTS

The judgment in the *Nyika* case is significant for taking full account of the socio-economic conditions that inhibit ordinary persons from successfully obtaining redress for abuses suffered at the hands of the police.

The unjustifiably shortened period of prescription for actions against the police (whether for abuses or for any other reason) is just one of many barriers faced by ordinary litigants. It must be removed but a lot more needs to be done to ensure that persons who suffer abuse or loss at the hands of the police obtain redress.

A suitable starting point, with regard to abuses, is to ensure that police officers are fully trained on the proper exercise of their powers

6 For criticism of the tendency to disallowing cases from going forward because   
of minor technical irregularities see Musa Kika’s article entitled ÒThe role and   
attitudes of the Zimbabwean Constitutional Court in operationalizing the 2013   
constitution, 2013-2017Ó in the Rule of Law Journal at pages 10-14

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in a manner which does not lead to abuses of the basic rights of persons with whom they interact. The police service must display zero tolerance to such misbehaviour and take firm disciplinary action against all abusers. It should make widely available a far stronger version of the Police Service Charter. The Government should use its country- wide information dissemination capacity to inform aggrieved parties remedies available to them and should prioritise such cases when granting state legal aid. Government must not leave it entirely to civic organisations, such as the Legal Resources Foundation and Zimbabwe Lawyers for Human Rights, to provide the necessary assistance. Finally a proper mechanism must be established for fair and expeditious processing of complaints against the police. This must be done in accordance with section 210 of the Constitution which provides:

An Act of Parliament must provide an effective and independent   
mechanism for receiving and investigating complaints from   
members of the public about misconduct on the part of members   
of the security services, and for remedying any harm caused by   
such misconduct.7

If such a mechanism were established and properly capacitated, it would provide one way of ordinary persons could obtain redress. However, this mechanism must not be used simply to cover up police excesses rather than fairly investigating complaints and providing redress where complaints are well founded.

The police force must also display that it is non-partisan in the way in which it operates in accordance with the constitutional provisions mandating this.8

7. Section 207 of the Constitution includes the police service as one of the security   
services.

8. Section 119 (3) lays down that the Police Service must be non-partisan, national   
in character, patriotic, professional and subordinate to the civilian authority   
as established by this Constitution. Section 208 provides that police officers as   
members of security services must not —

(a) act in a partisan manner;

(b) further the interests of any political party or cause;

(c) prejudice the lawful interests of any political party or cause; or   
(d) violate the fundamental rights or freedoms of any person.

LEGAL INFORMATION

The following provides information on aspects of the Legal System of Zimbabwe.

STATUTES OF ZIMBABWE

The Statutes of Zimbabwe are available on the Law Development Web site [http://www.ldc.gov.zw/statute-law-of-zimbabwe/](http://www.ldc.gov.zw/statute-law-of-zimbabwe/For)

[For](http://www.ldc.gov.zw/statute-law-of-zimbabwe/For) up to date information and commentary on Acts and Bills see the *Veritas Zimbabwe* Web site <http://www.veritaszim.net/>

CASE LAW IN ZIMBABWE

*Law Reports:*

The *Zimbabwe Law Reports* (published by the *Legal Resources*

*Foundation*). These reports from 2015 Part 2 onwards will only be   
available electronically on the Juta Zimbabwe Law Reports site.)

The *Zimbabwe Law Reports* (published by the *Judicial Service*   
*Commission*)

*Unreported judgments*

Zimbabwe Legal Information Institute [https://zimlii.org/](https://zimlii.org/All)

[All](https://zimlii.org/All) judgments on Zimlii are searchable on the home page by subject, judge, parties, court or case number. Judgments are available as follows:

Constitutional Court Judgments 2002 and 2012-2018

Supreme Court Judgments 1983-1987 and 2002X-2018

High Court Harare Judgments 2001-2018X

High Court Bulawayo Judgments 2001-X2018

High Court Masvingo Judgments 2016-X2018X

High Court Mutare Judgments 2018X

There is also a case index and there are case summaries. For case summaries of unreported judgments see also [http://www.lrfzim.com/](http://www.lrfzim.com/case-summaries/) [case-summaries/](http://www.lrfzim.com/case-summaries/) Case summaries for 2010 - 2016

*Veritas*

For up to date information and commentary on important case law developments see the *Veritas Zimbabwe* Web site [http://](http://www.veritaszim.net/) [www.veritaszim.net/](http://www.veritaszim.net/)

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JUDICIAL SERVICE COMMISSION

[http://jsc.org.zw/](http://jsc.org.zw/Court)

[Court](http://jsc.org.zw/Court) judgments for Constitutional Court, Supreme Court, High Court Harare and High Court Bulawayo from 2011-2018

GOVERNMENT LEGAL INSTITUTIONS

Ministry of Justice, Legal and Parliamentary Affairs   
[http://www.justice.gov.zw/](http://www.justice.gov.zw/Departments:)

[Departments:](http://www.justice.gov.zw/Departments:) Policy Legal Research, Law Development Commission, Constitutional and Parliamentary Affairs, Legal Aid Directorate, Community Service, Human Resources, Finance and Administration, Internal Audit, Deeds, Companies and Intellectual Property, Attorney- General’s Office and Zimbabwe Prisons and Correctional Services.   
Ministry of Home Affairs <http://www.moha.gov.zw/>

Ministry of Women’s Affairs, Gender and Community Development

<http://www.women.gov.zw/>   
National Prosecuting Authority

REGULATORY BODIES

Law Society of Zimbabwe [http://lawsociety.org.zw/](http://lawsociety.org.zw/The)

[The](http://lawsociety.org.zw/The) primary duties of the Law Society are to:

• Promote the study of the law

• Contribute, undertake or make recommendations on legal training • Control of admission of new members to the profession   
• Maintain a register of members

• Regulate the profession in respect of continuing training, discipline

and trust accounts

• Represent the profession and articulate its views on various issues

• Promote justice, defend human rights, rule of law and the   
independence of judiciary

• And generally control and manage the legal profession

The membership of the Law Society is drawn from all registered legal practitioners residing in Zimbabwe whether in private practice, in commerce or in civil service.X

Directory of Law Firms and Legal Practitioners http://

[lawsociety.org.zw/Directory](http://lawsociety.org.zw/Directory)

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Council for Legal Education <http://lawsociety.org.zw/AboutUs/>   
Council

This Council enables the Law Society to have full control of the profession fromXtraining, admission to regulationXof the membership in terms of discipline, trust accounting transparency, quality of service and client compensation as well as independence of the profession.

SOME NON-GOVERNMENTAL ORGANISATIONS

Legal Resources Foundation of Zimbabwe <http://www.lrfzim.com/> Zimbabwe Lawyers for Human Rights <https://www.zlhr.org.zw/>   
Zimbabwe Human Rights NGO Forum <http://www.hrforumzim.org/> Centre for Applied Legal Research <http://www.ca-lr.org/>

Veritas Zimbabwe <http://www.veritaszim.net/>

Zimbabwe Women’s Lawyers Association <http://www.zwla.co.zw/> Zimrights <http://www.zimrights.co.zw>

Women and Law in Southern Africa <https://www.wlsazim.co.zw/>   
Zimbabwe Women’s Resource Centre & Network [www.zwrcn.org.zw/](http://www.zwrcn.org.zw/) Justice for Children [www.justiceforchildren.org.zw/](http://www.justiceforchildren.org.zw/)

Childline [www.childline.org.zw/](http://www.childline.org.zw/)

Counselling Services Unit Tel +263 (0)4 773 496, 772 843, 772 883,

792 222, (0) 772 260 378

Zimbabwe Association for Crime Prevention and Rehabilitation of

the Offender

Zimbabwe Association for the Prevention of Crime and

Rehabilitation of Offenders Telephone: +263-(0)4-770046/ 780401-   
3 [Email:Xzacrohab@mweb.co.zw](mailto:Email:Xzacrohab@mweb.co.zw)

UNIVERSITY LAW FACULTIES

University of Zimbabwe Faculty of Law <http://www.uz.ac.zw/>

index.php/law-faculty-contacts

Southern and Eastern African Regional Centre for Women’s Law

which is housed in the Faculty of Law, University of Zimbabwe   
<https://www.searcwl.uz.ac.zw>

Midlands State University Faculty of Law <https://ww5.msu.ac.zw/>   
home/faculties/law/

Great Zimbabwe University Herbert Chitepo School of Law   
[www.gzu.ac.zw/school-of-law/](http://www.gzu.ac.zw/school-of-law/)

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Zimbabwe Ezekiel Guti University <https://www.zegu.ac.zw/>   
Programs/HLLB

LAW JOURNALS PRODUCED BY UNIVERSITY LAW FACULTIES IN ZIMBABWE

*The University of Zimbabwe Law Journal* (in hard copy)

*Midlands State University Law Review* (in hard copy and on ZIMLII

website)

Journal produced by International Commission of Jurists and the Centre

for Applied Legal Research

*Zimbabwe Rule of Law Journal* (in hard copy and on ZIMLII website)

Journal produced by the Zimbabwe Legal Information Institute   
Zimbabwe Electronic Law Journal   
<https://zimlii.org/content/welcome-zimbabwe-legal-information->

institute-website-0   
BOOKS ON ZIMBABWEAN LAW   
*Legal System*

Lovemore Madhuku *An Introduction to Zimbabwean Law* (Weaver Press   
and Friedrich Ebert Stiftung 2010)

Vakayi Chikwekwe *An Introduction to the Legal System of Zimbabwe*   
(VDC Legal Publications Mambo Press Gweru 2016)

*Arbitration*

Caleb Mucheche *Commercial Arbitration Law in Zimbabwe and South*

*Africa*

Civil Procedure

Geoff Feltoe and Ellen Sithole *A Guide to Civil Procedure in the*   
*Magistrates Courts in Zimbabwe* (LRF 1994)

*Commercial Law*

A. Chizikani *Commercial Law in Zimbabwe* (Word and Image

Publications 2010)

R. Christie *Business Law in Zimbabwe* (Juta 1998)

Manase and Madhuku *A Handbook on Commercial Law in Zimbabwe*   
(University of Zimbabwe Publications 1996)

Caleb Mucheche *Commercial Law in Zimbabwe: Cases and Materials* Caleb Mucheche *Advanced Practical Guide to Business Law in*

*Zimbabwe*

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*Company Law*

Caleb Mucheche *Company Law in Zimbabwe Commentary and Legal*

*Solutions for Insolvent Companies in South Africa*

Caleb Mucheche *Company Law Shareholder Rights in Zimbabwe*

Caleb Mucheche *Corporate Governance Law in South Africa and*   
*Zimbabwe*

*Competition Law*

Caleb Mucheche *Competition Law in Zimbabwe*

*Constitutional Law*

Greg Linington *Constitutional Law in Zimbabwe* (LRF 2001)

Justice Mavedzenge and Douglas Coltart *A Constitutional Law Guide*

*Towards Understanding Zimbabwe’s Fundamental Socio-economic*   
*and Cultural Human Rights* (ICJ and Zimrights 2014)

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*Zimbabwe*

*Consumer Law*

Caleb Mucheche *Consumer Law in Zimbabwe*

*Contract Law*

Innocent Maja *The Law of Contract in Zimbabwe* (The Maja Foundation

Harare 2015)

*Conveyancing*

Lloyd Mhishi *A Guide to the Law and Practice of Conveyancing in*

*Zimbabwe* (LRF 2004)

*Criminal Procedure*

John Reid-Rowland *Criminal Procedure in Zimbabwe* (LRF 1997)

*Energy Law*

Caleb Mucheche *Energy, Electricity, Oil and Gas Law in Zimbabwe*

*Ethics and Practice*

Brian Crozier *Legal Ethics: A Handbook for Zimbabwean Lawyers* (LRF

2012)

Theo Gambe The Legal Profession and *Practice Management: a*

*Practical Approach* (2013)

Mary Welsh *Civil Practice Handbook* (LRF 1996)

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*Family Law*

Welshman Ncube *Family Law in Zimbabwe* (LRF 1989)

*Immigration and Human Trafficking*

Caleb Mucheche *Immigration and Human Trafficking Law in Zimbabwe* *Insolvency Law*

Caleb Mucheche *Insolvency Law in Zimbabwe*

*Insurance Law*

Caleb Mucheche *Insurance and Pensions Law in Zimbabwe*

*Investment Law*

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*Labour Law*

Lovemore Madhuku *Labour Law in Zimbabwe* (Weaver Press and

Friedrich Ebert Stiftung 2015)

Munyaradzi Gwisai *Labour & Employment Law in Zimbabwe: Relations*

*of Work Under Neo-Colonial Capitalism* (Labour Centre and   
Institute of Commercial Law)

Caleb Mucheche *Law and Practice at the Labour Court*, 4th Edition   
Caleb Mucheche *Constitutionalism and Contemporary Labour Law*

*Developments in Zimbabwe, South Africa and Namibia: Labour*   
*Broking, Termination on Notice and Sexual Harassment*

Caleb Mucheche *Labour Law Rights Under the Constitution of*   
*Zimbabwe*

Caleb Mucheche *A Practical Guide to Labour Law, Conciliation,*   
*Mediation and Arbitration in Zimbabwe*

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*Negotiations in Zimbabwe*

Caleb Mucheche *Law and Practice at the Labour Court of Zimbabwe* Caleb Mucheche *Commentary on the Labour Court Rules of Zimbabwe* Caleb Mucheche *Law and Practice at the Labour Court Dismissal*

*Remedies in Zimbabwe: Reinstatement and Damages*

Caleb Mucheche *Justiciability of Labour Right to Strike Under the*

*Constitutions of Zimbabwe, Zambia and South Africa*

Caleb Mucheche *Constitutionality of Temporary Employment Services/*

*Labour Broking in South Africa.*

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*Land Law*

Caleb Mucheche *Land Law in Zimbabwe*

*Mining Law*

Caleb Mucheche *Mining and Exploration Law in Zimbabwe*

*Local Government*

Tinashe Chigwata *Provincial and Local Government Reform in*

*Zimbabwe An analysis of the Law, Policy and Practice* (Juta 2018) *Media Law*

Geoff Feltoe *A Guide to Media Law in Zimbabwe* (LRF 2003)

Caleb Mucheche *Media and Journalism Law in Zimbabwe*

*Medical Law*

Geoff Feltoe and Tim Nyapadi *Law and Medicine in Zimbabwe* (Baobab

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Caleb Mucheche *Medical and Health Law in Zimbabwe*

*Sentencing*

Geoff Feltoe *A Guide to Sentencing* (LRF 1990)

*Succession*

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George Karekwaivanane *The Struggle over State Power in Zimbabwe*   
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The following are books produced by or with involvement from staff in the Southern and Eastern African Regional Centre for Women’s Law which is housed in the Faculty of Law, University of Zimbabwe [https:/](https://www.searcwl.uz.ac.zw) [/www.searcwl.uz.ac.zw](https://www.searcwl.uz.ac.zw).

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*Customs and Practices in Southern Africa; Women and Law in*   
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*Primer of WLSA Research Methodologies*, (WLSA, Harare, 1997).

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*Experiences in Women’s Law*, (Tano, Oslo and Mond, Harare, 1998)

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*Delivery System in Zimbabwe*, (WLSA, Harare 2000)

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*Gender Generated Reproductive Crimes of Violence* (WLSA, Harare   
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*Skills, Sexual Maturation and Sanitation: What’s (not) happening*   
*in our schools – An Exploratory Study from Kenya*, (WLC and Weaver   
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(eds) *Human Rights, Plural Legalities and Gendered Realities:*   
*Paths are Made by Walking*, (Weaver Press, Harare, 2007)

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*Approaches to Teaching Research and Analysis*,( Weaver Press,   
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*Economic Growth and Poverty Reduction: A Training Manual*   
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*Policy: A Training Manual for Graduate Studies,* (OSSREA, Addis   
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Stewart, J.E. (ed) 2014 Beyene, F and Nemera, Z., *Gender, Agriculture*   
*and Natural Resources: A Training Manua*l, OSSREA Addis Ababa

Stewart, J.E. (ed) 2014 Kilonzo,S and Magak, K., *Gender, Vulnerability* *and Social Protection: A Training Manual,* (OSSREA, Addis Ababa)   
Stewart J.E, and Katsande. R.KX(2018) We Don’t Know When the Trucks Will Come: Social Theories of Urban Violence in the Global South:   
Towards Safe and Inclusive Cities, co-published by the International   
Development Research Centre (IDRC) and Routledge (New York)

pp 49 – 62

Katsande, R. K, Stewart, J.E and Mandipa, E. Infrastructure as a passive

medium for violence: Mapping Women’s housing entitlements   
through the 2013 Zimbabwe Constitution. In Chirisa, I et al.   
Multidisciplinary Perspectives on Urbanization in Zimbabwe: Past,   
Present and Future. University of Zimbabwe publications (2018)

The following publications compiled by Geoff Feltoe are available electronically on the Zimlii Website <https://zimlii.org/> go to drop down menu “Books”. These books will be regularly updated with new case law and statutory provisions:

*A Guide to Administrative and Local Government Law in Zimbabwe*   
(2017)

*Commentary on the Criminal Law (Codification and Reform) Act*   
[*Chapter 9:23*] (January 2018)

*A Guide to the Zimbabwean Law of Delict* (January 2018)   
*Criminal Defenders Manual* (2016)

*Judges Handbook for Criminal Cases* (2016)

*Magistrates Handbook for Criminal Cases* (2016)