The Zimbabwe Electronic Law Journal

Commentary on Contemporary Legal Issues

2017 Part 1

The Editorial Board of this new electronic journal comprises:

Dr T. Mutangi, Professor L. Madhuku and Dr. I. Maja (co-Chief editors) and Professors J. Stewart and G. Feltoe.

The primary objective of this journal is to post regularly online articles discussing topical and other important legal issues in Zimbabwe soon after these issues have arisen. However, other articles on other important issues will also be published.

The intention is to post at least two editions of this journal each year depending on the availability of articles.

We would like to take this opportunity to invite persons to submit for consideration for publication in this journal articles, case notes and book reviews.

Articles must be original articles that have not been published previously, although the Editors may consider republication of an article that has been published elsewhere if the written authorization of the other publisher is provided. If the article has been or will be submitted for publication elsewhere, this must be clearly stated. Although we would like to receive articles on issues relating to Zimbabwe, we would also encourage authors to send to us other articles for possible publication.

All articles must be typed preferably using 11 point Arial typeface and with 1.15 spacing. Text should be in justified format,

Footnotes should be used rather than endnotes and footnotes must be numbered consecutively.

The basic style to be used for references to books, articles and case law is set out below:

References to books

Maja, I *The Law of Contract in Zimbabwe* (2016) Maja Foundation, Harare.

References to journal articles

Feltoe, G "The press and the law of defamation; achieving a better balance" (1993) Vol 11 *Zimbabwe Law Review* 129

Reference to cases in Zimbabwe

S v Dube 1992 (2) ZLR 65 (S)
Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs N.O. & Ors CC-12-2015

Contents

Have the procedural and evidential rules in criminal cases been properly aligned to the Constitution and are the new provisions on the death penalty for murder satisfactory?

By B. Crozier and G. Feltoe

Introduction

Criminal procedure is the body of rules governing the processes used to determine the guilt or innocence of persons accused of criminal offences. The rules seek to ensure that all accused persons receive a fair trial while at the same time ensuring that, as far as possible, criminals are punished and crime is suppressed. There are also rules of evidence that apply in criminal cases to ensure that only reliable evidence is used to determine criminal liability. In these procedural and evidential rules, the law tries to strike a balance between the rights of persons suspected and accused of crimes, on the one hand, and on the other the interests of society in maintaining law and order.

The 2013 Constitution contains many new provisions that enhance and protect the rights of persons suspected of committing crimes. It places constraints on police powers of search and arrest. It gives rights to those who are arrested and detained and those on trial.

Some of the most important provisions in the Constitution in this context are the following ─

> section 50, which contains a detailed list of the rights of persons who have been arrested and detained;
>
> section 70, which sets out the rights of persons who are put on trial for criminal offences;
>
> section 46, which guarantees the right to life and provides for the death penalty to be imposed in limited circumstances;
>
> section 69(1), which provides for the right to a fair and public trial within a reasonable time before an independent and impartial court.

Some of the most important rights in sections 50 and 70 that needed to be incorporated into the Criminal Procedure and Evidence Act (“the CP&E Act”) are set out below.

Section 50:

A person arrested has the right─

> to be informed at the time of their arrest of the reason for the arrest;
>
> to be permitted without delay to contact, at the expense of the State, their spouse, partner, relative, legal practitioner or anyone else of their choice and to be informed promptly of this right;

to be permitted – this time at their own expense – to consult in private with a legal practitioner and a medical practitioner of their choice and to be informed promptly of this right;

to be treated humanely and with respect for their inherent dignity;

to be released unconditionally or on reasonable conditions, pending a charge or trial, unless there are compelling reasons justifying their continued detention;

to be released if not brought before a court within forty-eight hours of the arrest.

Persons arrested or detained have the right—

to remain silent;

to be informed promptly of their right to remain silent and of the consequences of remaining silent and of not remaining silent and not to be compelled to make any confession or admission;

at their first court appearance after being arrested, to be charged or to be informed of the reason why their detention should continue, or to be released.

Finally, persons who are detained pending trial for an alleged offence and who are not tried within a reasonable time must be released from detention, either unconditionally or on reasonable conditions to ensure that after being released they attend trial, do not interfere with the evidence and do not commit any other offence before the trial begins.

Section 70:

A person accused of an offence has the right—

to be presumed innocent until proved guilty;

to be informed promptly of the charge, in sufficient detail to enable them to answer it;

to be represented by a legal practitioner assigned by the State and at State expense, if substantial injustice would otherwise result; and they must be informed promptly of this right;

to remain silent and not to testify or be compelled to give self-incriminating evidence.

In any criminal trial, evidence that has been obtained in a manner that violates any provision of the Declaration of Rights must be excluded if the admission of the evidence would render the trial unfair or would otherwise be detrimental to the administration of justice or the public interest.

The Criminal Procedure and Evidence Amendment Act (Act 2 of 2016) (“the Amendment Act”) has made several changes to the procedures to be used in the investigation and trial of criminal cases and to some of the evidential rules used in criminal cases. The principal aim of these amendments, as stated in the explanatory memorandum to the Bill presented in Parliament, was to align the CP&E Act with the Constitution.

This article explores the extent to which the Amendment Act has successfully altered the procedural and evidential rules so as to conform to the Constitution. It will establish that, although some attempt has been made to reflect the constitutional provisions, there are many areas where the Amendment Act has failed to align the rules with the Constitution and that in some areas its provisions go contrary to the Constitution.

ARREST

Restrictions on power of arrest

Section 25(1)(b) of the CP&E Act prevents police officers below the rank of assistant inspector from arresting people suspected of committing any of the serious crimes specified in the Ninth Schedule to the Act, unless the officers have obtained permission from an assistant inspector or more serious officer. It is a mystery why such a provision was put into the Act in the first place: if a police constable or sergeant is unable to form a reasonable suspicion as to whether someone is committing a crime, even a serious one, then he or she should not be in the Police at all. The Amendment Act should have repealed this provision.

Use of force when arresting

The Amendment Act replaces section 42 of the CP&E Act with a new section intended to clarify the circumstances in which the Police and others may use force in order to arrest people. The new section says that "for the avoidance of doubt" the use of lethal force — i.e. force that kills a person — is legal only in certain circumstances, i.e. if the force is necessary to defend someone, or if there is a substantial risk that the person to be arrested will escape and cause death or serious injury to someone, or if the person to be arrested is likely to cause grievous bodily harm to others.

Under section 86(3) of the Constitution the right to life is sacrosanct. No law may limit it. The law cannot allow the killing of a human being in any circumstances whatever except in execution of a death sentence lawfully imposed by a court. However difficult it may be for police officers who have to arrest violent criminals, that is the law and they must obey it. This new section is unconstitutional.

Reasonableness of arrest

The CP&E Act sets out circumstances in which police officers and others are authorised to carry out arrests — for example, they can arrest anyone who is reasonably suspected of committing a crime, or who commits a crime in their presence, and so on. Nowhere does the CP&E Act say that an arrest must be reasonable, i.e. that although a police officer is authorised by the Act to make an arrest he or she may do so only if it is reasonable to arrest the person concerned. Our courts have said this repeatedly – see for example *Muzonda* v *Minister of Home Affairs & Anor* 1993 (1) ZLR 92 (S) and *Botha* v *Zvada & Anor* 1997 (1) ZLR 415 (S) at 418G. The CP&E Act should have been amended to include a provision to this effect so that police officers are made aware of the limits of their powers of arrest.

Information to be given to arrested persons

Section 50(1) of the Constitution provides that anyone who is arrested must be told of the reason for the arrest, of their right to remain silent and of their right to contact a relative, lawyer

or other source of help. The Amendment Act inserts a new Tenth Schedule in the CP&E Act which helpfully sets out a form of words to guide police officers in explaining their rights to arrested persons. The Amendment Act also inserts a new section 385A permitting arrested persons, at the State's expense, to contact their relatives, advisers and other sources of help, in accordance with section 50(1)(b) of the Constitution.

Right to remain silent

Under sections 50 and 70 of the Constitution, people who have been arrested and detained, and accused persons in criminal trials, have a right to silence. Section 50(1) explicitly provides that a person arrested or detained has the right to be informed promptly of his or her right to remain silent and of the consequences of remaining silent, and of not remaining silent, and not to be compelled to make any confession or admission.

This means that if they remain silent when being questioned by the Police, or if at their trial they refuse to outline their defence or give evidence, adverse inferences – that is inferences that they are guilty – cannot be drawn from their silence because they are exercising their constitutional right. If, however, the State establishes a *prima facie* case against the accused during a trial, the accused or his lawyer may be wise to put up a defence or risk being convicted. But the court cannot regard the accused person's silence, *in itself*, as indicating guilt.

In the CP&E Act as it stands—

> If suspects refuse to answer questions put to them by the Police, adverse inferences can be drawn from the refusal [section 257].
>
> Before evidence is led in a criminal trial, accused persons must outline their defence; if they fail to do so, adverse inferences can be drawn from the failure [sections 66 and 189].
>
> If accused persons decline to give evidence in a criminal trial, they may be questioned by the prosecutor, and the court may draw adverse inferences from their failure to answer the questions satisfactorily [section 198]
>
> If suspects are forced or tricked into confessing their guilt and, as a result of the confession, the Police find evidence against them – for example, if they are forced to show the Police where they hid stolen property – their confession cannot be revealed at their trial because it was not made voluntarily, but the Police can tell the court that they found the evidence as a result of what the suspects told them [section 258].

All these provisions are inconsistent with the constitutional provision guaranteeing the right to silence. They should have been amended or repealed by the Amendment Act, but the Act has not altered them.

Bringing persons before court within forty-eight hours

Section 50(2) and (3) of the Constitution provides that an arrested or detained person must be brought before a court of law as soon as possible but not later than forty-eight hours after the arrest or detention. The forty-eight hour upper limit applies whether or not the period ends on a Saturday, Sunday or public holiday. If the person is not brought before a court within this period the person must be released immediately unless the detention has earlier been extended by a

competent court. Here the Amendment Act has properly aligned the CP&E Act with the constitutional requirement. This was done by section 9 of the Amendment Act which amends section 32 of the CP&E Act.

Detention without arrest

Section 11 of the Amendment Act gives police officers, in the exercise of their "socially protective function", a power to apprehend people who are found drunk or apparently mentally disordered and to detain them for up to twenty-four hours before releasing them without charge. This provision, though probably well intentioned, may cause problems.

First, it is not clear what "socially protective function" the Police have, apart from combating crime, and this needs to be clarified. Secondly, the Police already have power to arrest persons who are found drunk in public [section 116(1)(k) of the Liquor Act] or who, whether drunk or not, refuse to leave land or premises when asked by the occupier to do so [section 132 of the Criminal Law Code]. And the Police have adequate powers under the Mental Health Act to apprehend mentally disordered people and get them treated in a health institution. So it is not clear what real purpose the new provision will serve. Furthermore, the main function of the Police is to enforce the law. Drunkenness in public is a crime under the law, and people who break the law should be arrested and charged according to law rather than detained administratively.

Persons seeking to contact arrested persons

The new section 385A which section 44 of the Amendment Act inserts in the CP&E Act obliges officials responsible for detaining arrested persons to tell their relatives, advisers and other interested parties if they make an enquiry, where and why those persons are being held. However, the new obligation is imposed only on the officials who are holding the arrested persons, so lawyers who want to find out where their clients are being held will have to search unaided until they locate the right place, and only then will they find officials who are obliged to reveal that the clients are indeed being held at that place – but only if those officials are asked about the arrested persons.

It would have been better if a more general obligation had been imposed on senior police officers at a central point to reveal the whereabouts of detained persons.

Warrants of arrest: who may issue warrants

Section 33 of the CP&E Act is amended by section 9 of the Amendment Act so as to prohibit justices of the peace who are police officers from issuing warrants of arrest. This is a welcome amendment because it will prevent one police officer from issuing a warrant for a fellow police officer.

Warrants of arrest: reasonable suspicion

The amendment to section 33 of the CP&E Act does not require persons who issue warrants to have a reasonable suspicion that the person named in the warrant is guilty of an offence; under the section at present, they need merely be told by the person applying for the warrant that he or she has a reasonable suspicion.

This is unconstitutional as the person issuing the warrant must himself or herself have a reasonable suspicion that the person whose arrest is sought has committed an offence.

Warrants of arrest: bringing arrested persons to court

As pointed out earlier, section 50(2) of the Constitution states that anyone who is arrested for an alleged offence must be brought before a court as soon as possible and in any event within 48 hours. Section 8 of the Amendment Act inserts a provision to this effect in the CP&E Act (it is the new section 32(3) of that Act) but, although the provision is couched in general terms, section 32(3) of the CP&E Act deals with arrests without warrant, and the provision can be construed as applying only to such arrests, not to arrests carried out on the authority of a warrant of arrest.

No equivalent provision has been inserted in sections 33 to 38 of the CP&E Act, which deal with warrants of arrest. Such a provision should have been inserted into one of those sections, to guide police officers.

BAIL

Section 50(1)(d) of the Constitution provides that anyone who is arrested must be released unconditionally or on reasonable conditions, i.e. on bail, “unless there are compelling reasons justifying their continued detention”. The Constitution does not define “compelling reasons” but the Amendment Act tries to do so by reference to sections 115C(1) and 117(2) of the CP&E Act as amended by section 28 of the Amendment Act. In effect, “compelling reasons” are equated with the reasons which since 2006 have justified a court in refusing bail in the interests of justice. These grounds are:

That the accused person is likely, if released:

> to endanger the safety of the public or of an individual;
>
> not to stand trial or appear to receive sentence;
>
> to try to interfere with the evidence; or
>
> to “undermine or jeopardise the objectives or proper functioning of the criminal justice system” (whatever that means); or
>
> that in exceptional circumstances the release of the accused will disturb public order or undermine public peace or security.

Not all these grounds are “compelling” as envisaged by the Constitution. To the extent they are not, they are unconstitutional.

In section 28, the Amendment Act requires an arrested person who is charged with certain serious crimes to satisfy the court that there are compelling reasons for his or her release, whereas it is clear from the Constitution that the prosecution should establish compelling reasons for detaining the person.

The shifting of the onus of proof in this regard is unconstitutional.

The Amendment Act does not touch sections 32(3a) and (3c) and 34(4) of the CP&E Act, which prohibit a court from granting bail for 21 days to persons who have been arrested for serious offences.

These sections are manifestly unconstitutional – the fact that a person has been arrested on suspicion of committing a serious offence is not in itself a compelling reason for denying him bail. The sections should have been repealed.

SEARCH AND SEIZURE OF PROPERTY

Power of search and seizure

In regard to the powers of the Police to search for and seize articles that constitute evidence or that have been used to commit crimes, the Amendment Act makes several changes:

Section 50 of the Act is amended to prevent police officers who are justices of the peace from issuing search warrants. As with warrants of arrest, this will prevent the Police issuing warrants "in-house".

Police officers who conduct searches without a warrant, or enter premises to interrogate suspects and witnesses, will now have to disclose their identities to interested parties; if they do not, they commit a criminal offence [sections 18 and 20 of the Amendment Act]. This, one hopes, will make them more careful to act within their powers.

Police officers who seize articles from arrested persons or from premises they have searched must issue full receipts for the articles that are taken — and if they do not do so they will commit a criminal offence [section 16 of the Amendment Act]. This will make police officers more accountable.

The power of police officers to stop and search people at night are restricted so that the officers are allowed to search only persons whom they reasonably suspect are carrying goods illegally [section 19 of the Amendment Act]. Arbitrary searches, in other words, are no longer permitted.

Procedures for the disposal of seized articles are made more elaborate so as to increase transparency and reduce corruption.

PRIVATE PROSECUTIONS

Section 16 of the CP&E Act provides that no private person can institute a prosecution unless the Prosecutor-General had issued a certificate to the effect that he or she — the Prosecutor-General — declines to prosecute the case. The Amendment Act replaces section 16 with a new one that gives the Prosecutor-General a very wide discretion whether or not to issue such a certificate and prevents companies and other bodies corporate from instituting private prosecutions. This will nullify the decision of the Supreme Court in *Telecel Zimbabwe (Pvt) Ltd* v *Attorney-General* 2014 (1) ZLR 47 (S) where the court held that the Prosecutor-General had to issue such a certificate so long as the private prosecutor could show a real interest in bringing a prosecution, and that companies were entitled to institute private prosecutions.

It is most undesirable that the Amendment Act has overturned a decision of the Supreme Court in this way. Furthermore, abolishing the right of companies to institute private prosecutions effectively denies them access to a court, which is a right guaranteed by section 69(3) of the Constitution. For that reason, the amendment is unconstitutional.

CONTEMPT OF COURT

The Amendment Act leaves intact section 9 of the CP&E Act, which prevents courts from punishing people for contempt of court committed outside a courtroom. Only the Prosecutor-General can institute proceedings against such people in terms of section 9A(2). The section was originally enacted to prevent the High Court from taking action against the present Minister of Finance after he had criticised a decision of that court.

This is an undue limitation on the powers of the courts to protect themselves against abuse, and the Amendment Act should have repealed the section.

TRIAL RIGHTS

Proof of statements made by accused

The general rule of our common law is that if the prosecution wants to prove that an accused person made a confession or other statement, the prosecutor must prove beyond a reasonable doubt that the accused made it freely and voluntarily and without undue influence.

For the most part the CP&E Act as it stands adopts this rule, but in section 256 it makes two exceptions:

The fact that an accused was compelled by law to make the statement does not render it inadmissible.

If the statement has been confirmed by a magistrate before the accused's trial, then it can be handed in at the trial by the prosecutor and it is up to the accused to prove that he did not make it freely or voluntarily.

Both these exceptions are unconstitutional and should have been repealed by the Amendment Act. In regard to the first exception, if a person is compelled to make a statement, whether by compulsion of law or because he or she has been assaulted, the statement cannot be said to have been made freely and voluntarily: see the judgments of the South African Constitutional Court in *Ferreira* v *Levin NO & Ors; Vryenhoek & Ors* v *Powell NO & Ors 1996 (1) SA 984 (CC)*.

As to the second exception, shifting the onus of proof on to the accused violates the presumption of innocence laid down in section 70(1)(a) of the Constitution, and the presumption of innocence is an essential element of the right to a fair trial guaranteed by section 69 of the Constitution. See the South African case of *S* v *Zuma & Ors* 1995 (2) SA 642 (CC) at 659G-I.

Assistance to unrepresented accused

Although section 34 of the Amendment Act obliges judges and magistrates to inform accused persons of their right to legal representation, as required by section 70(1)(f) of the Constitution, the section does not go further and require judicial officers to assist unrepresented accused persons at all stages of their trials by explaining their rights and the options open to them.

This is essential if unrepresented accused persons are to get a fair trial as required by section 69(1) of the Constitution. The Amendment Act should have included such a provision.

Detention of persons who are deaf and unable to speak

People living with a disability that renders them deaf and unable to speak may be unable to conduct their defence properly if they are charged in a criminal court. Section 193 of the CP&E Act provides a drastic way of dealing with them: the judicial officer does not have to decide on their guilt or innocence but can simply order them to be detained in prison indefinitely at the President's pleasure.

Imprisoning a disabled person who is perfectly sane and who has not been convicted of a crime is grossly unjust and violates the person's rights to personal liberty and human dignity conferred by sections 49 and 51 of the Constitution. The Amendment Act should have repealed section 193 of the CP&E Act.

Separation of trials

If two or more people commit a crime together, they are very often tried together in the same trial. Sometimes, however, a joint trial may prejudice one or other of the accused persons – for example, if evidence against one of them is inadmissible against the other – and in that event the court can order the accused to be tried separately in the interests of justice. However, the court can only do so in terms of section 190 of the CP&E Act if either the accused or the prosecutor applies for separation of trials; the court cannot order separation on its own volition.

This can cause injustice, particularly when the accused is not represented by a lawyer and is not aware of his right to ask for a separate trial. The Amendment Act should have amended section 190 to allow courts to order separation without being asked.

SENTENCE

Corporal punishment

In 1989 the Supreme Court declared that sentences of whipping imposed on boys under the age of 18 were unconstitutional in that they were inhuman and degrading (*S* v *A Juvenile* 1989 (2) ZLR 61 (S)). The Government promptly amended the then constitution to allow such punishments to be imposed. The present Constitution does not incorporate this amendment, however, so juvenile corporal punishment – i.e. the whipping of boys – has once again become unconstitutional. The High Court has ruled to that effect, i.e. that corporal punishment is unconstitutional, in *S* v *C (a juvenile)* 2014 (2) ZLR 876 (H) and *S* v *M & Ors (juveniles)* HH-409-15. The Constitutional Court has not yet given its ruling on the question.

The Amendment Act should have pre-empted the issue by repealing section 353 of the CP&E Act, which gives courts power to impose corporal punishment.

The death sentence

Section 48 of the Constitution provides that a law *may* permit the death penalty to be imposed for murder, but only where the murder is committed in circumstances of aggravation. It further provides that the law must permit the court a discretion whether or not to impose the penalty in cases of murder committed in such circumstances and the death penalty may not be imposed

upon a woman or a person over 70 years old or a person who is less than 21 years old when the offence was committed.

Sections 42 and 43 of the Amendment Act amend sections 336 and 337 of CP&E Act to conform to the constitutional provisions by providing that the death sentence may only be imposed by the High Court for murder committed in aggravating circumstance and may not be imposed on a woman, a man older than 70 or a person who was under 21 when the offence was committed.

In addition to the amendments made by the Amendment Act, Part XX of the Schedule to the General Laws Amendment Act, 2016 (Act No. 3 of 2016) repeals section 47(2) and (3) of the Criminal Law (Codification and Reform) Act [*Chapter 9:23*] ("the Criminal Law Code") and substitutes new provisions that provide that the death sentence can only be imposed for murder when committed in aggravating circumstances. The new provisions go on, however, to set out a non-exhaustive list of circumstances that a court must ("shall") regard as aggravating; these circumstances include:

> that the murder was committed in the course of committing another crime such as terrorism, rape, kidnapping or housebreaking, or was connected to any act constituting an essential element of such a crime;
>
> that the murder was one of a series of two or more murders committed by the same person;
>
> that the victim was murdered in a public place in such a way as to endanger other people.

The passing of these provisions effectively re-instated the death penalty for murder, but this was done without any prior debate on whether the death penalty should be retained in Zimbabwe. It is submitted that the provisions should not have been passed until Parliament had fully debated the issue of whether the death penalty should remain as a penalty for murder. The use of the word "may" in section 48 of the Constitution gives a discretion to Parliament to decide whether the death penalty should continue to be used as a permissible punishment for murder. A parliamentary debate on this issue was required, especially in the light of the publicly expressed opinion by the Vice-President responsible for the Ministry of Justice that the death penalty should not be imposed in murder cases.

The General Laws Amendment Act's list of circumstances which courts must regard as aggravating is unconstitutional. The constitution-makers did not attempt to define the phrase "aggravating circumstances" and almost certainly wanted to leave the courts free to determine, on a case-by-case basis, what it means. If Parliament tries to pre-empt the courts in this regard it encroaches on the judicial function and breaches the constitutional principle of separation of powers. Moreover, by laying down a mandatory list of aggravating circumstances, the General Laws Amendment Act suggests – though it does not say so – that courts must impose the death penalty in murder cases where those circumstances are present.

The Act does not make it sufficiently clear that the death penalty is not mandatory − even if those circumstances are present − that the court must still take into account any mitigating circumstances and decide whether, on balance, the death penalty is justified. In other words, by

providing that the death penalty should only be imposed where there are aggravating circumstances, the Constitution envisages that the death penalty will only be imposed where the murder is exceptionally grave or heinous. But even where the murder is exceptionally grave or heinous, there may still be significant mitigating circumstances which justify the court imposing a penalty other than the death penalty.

The amendment should also have contained provisions explicitly laying down that the onus is on the State to prove the presence of aggravating circumstances and to provide that the court must take account of all possible mitigating circumstances that have been pleaded or that have emerged from the evidence in the case.

The only crime for which the Constitution permits the death penalty to be imposed is murder. Hence there is a need to amend the provisions in the Criminal Law Code and other legislation which still allow the death penalty to be imposed for other crimes. These provisions are:

Section 20(1) of the Code, which currently provides that a person convicted of treason can be sentenced to death or to imprisonment for life.

Section 23(1) of the Code, which currently allows the death penalty to be imposed for the crime of insurgency, banditry, sabotage or terrorism where the commission of this crime results in the death of a person. However terrible the crime may be, and however many persons the accused person may have killed, and however aggravating the circumstances, the accused cannot be sentenced to death unless he or she is charged with and convicted of murder.

Section 4 of the Genocide Act [*Chapter 9:20*] which implicitly allows the death penalty to be imposed on anyone convicted of genocide involving the killing of a person [the implication arises because life imprisonment is the penalty for genocide that does not involve killing].

Section 3 of the Geneva Conventions Act [*Chapter 11:06*], which allows the death penalty to be imposed for committing a grave breach of a Geneva Convention.

The General Laws Amendment Act does not touch any of these provisions.

REPORTING OF CRIMES

There are circumstances in which it is difficult or inappropriate to report a crime at the police station nearest to the scene of the crime, but nonetheless the Police generally insist that crimes be reported there rather than at some other police station.

Their insistence can cause trouble and sometimes considerable distress to victims and their families. This is particularly so in the case of rape and other sexual crimes which cause victims immense trauma. The procedures for reporting such crimes must be sensitive to the victims' needs so as to avoid causing them further distress. Currently, however, it is the practice for police officers, at some stations at least, to insist that victims must make their reports to the police stations within whose area the crimes were committed.

The Amendment Act should have amended the CP&E Act to require the Police to be more sensitive to victims of such crimes and to allow them to make their reports at any police station they choose.

CONCLUSION

It is clear from what has been said in this article that the Amendment Act and the General Laws Amendment Act, in so far as it affects the criminal procedure laws, fall far short of aligning the CP&E Act with the Constitution.

Back to Contents Page

A legal analysis of retrenchment and termination of employment under the Labour Laws of Zimbabwe ushered in by the Labour Amendment Act, 2015: simplified, seamless and synchronized termination and retrenchment of employees by employers

By Caleb Mucheche[1]

Introduction

On 17 July 2015, a five member bench of the Supreme Court led by Chief Justice Godfrey Chidyausiku delivered a far reaching judgment in the case of *Don Nyamande and Anor v Zuva Petroleum (Private) Limited*, which upheld the employer's common law right to terminate a contract of an employee on notice for no fault on the part of the affected employee. The aftermath of that judgment saw mass arbitrary sacking of employees on the basis of the common law right of the employer to terminate a contract of employment. It was such indiscriminate and frenzied terminations which led to the legislature enacting the Labour Amendment Act No. 5 of 2015 in an attempt to stop the hemorrhage that arose from the Supreme Court judgment.

Meaning of *Don Nyamande & Anor v Zuva Petroleum* judgment

In its simplest form the import of the Supreme Court judgment in *Don Nyamande and Anor v Zuva Petroleum* was that, at common law, an employer had the legal right to terminate a contract of employment for any employee at any given time even if that employee had not committed any wrong against the employer. The court reasoned that just like an employee had the right to terminate a contract of employment at any time by giving a notice of resignation from such employment, by the same token, an employer also enjoyed the same right to terminate such contract of employment by giving an employee notice of termination. The Supreme Court's decision was based on a startling reasoning that employers and employees are equal in the employment contract.

With due respect, the Supreme Court erred by holding that employers and employees are on an equal footing. In reality, there is inequality between an employer and an employee due to the economic disparity between the two parties and the employee is economically dependent on the employer. It was such a fallacious employer-employee equality based reasoning of the Supreme Court that soon after the *Zuva* Judgment was delivered on 17 July 2015, both Parliament and the President of Zimbabwe moved extremely quickly to pass the Labour Amendment Act No. 5 of 2015. Technically, the Labour Amendment Act No. 5 of 2015 (hereinafter referred to as the 'new Labour Act') reversed the *Zuva* judgment with effect from 17 July 2015.

Labour Amendment Act No. 5 of 2015 and its implications

The advent of the Labour Amendment Act No. 5 of 2015 marked the demise of the employers' unbridled common law right to terminate a contract of employment on notice at any time. In the

[1] Senior Partner and Legal Practitioner at Matsikidze & Mucheche Legal Practitioners, Commercial & Labour Law Chambers, and Dean of Law, Faculty of Law, Ezekiel Guti University, Bindura, Zimbabwe.
Paper presented at a labour seminar held at Cresta Lodge, Harare on 29 July 2016

Zuva case, the Supreme Court judgment gave employers the opportunity to terminate contracts of employment on notice but that short lived prospect was shut down by the Labour Amendment Act No. 5 of 2015. With this enactment, employers no longer no longer have the right to terminate a contract of employment on notice.

In fact, the new section 12(4a) (a)-(d)of the Labour Amendment Act No. 5 of 2015 expressly abolished the employer's common law right to terminate a contract of employment on notice as enunciated by the Supreme Court in the *Zuva* judgment. In terms of section 12(4a) of the Labour Amendment Act No. 5 of 2015, an employer's right to terminate an employee's contract of employment on notice is now strictly limited to **four** scenarios namely; (a) termination in terms of an employment code or, in the absence of an employment code, in terms of the model code made under section 101(9); or (b) the employer and employee mutually agree in writing to the termination of the contract; or (c)the employee was engaged for a period of fixed duration or for the performance of some specific service; or (d) pursuant to retrenchment, in accordance with section 12C. Outside the aforementioned four instances, an employer does not have any legal right to terminate a contract of employment on notice. The common law right that existed formerly in favour of employers to terminate a contract of employment on notice is now a thing of the past as it was abolished by section 12(4a) of the Labour Amendment Act No. 5 of 2015 with effect from 17 July 2015.

The termination on notice in terms of an employment code or the model code means that a registered employment code of conduct, or the national employment code of conduct (model) code, gave an employer with a right to terminate a contract of employment on notice within that relevant employment code or model code. In the absence of an express right of an employer to terminate a contract of employment on notice being provided for in the applicable employment code of conduct, an employer does not have any legal right to terminate a contract of employment on notice in terms of an employment code. It is noteworthy to point out that the model code, that is, the National Employment Code of Conduct, Statutory Instrument 15 of 2006 does not give employers any right to terminate a contract of employment on notice. Suffice to mention that section 5 of Statutory Instrument 15 of 2016 provides for legally permissible grounds upon which an employer can terminate an employee's contract of employment and none of these grounds closely or remotely relates to termination on notice. Thus, in terms of the model code as it currently stands, termination on notice is illegal.

Concerning the second scenario in terms of which termination on notice at the instance of the employer is allowed where the employer and employee mutually agree in writing, it is important to emphasize that there must be a mutually signed agreement between the concerned employer and employee confirming termination on notice. Once the parties append their signatures to the mutual termination agreement, in sync with the legal principle known as the *caveat subscriptor* rule (the person signing beware), both parties are legally bound by the mutual termination agreement. Thus it is vital for the employer and employee to know that the moment they sign a mutual termination agreement, they are legally bound by such a contract. Also it is necessary that the mutual termination agreement be signed by the employer and employee and not some other third parties, agents or proxies, otherwise such a mutual termination agreement can be legally contested.

The third scenario which allows for termination of a contract of employment on notice at the behest of the employer is where the employee was engaged for a period of fixed duration or for the performance of a specific service. This circumstance applies to fixed term contracts of employment and those contracts for some specific service. If an employee is employed for a fixed term contract of employment or on a contract for the performance of some specific service, then the employer has a right to terminate that contract of employment on notice.

The fourth scenario which gives an employer the right to terminate a contract of employment on notice is where the employer terminates such contract of employment pursuant to a retrenchment in terms of section 12C of the Labour Act. The retrenchment procedure has been simplified by the new section 12C of the Labour Act which has created a one stop shop by giving employers the right to retrench employees and also specifying the minimum retrenchment package which employers can pay the affected employees. The new section 12C of the Labour Act applies to the retrenchment of one or more employees unlike the repealed old section 12C of the Labour Act which applied only to the retrenchment of five or more employees. In terms of section 12C (2) of the Labour Act, unless the employer and employees concerned, or their representatives, agree to better terms, the employer has the right to pay the affected employees a minimum retrenchment package of not less than one month's salary or wages for every two years of service as an employee or the equivalent lesser proportion of one month's salary or wages for a lesser period of service.

One size fits all minimum retrenchment package

This minimum retrenchment package is in full and final settlement of such retrenchment. It is worth pointing out that, in terms of section 12C (3) of the Labour Act, should an employer allege financial incapacity and consequent inability to pay the minimum retrenchment package timeously or at all, the employer has the right to apply in writing to be exempted from paying then full minimum retrenchment package or any part of it either to an employment council or, if there is no employment council, the retrenchment board. If the employment council or retrenchment board fails to respond to the request for exemption within fourteen days of receiving the notice, the application is deemed granted.

If the employer succeeds in an application to be exempted from paying the full minimum retrenchment package, the employer can retrench the concerned employees and such employees can leave empty handed. Also due to bureaucracy that normally characterize the operations of employment councils and the retrenchment board, once fourteen days elapse from that date the employment council or retrenchment board receives the employer's written application for exemption, that application for exemption will stand granted by operation of the law as provided for in terms of section 12C(3) of the Labour Act.

Demise/redundancy of the retrenchment board

Works councils, employment councils and the retrenchment board have been rendered white elephants or lame ducks when it comes to retrenchment of employees in Zimbabwe as they no longer enjoy the legal power to approve or not to approve the retrenchment of employees. Under the former retrenchment law, the retrenchment board was the final arbiter on whether or not to approve the retrenchment and the applicable package. In the past, a retrenchment

process could be long and cumbersome but under the new law, it has been made simple and fast.

In the same vein, the retrenchment board now has a limited say on the retrenchment package as its role is now confined to dealing with applications for exemptions in default of employment councils as provided for in terms section 12C(3) of the Labour Act. There is no longer a need for employers to seek any approval of retrenchment as that approval is already given in terms of section 12C of the Labour Act. Those employers who approach the retrenchment board other than in circumstances of applying for exemption from paying the minimum retrenchment package under section 12C(3) of the Labour Act, are not legally obliged to do so but simply do so out of courtesy or a mere formality. One can jokingly say that the new section 12C of the Labour Act "… retrenched" and sidestepped the retrenchment board". Operationally, the retrenchment board was dethroned except for the very limited role on exemptions.

Commonality of compensation for loss of employment via termination on notice in terms section 12(4a) or retrenchment as provided in terms of section 12C of the Labour Act.

In terms of section 12(4b) of the Labour Act:

> "… where an employee is given notice of termination of contract in terms of subsection (4a) and such employee is employed under the terms of a contract without limitation of time, the provisions of section 12C shall apply with regard to compensation for loss of employment."

The meaning of section 12(4b) of the Labour Act is that a permanent contract of employment/contract of indefinite duration/contact without limit of time can easily be terminated on notice by the employer in terms of section 12(4a) of the Labour Act but the employer must compensate the affected employee by paying him/her the minimum retrenchment package provided for in terms of section 12C (2) of the Labour Act. Thus, practically speaking, job security no longer exists in Zimbabwe. as it is now so easy for employers to terminate permanent contracts of employment by simply paying the affected employees the minimum retrenchment package stipulated in terms of section 12C(2) of the Labour Act.

If the employer terminates a contract of employment on notice as stated in section 12(4a) of the Labour Act and the employee was not employed on a permanent contract of employment, that employee is not legally entitled to any compensation for loss of employment which is entrenched in terms of section 12(4b) of the Labour Act. There is a nexus between the compensation for loss of a permanent contract of employment and retrenchment under sections 12(4a) and 12C of the Labour Act in that both attract payment of the minimum retrenchment package. Retrenchment is now the easiest method for employers to terminate contracts of employment such that employers are likely to forgo going through costly and arduous disciplinary hearings for misconduct by simply resorting to termination on notice in terms of section 12(4a) of the Labour Act.

Conclusion

In conclusion, the previously watertight legal provisions restricting termination of contracts of employment in Zimbabwe have been watered down by the enactment of the new Labour Act.

Employees are now at the mercy of employers in so far as termination of contracts of employment is concerned. There is need to effect further amendments to our labour laws to protect both employers and employees from abuse.

Back to Contents Page

The rules of civil procedure in the Magistrates Courts of Zimbabwe: When rules of civil procedure become an enemy of justice to self-actors

By Rodgers Matsikidze[1]

Introduction

This article is largely based on my M. Phil thesis submitted in 2014 and which I intend to publish in full in the near future.[2] The findings from the empirical study show a gloomy picture on access to justice by self-actors. The statistics of self-actors failing to access justice paints a picture of the sun setting as opposed to rays of the sun rising.[3] The self-actors' journey to access justice seems long and arduous and requires many reforms in terms of the civil procedure in the Magistrate Court. A number of scholars have written extensively with regard to the possible solutions to the problem of access to justice through the courts although most of these scholars are Western and North American and they contextualize the access to justice problem within the European context.[4]

In the European and North American context the emphasis is on placing the responsibility of ensuring that everyone accesses justice on the state. These authors look at the problem of access to justice through different filters, hence their solutions are modelled by their perspectives, of which many are resource inclined.[5] A number of scholars believe that the State should provide legal aid to those who cannot afford lawyers but that is unrealistic for Zimbabwean litigants.[6] There are serious problems like lack of adequate water and food that the state needs to prioritize. In other words, the problem is not just the procedure in the courts but poverty is a huge factor, and a decisive one 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;

---

[1] Rodgers Matsikidze is a PhD student with the University of Witwatersrand 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 Machete Legal Practitioners: www.mmlawchambers.co.zw. He is a 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] 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] Rodgers Matsikidze supra note 2 at 140.

[4] See Lord Woolf 'Report on Civil Procedure reform in UK',1994, Also Sir Ruppert 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? Op cit note 2.

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 where it is argued that procedural access ought not to be difficult to attain for self-actors. It demystifies the problem 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.

The theoretical framework providing guidelines for enhancing procedural access to justice is already well established. In England, for example, a framework of eight "basic principles which should be met by a civil justice system so that it ensures access to justice" was 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.
>
> (6) It should be responsive to the needs of those who use it.
>
> (7) It should provide as much certainty as the nature of particular cases allow.
>
> (8) It should be effective: adequately resourced and organised so as to give effect to … the above principles." [10]

The above principles anchor the proposed solutions to the reform of the rules of civil procedure in Zimbabwe. In my M. Phil thesis I suggest a number of approaches and solutions to the growing woes of self-actors.

The solution is home grown initiatives: contextualizing the reform agenda

There is no doubt that the initiatives to improve access to justice in Zimbabwe should be homegrown and they should be linked to the socio-economic context. In other words, they should relate to the self-actors' experiences in the Zimbabwean courts.[11] The majority of self-

[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.
[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, July1996.
[11] See Rodgers Matsikidze, The Civil Procedure in the Magistrates Court of Zimbabwe. A denial of justice to self-actors? op cit note 2 at p105

actors lack knowledge of substantive and procedural law[12] hence any solution should be aimed at ensuring that they fully understand the 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.[13] Self-actors are found not only in the rural areas but also in the urban areas.[14] Although 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]

When in court, self-actors have no one to assist them on procedures that they may not understand.[16] Legal aid cannot be an immediate solution but is needed in the long term. While legal aid plays a fundamental role in enhancing justice in Western countries like USA, Canada and UK, in Zimbabwe it will hardly be a major solution and remains a limited avenue to improve access to justice. Currently in Zimbabwe a few organizations are focusing on providing legal aid and some only focus on specific areas, such as human rights.

Legal aid cannot solve the self-actors' problems due to lack of adequate funding. Moreover, legal aid would 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 answer the problem of the complexity of court procedures which, if addressed, may increase access to court.

Can the introduction of legal literacy for all be achieved?

In the Canadian province of Saskatchewan, a committee on civil law reform recommended a wide spectrum of educative and literacy initiatives, including tuition on the diverse ability to self-expression in a public forum, amongst unrepresented litigants.[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 a 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 to showcase civil procedure might help to clarify some of the key procedural aspects. Although these steps would not bring direct reform to the civil procedure they would increase the legal knowledge of potential litigants. While this approach is a long term solution, it would be a move in the right direction.

Introducing audio and video manuals as instructors to self-actors in court.

---

[12] See Rodgers Matsikidze The Civil Procedure in the Magistrates Court of Zimbabwe. A denial of justice to self-actors? op cit note 2 at,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
[14] See Rodgers Matsikidze, The Civil Procedure in the Magistrates Court of Zimbabwe. A denial of justice to self-actors? op cit note 2 at p89.
[15] See Rodgers Matsikidze, The Civil Procedure in the Magistrates Court of Zimbabwe. A denial of justice to self-actors? op cit note 2 at 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.
[17] See Law Society of Upper Canada Report of 2008, www.lsuc.on.ca accessed 10 April 2011.

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 too big, the other route will be to avail such media for free at every court and public hall. These manual tapes could play continuously to allow litigants to listen to or watch them and they would take potential litigants through every step of procedure. 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.

Alternative dispute resolution services: is it the way to go?

There is a need to establish arbitration and conciliation centres like the current set up 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 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 pro bono lawyers or trained paralegals?

There is need to extend pro bono services to civil cases as well although there could be a challenge to this approach from lawyers in commercial practice.[20] This is 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 lawyers 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 for the client. The paralegal thrust can be useful although, in essence, use of paralegals creates problems of demarcation of representation *vis a viz* the role of a legal practitioner. More so, there are some cases where paralegals may still not adequately represent the self-actor to the same level of competence of a trained lawyer.

Use of customary fora for dispute resolution: going two steps back?

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 were used to solve disputes before 1890 when Rhodesia used the Roman-Dutch legal system and imported procedure. The customary *fora* started from the level of the family head, *dare,*[22] village head to the chief/paramount chief or king. A limitation applies here due to 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

[18] See Labour Act 28.01 sections 93 and 98.
[19] See Labour (Settlement 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 R Matsikidze
[22] *Dare* means family council of elders.

is a danger of cultural biases' due to the application of 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 and 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 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 to draft their court papers properly. The programme caters mainly for family law matters and focuses on women self-actors. The women come for advice and are grouped into various groups depending on the nature of their cases, i.e. like cases are grouped together. If particular groups reach a certain number, they are given a day on which they should come to 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 taught further 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 and, in the area of maintenance, procedures are already simplified. Hence, the procedure in any maintenance case is standardized and parties fill in the details only. This initiative needs to be expanded to identify additional areas of civil litigation that may require forms that can be standardized: a good example would be the eviction process. Claim, or defence, forms can be designed and 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. These forms can be drafted for use up to the execution stage. As ZWLA does, at every court there will be a paralegal or a lawyer who teaches litigants with similar cases on what to do, and how to fill in the forms.

Admittedly, this initiative may not be able to cover 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 reduced level. The self-actors with similar cases would come to court at specified days of the week for assistance.

Redefining the role of the magistrate

[23] Nyamusi-Musembi Celestine, The Urban poor and problems of access to Human Rights: Traditional justice institutions - can they be more effective? Institute of Development Studies, University of Sussex, September 2002.

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 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 the woes of self-actors

This initiative is the most convincing and all encompassing and promoted by scholars such as Cappelletti.[25] The current civil procedure is legalistic and complicated. The procedure does not have any provisions for informality whereas 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 expressed in 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 the 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 comprehend the meaning. Plain English removes some legalese and Latin words, which have no necessity 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 and 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 law experts to spearhead a programme of procedural law and other reforms that can help self-actors end the woes they currently face.

[24] See Rodgers Matsikidze, The Civil Procedure in the Magistrates Court of Zimbabwe. A denial of justice to self-actors? op cit note 2 pp 152-3.
[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.

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 practical manual and be translated in all languages. The manual book should cover the following areas: -

i. The Court itself and its officials

The manual should provide an outlines of the structure of the Court and key officers and their functions including clerk's office, interpreters, Magistrate's office, Messengers of Court's office. This will 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 and 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 with regard to the jurisdiction of the court. In particular, the meaning of jurisdiction, monetary or otherwise. The manual should give examples of cases that ought to be brought before the Magistrates Court.

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; and examples with regard to possible defenses that can be brought in court. There could also be cartoons to illustrate the same, in graphic 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 their rationale explained. This would aid the self-actor to know what ought to be done in the next step of their case. 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 and it should provide for the frequencies of case follow-ups. 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 often made by self-actors.

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 office 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. At this juncture it would be advisable to caution 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 (who spent four years studying those Rules) 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 and 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 and the costs of running the court are naturally reduced. The costs are reduced 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 such as the names of the parties, their addresses, and 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 and it 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 the complex legal terminology is alien to self-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 – which 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

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

b) Summons stage

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

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 be sold in stationers or 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 in 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 stage[29]. 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 out.[30]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 as well. Hence, no need for the discovery stage. The summons should have all documents sought to be relied upon attached to it.[31] After 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 as *Additional Essential***.**

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

[27] Order 10 of the Magistrates Court (Civil) Rules,1980
[28] Order 11 and 12 of the Magistrates Court (Civil) Rules,1980
[29] See Order 18 of the Magistrates Court (Civil) Rules,1980
[30] See Order 12, 14, and 16 of the Magistrates Court (Civil) Rules,1980
[31] See Order 18 of the Magistrates Court (Civil) Rules,1980

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*.

Trial Stage

During the trial stage, the procedures should also be simplified. Parties should be allowed to ask questions in vernacular and 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 the forms to be completed. Furthermore, the fees for enforcement should be reasonable or self-actors should be allowed to pay in installments for their judgments to be enforced.

The simple procedure suggested above would help greatly in making the system cheaper and friendly to self-actors. Even for lawyers, 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.

Application Procedure

The application procedure should be simplified. There should be prescribed forms and affidavits as 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 seek. There is no form of what the affidavit entails.[33] The court should then have discretion after filing of the opposition to the application by the 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]

[32] See Order 19 of the Magistrates Court (Civil) Rules,1980
[33] Order 22 of the Magistrates Court (Civil) Rules,1980
[34] Order 22 Rule2 Magistrates Court (Civil) Rules,1980

Conclusion

It is my view that 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 great resources.

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 been 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 avail access to self-actors. The right of access to court is a right that unlocks other rights and should be enhanced forthwith.

Bibliography

Articles and books

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

Lord Woolf, 'Report on Civil Procedure reform in UK', 1995

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

Sir Ruppert Jackson's Report on UK Civil Procedure, 2013

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

Buhai Sande L, 'Access to Justice for Unrepresented Litigants: A comparative perspective' (2009) *Loyola of Los Angeles Law Review*, 42.

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*, (1998) American Judicature Surly, USA.

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

Galanter M, '"Why the Haves" come out ahead: Speculation on the limits of legal challenge' (1974) Vol 9, No 1, *Law and Society*

Law Society of Upper Canada report of 2008, www.lsuc.on.ca accessed 10 April 2011.

Maru Vivek, *Between Law and Society − Paralegals and Provision of Primary Justice Services in Sierra Leone*, Open Society Justice Initiative, New York, 2006.

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.

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.

Statutes

Constitution of Zimbabwe, 2013

Magistrates Court (Civil) Rules, 1980

Labour Act [*28.01*]

Labour (Settlements of Disputes) Regulations, SI 217 of 2003

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

By Caleb Mucheche[2]

Introduction

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

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

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

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

[1] Paper presented at Great Zimbabwe University, Masvingo on 29 September 2015

[2] LLB(Hons) UZ, LLM Labour Law - Legal Practitioner/Labour Specialist/Arbitrator/Senior Partner at Matsikidze and Mucheche Legal Practitioners, Commercial and Labour Law Chambers

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

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

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

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

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

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

Exposure of employees under the termination on notice legal regime

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

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

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

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

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

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

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

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

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

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

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

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

Minimum retrenchment package likely to be the maximum in reality

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

time whereas those who have been employed for a short duration are susceptible to get paltry 'crumbs' packages. The newer workers are left without protection as their jobs are not secure and if they get terminated on notice, they will not get anything meaningful out of the minimum retrenchment package.

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

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

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

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

Statutory right to termination on notice an open option to employers

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

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

for potential abuse of the right to terminate a contract on notice. When a provision in a contract or employment code lends itself to abuse, there is probably something wrong with the provision to start with. There is need to plug such loopholes.

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

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

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

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

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

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

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

before the law and unjustified discrimination which is an affront to section 56 of the Constitution of Zimbabwe.

Unpacking the minimum retrenchment package

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

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

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

Powers of labour officers to make binding rulings and potential abuse

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

The party against whom the ruling is made is therefore only entitled to challenge the confirmation of such a ruling before the labour court. It would appear, however, that the obligation to comply with the ruling only arises after confirmation. Therefore, the right of appeal

[4] Unless the termination is disciplinary and has been made in terms of the law.
[5] Where this is allowed under the relevant employment code
[6] Retrenchment

is not really necessary considering the fact the party against whom the ruling is made can still oppose its confirmation. However, it seems the one in whose favour the ruling is made is at a disadvantage. Without this right of appeal, it is difficult to see how the party can seek a variation of the ruling so that it satisfies them. It appears once the order is made, the party in whose favour it is made is put in an untenable position should he wish to have it varied so as to be more favourable. The section does not seem to allow the party in whose favour the award is made the right to intervene in the confirmation process. This is particularly important considering the fact there is no time line within which the application for confirmation must be made. What this means therefore is that a party may have to apply to a court for a *mandamus* to have the labour officer make the application. This makes the whole concept of speedy justice under section 2A meaningless.

Challenges with the new powers of labour officers

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

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

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

[7] That is where the ruling is confirmed

Mandatory powers of labour officers and counter productivity

Another aspect relates to subsection 93 (5b) being worded in the peremptory. It mandates an officer to go and register the order. This section does not leave room for the employer and the employee to negotiate a payment plan or just negotiate on how the liability would be disposed of. It leaves no room for the parties to further negotiate in order to preserve relations. The section does not relate to what would happen after the registration is granted in the High Court. Whose responsibility would it be to attend to the execution? Who activates the execution process? Is it the labour officer? Is it the litigant? This remains a grey area. The wording of the subsection (5a) is also peremptory. It does not give the parties the room to settle their dispute without the need of the involvement of the Labour Act.

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

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

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

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

It may be strongly argued that government breached the tripartite agreement with employers and employees (labour and business) by awarding itself powers to make rulings through labour officers and super-imposing such decisions on the other two parties to the tripartite negotiating forum. It is a mockery of the dispute resolution system for government appointed labour officers to make binding rulings on the parties to a labour dispute as they now play the dual and mutually exclusive role of conciliation and adjudication. The issue of conflict of interest will follow

labour officers like an avenging spirit even if cosmetically they can pretend to be neutral. Justice should not only be done but it must manifestly appear to be done.

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

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

Dealing with casualization of labour and fixed term contracts of employment

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

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

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

The new section 63A of the Labour Act is a very progressive provision as it seeks to cut out the rot which was evident in some employment councils characterized by the abuse of employment council funds with impunity. Some employment councils had became a looting ground for some unscrupulous employer and employee representatives who colluded and illegally helped themselves from funds of employment councils in a typical scot free unauthorized borrowing.

[8]SC 10/10
[9]SC 24/14

The absence of stringent financial rules aided and abetted the financial mess in which some employment councils found themselves. This provision will go a long way to curb the rampant abuse by culprits who siphon employment council moneys, and to hold them accountable. The guilty will always be afraid but they should face the full wrath of the law.

Investigation of trade unions and employers organizations by the minister

In terms of the new section 120 of the Labour Act, the Minister is granted far reaching powers to investigate trade unions for vices. At face value, it is commendable if the powers are used to curb abuses at trade unions e.g. abuse of members' funds. There are some trade unions and employers' organizations which are run like a personal fiefdom by a cabal and the Minister is justified to investigate such trade unions to stop any abuses. However, there is a potential of the abuse of the very powers by the Minister as an extension of government to stifle radical trade unionism and that is retrogressive. If the Minister oversteps his/her mandate, it is possible for the affected party to take legal recourse for redress.

Review powers of the Labour Court

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

Conclusion

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

Back to Contents Page

Using the Constitution to Develop the Law of Delict

By G. Feltoe

Introduction

The law of delict is a dynamic branch of the law which has shown itself to be capable of development and adaptation in the light of changing conditions in society. For instance, the concept of negligence has been applied to many new situations arising out of modern industrial and technological developments. Particularly in South Africa, the ambit of legal duty for public authorities in respect of liability for omissions has been broadened based upon the concept of the legal convictions of the community.

This article explores how the constitutional provisions can and should be used to develop and expand the common law of delict. It draws mostly from South African case law in which the courts have relied on constitutional values and fundamental rights guarantees to re-shape certain areas of the law of delict. The Constitution of Zimbabwe[1] contains many values and rights which are identical, or at least very similar, to those in the South African Constitution. The jurisprudence in these South African cases is thus of importance in the development of the law of delict in Zimbabwe.

Judicial development of common law prior to enabling constitutional provision

Prior to the inclusion of a constitutional provision empowering the courts to develop the common law in line with the Constitution, the courts were already taking it upon themselves to develop the common law. In the case of *Zimnat Insurance Co Ltd* v *Chawanda* 1990 (2) ZLR 143 (S) the court said that law in a developing nation must be dynamic and capable of accommodating to change. It said that the judiciary has a vital role to play in moulding and developing the law in light of social and economic change so as to accord with social needs of the country[2].

Zimbabwe constitutional provision on development of common law

The Constitution of Zimbabwe obliges the courts to develop the common law in line with it, delict being a branch of law that is governed primarily by the common law.

Section 46(2) of the Constitution provides that when developing the common law, every court must promote and be guided by the spirit and objectives of the fundamental rights provisions in Chapter 4 of the Constitution. Section 176 provides that the Constitutional Court, the Supreme Court and the High Court have inherent power to develop the common law, taking into account the interests of justice and the provisions of this Constitution. Like the Zimbabwean Constitution, the South African Constitution in s 19(2) provides that when developing the common law, every court must promote the spirit, purport and objects of the Bill of Rights.

Constitutional values and fundamental rights provisions in the Constitution of Zimbabwe

[1] Constitution of Zimbabwe Amendment No 20, 2013

[2] In this case the court extended the Aquilian action for loss of support to cover a situation where a woman in an unregistered customary law union had lost support due to the death of her husband.

Section 3 of the Constitution of Zimbabwe contains the founding values and principles that must be respected. These include the supremacy of the Constitution, the rule of law, fundamental rights and freedoms, the recognition of the inherent dignity and worth of each human being, equality, gender equality and good governance. Chapter 4 contains the fundamental rights provision such as the right to life, the right to personal liberty, the right to dignity and the right to personal security.

Case law in South Africa

Various South African cases are summarised below. These cases show how constitutional values can be used to fortify the arguments in favour of delictual liability.

Loubser and Midgley *The Law of Delict in South Africa*[3] p 33 point out:

> "The [South African] courts have repeatedly emphasised that the [South African] Constitution embodies a normative value system that underpins our law and provides the backdrop against which we must develop the common law. Therefore, the Constitution expresses society's core values and sets basic criteria against which we must test laws and conduct."

Legal duty leading to liability for omissions

The cases summarised below deal with the issue of the extent to which constitutional provisions should be taken into account in deciding whether state officials should be held liable for omissions which have led to harm to private persons. These cases illustrate that, in deciding whether the legal convictions of the community demand the imposition of a legal duty upon the State, important considerations are constitutional values and rights. The cases dealt with below all involve police officers whose action or failures to take action have led to harm being caused to private persons.

The *Carmichele* case

This case illustrates the way in which constitutional provisions can help to shape the law of delict. is. In a Masters Dissertation[4] the author refers to the *Carmichele* case as heralding the birth of transformative jurisprudence.

The summary of this case draws from Loubser and Midgley *The Law of Delict in South Africa*[5] pp 37-40.

X was charged with attempted rape and attempted murder. The investigating officer was aware of X's previous convictions for sexual offences. Despite this, he told the prosecutor there was no reason to oppose bail and the prosecutor did not oppose bail. X was released on bail and a few months later he broke into C's house and attempted to murder her. He was convicted for these

[3] Loubser, M and Midgley, R Eds *The Law of Delict in South Africa* Second Edition (2012)
[4] H.W. Chauke *The Development of the Common Law under the Constitution: Making Sense of Vicarious Liability for Acts and Omissions of Police Officers* Masters Dissertation, University of the Limpopo 2010. http://ul.netd.ac.za/bitstream/handle/10386/580/Research.pdf?sequence=3
[5] Loubser, M and Midgley, R Eds op cit note 3.

offences. C claimed damages against the police and the prosecution for the harm she had suffered.

The Supreme Court of Appeal originally dismissed the claim for damages finding that neither the police not the prosecutor had acted wrongfully as there was no legal duty to act positively to oppose bail. The matter was then taken to the Constitutional Court.[6] The issue there was whether the court should develop the law of delict in this regard in the light of the contention by C that her rights to life, human dignity, equality and security as well as the constitutional provisions on the duties of the police had been violated. In particular, she alleged that the State had a duty to protect women against violent crime and sexual abuse.

The Constitutional Court reiterated that the Constitution is the supreme law and the Bill of Rights applies to all law and that under s 39(2) of the Constitution it provides that when developing the common law, every court must promote the spirit, purports and objects of the Bill of Rights and remove deviations in the common law where these are found to exist. The Court said that it was implicit in C's case that the common law had to be developed in this case beyond existing precedent. The court would consider whether the common law is in need of development and, if it is, in what way it should be developed. It pointed out that the State has positive duties to promote and uphold the spirit, purport and objectives of the Bill of Rights and is obliged not to perform any act that infringes the rights to life, human dignity and the freedom and security of the person.

The Constitutional Court then referred the matter back to the Court of first instance to reconsider the matter in the light of the principles raised by the Constitutional Court. The court of first instance, having heard further evidence, found in C's favour.[7] There was then an appeal to the Supreme Court of Appeal. This court dismissed the appeal and found in C's favour. It accepted that both the police and the prosecutors have a public duty either to oppose bail or to place all relevant and readily available facts before the Court. It found that they had failed in this duty. It referred to the principles it has set out in the earlier decision of *Minister of Safety and Security* v *Van Duivenboden* 2002 (6) SA 431 (SCA) and found that someone in the position of C had no other effective remedy against the State except an action for damages in delict. This remedy would therefore be available unless there were public policy considerations that required that the remedy should not be granted, such as whether in the present case that granting of the remedy would inhibit the police or the prosecution in the performance of their duties. The Court found that in the present case there was no reason to depart from the general principle that the State will be liable for its failure to comply with its constitutional duty to protect C who pre-eminently was a person requiring the State's protection.

In granting the damages, the Supreme Court of Appeal found that the police and prosecution had acted negligently and the harm to C was foreseeable in the circumstances given the proximity of the parties.

The *Van Duivenboden* case

[6] *Carmichele* v *Minister of Safety and Security 2001* (4) SA 938 (CC)
[7] *Carmichele* v *Minister of Safety and Security 2004* (3) SA 431 (SCA) paras 21-22

In *Minister of Safety and Security* v *Van Duivenboden* 2002 6 SA 431 (SCA) under statute the police had power to take measures to deprive an unfit person of a firearm. The police were in possession of information that a person was unfit to be granted the permit but did not take action and the person used the weapon to kill his wife and daughter and to injure a third party. It was held the police owed a legal duty to members of the public to take reasonable steps to act on information in order to prevent harm to members of the public.

In reaching this conclusion, the court said that in determining whether the law should recognise the existence of a legal duty in any particular circumstances is a balancing against one another of identifiable norms. While private citizens might be entitled to remain passive when the constitutional rights of other citizens are threatened, the State has a positive constitutional duty, imposed by s 7 of the Constitution, to act in protection of the rights in the Bill of Rights. The existence of that duty necessarily implies accountability and s 41(1) of the Constitution expressly requires that government be accountable. Where the State officials act in conflict with their constitutional duty to protect rights in the Bill of Rights, the norm of accountability will assume an important role in determining whether a legal duty ought to be recognised in any particular case. Here there was a potential threat which placed in peril the constitutionally protected rights to human dignity, to life and to security of the person.

The present case concerned only with whether police officers who, in the exercise of duties on behalf of the State, are in possession of information that reflects upon the fitness of a person to possess firearms are under an actionable duty to members of the public to take reasonable steps to act on that information in order to avoid harm occurring. The imposition of this legal duty will not disrupt the efficient functioning of the police. There is no effective way to hold the State to account in the present case other than by way of an action for damages and, in the absence of any norm or consideration of public policy that outweighs it, the constitutional norm of accountability requires that a legal duty be recognised. The negligent conduct of police officers in those circumstances is thus actionable and the State is vicariously liable for the consequences of any such negligence.

The *Van Eeden* case

In *Van Eeden* v *Minister of Safety and Security (Women's Legal Centre Trust, as amicus curiae)* 2003 (1) SA 389 (SCA) C, a 19-year-old woman, was sexually assaulted, raped and robbed by M, a known dangerous criminal and serial rapist. M had escaped from police custody through an unlocked security gate some two-and-a-half months before. A instituted an action for delictual damages against the State in a Provincial Division. She claimed that the police owed her a duty to take reasonable steps to prevent C, a dangerous criminal and serial rapist, from escaping and harming her and that they had negligently failed in that duty. The police admitted that at the time of M's escape they had realised that M was a dangerous criminal who was likely to commit further sexual offences; that his continued detention was necessary for the protection of the general public and their personal rights and property; that his escape could easily have been prevented; and that the police regarded escapes from police custody and sexual attacks on women as 'policing priorities'. The Court *a quo* dismissed the appellant's claim on the ground that in the light of *Carmichele* v *Minister of Safety and Security* 2001 (1) SA 489 (SCA) the police had owed the appellant no legal duty to act positively in order to prevent harm.

The appeal succeeded. The Supreme Court of Appeal emphasised that the police have a legal duty to act positively to protect individuals by taking active steps to prevent violations of the constitutional right to freedom and security of person, *inter alia* by protecting everyone from violent crime. The State was also obliged under international law to protect women against violent crime such as sexual assaults. The police had failed in this duty by negligently allowing a known dangerous criminal to escape from police custody. The requirement of special relationship between plaintiff and defendant for imposing legal duty was no longer valid. The criterion in terms of the legal convictions of the community lies in deciding whether an omission must now incorporate constitutional norms, values and principles. This has to be done because the Constitution is the supreme law of the country, and no law, conduct, norms or values that are inconsistent with it have legal validity. This, for legal purposes, makes the Constitution a system of objective normative values. Under the Constitution there was a fundamental right to dignity and the Constitution sought to achieve equality and to advance human rights and freedoms, non-racialism and non-sexism.

The *Hamilton* case

In *Minister of Safety and Security* v *Hamilton* 2004 (2) SA 216 (SCA) the police failed to enquire into the psychological fitness of a person to hold a firearms permit. The applicant, who was mentally unstable, shot and seriously injured the respondent. The respondent sued the police in delict and was granted damages. On appeal, the court found that the police had negligently failed to perform their statutory duty to screen properly the applicant for the firearms permit. In deciding the issue of legal duty, the court took into account the duties imposed by the legislation relating to firearms permits. It also upheld, that under the Constitution, the injured party had an absolute right to protection of his right to bodily integrity and security.

The *Moses* case

In *Moses* v *Minister of Safety and Security* 2000 (3) SA 106 (C) a person detained in a police cell died after being assaulted by fellow inmates. The assault took place between cell inspections which were 25 minutes apart. The police were unaware of the propensity of assailants towards violence and the assailants had not exhibited signs of aggressiveness. The police had limited manpower available and had other duties. In the circumstances the reasonable person would not have done more than the police had done.

Although the court decided that the police were not liable in this case, on the issue of wrongfulness it said that once a person was arrested, the defendant's employees were under an obligation to such a person to perform their duties and functions in a manner reasonable in the circumstances and with due regard to such a person's fundamental rights. The consequence of a person's detention was that she or he was deprived of her or his freedom of movement. Furthermore, that person's capacity to make and carry out her or his own decisions was interfered with. That brought about a heightened duty on the part of the defendant's employees of safeguarding a detained person's interests as one of the factors in the totality of circumstances relevant to the enquiry into wrongfulness.

Legal duty and vicarious liability

The *K* case

In *K* v *Minister of Safety and Security* 2005 (6) SA 419 (CC) the applicant, who was brutally raped by three uniformed policemen who had given her a lift, applied for leave to appeal against a judgment of the Supreme Court of Appeal that held that the respondent was not vicariously liable for the policemen's conduct because, on the application of the standard test for vicarious liability of whether there had been deviation from course of employment, the policemen had deviated from the course of their employment to an extent that they were no longer exercising the functions for which they were appointed or carrying out an instruction of their employer.

One of the grounds of appeal was that the Supreme Court of Appeal had erred in its application of the common law test for vicarious liability; and that if it had not, the test had to be developed as intended in s 39(2) of the South African Constitution. Leave to appeal was granted.

The court held that the overall purpose of s 39(2) was to ensure that the common law was infused with constitutional values. This normative influence had to extend throughout the common law, not only to instances in which the existing rules were clearly inconsistent with the Constitution. Thus the obligation s 39(2) imposed on courts was extensive and required them to be alert to the normative framework of the Constitution not only when some startling new development of the common law was in issue, but in all cases in which the incremental development of the rule was in issue. It held that the protection of the applicant's fundamental rights (to security of the person, dignity, privacy and substantive equality) were of profound constitutional importance. It was part of the duties of every police officer to ensure the safety and security of the public and to prevent crime. These were constitutional obligations affirmed by the provisions of the Police Act.

The court held the principles of vicarious liability and their application had to be developed to accord more fully with the spirit, purport and objects of the Constitution. What this meant was that the existing principles of common law vicarious liability had to be understood and applied within the normative framework of the Constitution, and the social and economic purposes which they sought to pursue. Although in committing the rape, the police officers had deviated from their duties and were acting for their own purposes and not those of the employer, they were simultaneously omitting to perform their duties as policemen.

There were several important facts pointing to the closeness of the connection between the conduct of the policemen and the business of their employer. First, the policemen all bore a statutory and constitutional duty to prevent crime and protect the members of the public. That duty also rested on their employer, and the policemen had been employed to perform that obligation. Secondly, the policemen had offered to assist the applicant and she had accepted their offer. She had thus placed her trust in them. In determining whether the Minister was vicariously liable, the court had to take into account the importance of the constitutional role entrusted to the police and of nurturing confidence and public trust in the police in order to ensure that their role was successfully performed. It had been objectively reasonable for the applicant to place her trust in the policemen. From a constitutional perspective the connection between the conduct of the policemen and their employment was sufficiently close to render the Ministry liable. Accordingly, that the Ministry was vicariously liable to the applicant for the wrongful conduct of the policemen.

Conclusion

The South African courts have relied upon their constitutional provisions when deciding when the State should be delictually liable for inaction or action on the part of State officials. Chauke, in his dissertation, comments that the landmark decisions of the Constitutional Court in *Carmichele v Minister of Safety & Security & Anor* and *K* v *Minister of Safety & Security* represent its first steps forward in the journey of modernizing the law of state delictual liability to remedy the violation of fundamental rights occasioned by acts and omissions of police officers in the discharge of their duties.

The Zimbabwean courts should follow the lead provided by these cases and take full account of constitutional values and rights provisions when deciding cases of this nature.

Back to Contents Page

Strengthening Our Law on Child Sexual Abuse

By G. Feltoe

Introduction

Sexual abuse of children is a terrible social evil. It blights the lives of the child victims, as well as their families, and debases our society.

Young people are especially vulnerable to sexual abuse and exploitation and all possible steps must be taken to protect children against sexual predators who prey upon them. The Constitution defines a child as a boy or a girl under the age of 18 years. Section 81 of the Constitution proclaims that every child has the right to be protected against sexual exploitation and section 19 of the Constitution places an obligation upon the State to adopt reasonable measures to ensure that children are protected against all forms of abuse.

In Zimbabwe there has been an alarming increase in the number of reported cases of child sexual abuse.[1] Economic decline has undermined family structures and conditions of poverty have made children more vulnerable to sexual abuse. Certain cultural and religious practices have also contributed to the high rate of child sexual abuse, especially the practice of child marriage.

Child sexual abuse has completely devastating effects. Victims often feel significant distress and display a wide range of psychological symptoms, both short- and long-term. They may feel powerless, ashamed, and distrustful of others. The abuse may disrupt victims' development and increase the likelihood that they will experience other sexual assaults in the future or become abusers themselves. Sexual abuse can result in HIV infection and other medical problems. Girls may become impregnated, with all the health risks arising from early pregnancy and the social consequences for young girls who give birth.

The offenders are often the very persons who are supposed to care for and protect the children, such as the father of a girl child, a relative, a child minder or a schoolteacher. Those who sexually assault very young children, in some cases even babies, deserve extremely severe punishment.

Main issues covered

In this article;

- I will suggest ways to strengthen the current laws against child sexual abuse and will underscore the need for deterrent sentences for the worst offenders;
- I will propose that we make it compulsory for persons having knowledge of child abuse to report such abuse to the authorities;
- I will emphasise the need for proper detection and enforcement of these laws, using child-friendly investigation and trial techniques;

---

[1] *Hidden in plain sight: Child sexual abuse in Zimbabwe*
http://www.unicef.org/zimbabwe/resources_15420.htm

- I will allude to social and cultural practices that can lead to child sexual abuse;
- I will also recommend that we establish a register of sex offenders to allow the monitoring of such offenders after their release from custody.

The current law

Before we can suggest changes to the current law, we need to know what the current law says.

The two-stage system

Our law presently has a two-stage system for dealing with child sexual abuse. The law differentiates between consensual and non-consensual sexual activity with a child. The crimes of rape[2], aggravated indecent assault[3] and indecent assault[4] cover non-consensual sexual assaults upon a child, but the law provides that a child under 12 is deemed incapable of consenting to sexual activity for the purposes of these crimes.

The maximum sentence for rape and aggravated indecent assault is life imprisonment and for indecent assault it is imprisonment for two years.

I will discuss later the much discussed issue of whether we should raise the age below which the child is deemed to be incapable of consenting.

There is a separate crime commonly known as "statutory rape", but it is also called "defilement" in some countries. The crime of statutory rape[5] seeks to protect children between 12 and 15 from sexual exploitation. A person who engages in sexual activity with a child in this age group with the consent of the child is still guilty of statutory rape as the law lays down that the consent of the child is no defence to this charge. The maximum sentence for this offence is imprisonment for 10 years.

This two-tier approach is followed in many countries but the age group covered by these different crimes varies from country to country. For instance, Britain has set 13 as the age below which a child is deemed to lack the capacity to consent and the crime of defilement in Uganda covers girls up to the age of 18. Additionally, in some countries the penalties for statutory rape or defilement are far more severe than in Zimbabwe. For example, in Zambia the sentence for child defilement is a minimum term of fifteen years imprisonment and a maximum sentence of life imprisonment.[6] In Uganda, the death sentence[7] may be invoked for defilement of a girl under the age of 18.

Rape and aggravated indecent assault

The most serious sexual offences against children are rape and aggravated indecent assault. As already indicated, in Zimbabwe both these crimes currently attract a maximum penalty of life imprisonment.

---

[2] Section 65 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]
[3] Section 66 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]
[4] Section 67 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]
[5] Section 70 of the Criminal Law Codification and Reform Act [*Chapter 9:23*]
[6] Section 138 of the Penal Code of Zambia [*Chapter 87*]
[7] Section 129 of the Penal Code of Uganda [*Chapter 120*]

A male is guilty of rape of a girl child if he has sexual intercourse with or without her consent. If the girl is under the age of 12, the male is automatically guilty of rape as the law deems such a girl to be incapable of giving consent to sexual intercourse.

The offence of aggravated indecent assault is committed when a person, without consent, engages in a penetrative sex act, other than sexual intercourse, with a girl or with a boy such as where a male sodomises a boy or a female forces the boy to have sexual intercourse with her. Again, if the girl or boy is under the age of 12 the other person is automatically guilty of aggravated indecent assault as the law deems such a girl or boy to be incapable of giving consent to the sexual act.

Age of consent in Zimbabwe

It has been strongly argued that the age of consent for the purposes of the offences of rape and aggravated indecent assault is far too low at 12 years and should be raised to 14 or 16.

If we were to raise the age of consent to 16, this would mean that any person who engages in sexual activity with a girl or boy below 16 would automatically be guilty of the crime of rape or aggravated indecent assault as the law would have deemed a child under 16 to be incapable of giving consent to the sexual activity.

This would mean that the criminal offence of statutory rape would fall away as all cases of sexual activity with children under 16 would be covered by the offences of rape or aggravated indecent assault.

Persons in position of authority over the child

The law on rape or aggravated indecent assault in relation to child victims could be strengthened by creating a presumption of absence of consent when the person charged stands in a position of trust or authority in relation to the child. Such a position would usually mean that the child is inhibited from indicating his or her unwillingness or resistance to the sexual act.

“A position of authority or trust” must include the following relationships—

- a parent, step parent or a foster parent, and a child;
- a school headmaster, headmistress or a teacher, and a child pupil;
- a head or staff member in a children’s home, and a child in the home;
- a member of staff of a hospital and a child patient;
- a traditional healer and a child patient;
- a minister of religion and a child parishioner.

Sentencing for rape and aggravated indecent assault

The sentence for rape or aggravated indecent assault upon a girl or a boy must fully reflect the depravity and seriousness of the crime. In a series of cases, our courts have laid down that a person who rapes a young girl must be sentenced to imprisonment for a period of at least 10 to 15 years. In one case in Bulawayo, a child of 3 years was raped by a man in whose care the child was left and the child was infected with syphilis. The man was sentenced to an effective

sentence of 15 years and the appeal court commented that the sentence was on the lenient side.[8]

Long prison terms will always be imposed for rape and aggravated indecent assault and no court would ever impose a suspended sentence or a sentence of community service for these crimes. Even longer prison terms are appropriate is situations where a father rapes his very young daughter.

Vice-President Mnangagwa has come out in favour of minimum mandatory sentences for rape but has said that such sentences should not be applicable where there are special circumstances. The First Lady has even suggested that we should consider castrating rapists. In some countries ─ such as Poland, South Korea and Russia ─ chemical castration is mandatory for sex offenders and in some countries ─ such as Britain ─ sex offenders, particularly repeat offenders, can volunteer to undergo chemical castration. Chemical castration involves an offender taking a course of drugs that will severely decrease the prisoner's testosterone levels to reduce their sex drive.

Statutory rape or defilement

There is another crime which is commonly known as statutory rape. This is also called defilement in some countries.

In Zimbabwean law, if a girl or boy is between 12 and 15 consents to engage in the sexual act, the other person is still guilty of the separate crime of statutory rape and it is no defence to this offence that the girl or boy consented. The maximum sentence for statutory rape is imprisonment for up to 10 years.

The problem with statutory rape is that it covers a range of situations which vary in seriousness. The offence covers both the following situations:

- A 60 year old man persuades a 13 year old girl to have sex with him by offering her money or a gift;
- A boy of 17 and a girl of 15 fall in love and they mutually agree to have sexual relations.

Community service is never appropriate for the first case, but it may be appropriate in the second type of case. There are thus a number of court cases where community service has been imposed in situations similar to the second case.[9]

Where both the parties who are involved in voluntary sexual activity are children under the age of 16, the question arises as to whether it is appropriate to criminalise these teenagers. The General Laws Amendment Bill provides that if both the parties involved are over 12 but below 16 neither party will be charged with this offence unless a probation officer reports that it is

[8] *S v Mpande* HB-43-11.

[9] See, for instance, *S v Tirivanhu* HH 219-2010; *S v Matsiga* HH 227-2011; *Ginandi* HB 55-2012; *S v Everson* HH-461-2012. However, in *S v Dlodlo and Ors* HB-124-2006 the court severely criticised the trial court for sentencing the accused, aged 20, to perform community service at the same school where he had had illegal sexual relations with a 14 year old girl.

appropriate to charge one of them with the offence. South Africans have a different approach to this matter. They recently amended their legislation on sexual offences to provide that if both parties are children they are not criminally liable.

If we create a mandatory prison sentence for statutory rape this sentence would have to be imposed in both these cases. It would be preferable to create separate crimes involving clear situations of sexual exploitation by sexual predators.

As in South Africa and England we should have various separate offences with very heavy penalties to cover exploitive situations. These should include—

- The offence committed by a person who induces or influences a child to agree to engage in the sexual act by paying or promising to pay the child money or provide the child with some other gift or reward or benefit.
- The offence of a person in a position of authority or trust having consensual sexual activity with a person in his or her care such as a teacher engaging in sexual activity with a pupil;
- The offence of trafficking children for prostitution;
- The offence of causing a child to become a prostitute;
- The offence of involving a child in child pornography;
- The offence of distributing child pornography;
- The offence of sexual grooming of a child, which offence will punish a paedophile who entices or persuades a child to engage in a sexual act with him by using the Internet to communicate with the child.

Compulsory reporting of sex abuse

Child abuse is often hidden away within the home and we need to take all possible steps to detect such abuse and protect the abused children. Children themselves must continue to be educated on their rights and be encouraged to come forward to report abuses to the authorities. Organisations such as Childline provide a free counselling service for distressed children.

We also need to adopt measures to increase the reporting of child abuse. It is suggested that we should adopt strategies similar to those in South Africa. In South Africa, it is a criminal offence for a person who has direct knowledge that such abuse is occurring not to report this to the authorities. Additionally, persons including doctors and nurses who have reasonable grounds for believing that child sexual abuse is taking place must report this to the authorities. Similarly, school teachers should be trained about the behavioural warning signs of child abuse so that they can take appropriate action.

Conviction rates in child sex abuse cases

We need to maximize conviction rates in child sexual abuse cases. Allegations of child sexual abuse need to be carefully and sensitively investigated and the vulnerable witness provisions need to be used when offenders are being tried. The use of DNA evidence would greatly help in the identification and conviction of culprits, as well as exonerating the innocent.

National register of sex offenders

A national register of sex offenders should be established, to contain details of all sex offenders against children; to monitor sex offenders upon release from prison to ensure that they are not employed in institutions where there are children, such as schools; and to keep them under surveillance to try to prevent them from re-offending.

Conclusion

Our criminal laws that deal with the evil of child abuse must be strengthened; these laws must be rigorously enforced; and the courts must impose deterrent sentences upon child sexual abusers. However, we also need to confront the societal factors that are leading to the upsurge in cases of child abuse. A good starting point is enforce effectively the judgment in the Constitutional Court in *Mudzuru & Anor v Minister of Justice, Legal and Parliamentary Affairs & Ors* CC-12-15 which prohibited all future child marriages and by engaging in an extensive public education campaign to disseminate information about why child marriages are no longer acceptable in our society and constitute a form of child abuse.

Back to Contents Page

Strengthening legislations as a way to combat sexual harassment at workplace and in universities in Zimbabwe.

By R. Matsikidze[1]

Introduction

Sexual harassment may easily be put in the same category with rape but in our society the legal system seems to treat it as a light offence. The public service and the private sector lack the mechanisms in the legal framework to deal with sexual harassment as a scourge in our country. This paper seeks to discuss the extent of the *lacunae* in the Zimbabwean legislation meant to protect the female and male employee who may be victims of sexual harassment. It further explores possible ways of filling those gaps and, more importantly, seeks to stimulate debate on how to combat this blight.

Defining sexual harassment

The International Labour Organisation (ILO) has defined sexual harassment as a sex-based behaviour that is unwelcome and offensive to its recipient.[2] The ILO further notes that sexual harassment may take two forms, namely, *quid pro quo* or hostile working environment in which the conduct creates conditions that are intimidating or humiliating for the victim.[3] ILO further notes that the behaviour that qualifies as sexual harassment may be physical violence, touching, unnecessary close proximity, verbal comments and questions about appearance, lifestyle, sexual orientation, offensive phone calls and non verbal behaviour like whistling, sexually suggestive gestures, and display of sexual materials.[4] The definition is wide and covers all ranges of possible sexual harassment scenarios.[5] In addition, Convention No 111 on Discrimination (Employment and Occupation) Convention, 1958 provides that one cause of discrimination the national legislations ought to combat is sexual harassment as it erodes equal opportunity and treatment in employment and occupations.

---

[1] Rodgers Matsikidze is a PhD student with the University of Witwatersrand 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: www.mmlawchambers.co.zw. He is a 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.

[2] See www.ilo.org/ declaration on fundamental principles and rights at work accessed 19 March 2017-sexual harassment at work.

[3].*Supra*

[4].*Supra*

[5] See also M. Rubenstein, 'Dealing with sexual harassment at work: The experience of industrialised countries' in *Conditions of Work Digest: Combating sexual harassment at work*, Vol 11, No, 1992, p11. See also Deirdre McCann, 'Sexual harassment at work: National and International Response, 'Conditions of Work and Employment Series No 2, International Labour Office, Geneva,2005, p18

There are also a number of international instruments that define sexual harassment. United Declaration on Violence against Women, 1993, article 2 provides that 'violence against women shall be understood to encompass, but not limited to, physical, sexual and psychological violence …including ...sexual harassment and intimidation at work.'[6] Women have been silent victims of sexual harassment. They find it difficult to report.[7] In addition there is also fear to lose employment, and fear of the repercussions of rejecting unwelcome advances by the superiors or employer.

The Universal Declaration of Human Rights, 1948, also in its preamble, provides against discrimination but recognises the inherent equality, dignity and inalienable rights of all members of the human family.

Poverty, high levels of unemployment, lack of mechanisms to identify or detect sexual harassment, and networks to help victims of sexual harassment are some of the factors that allow the proliferation of sexual harassment in Zimbabwe.[8] Perpetrators are taking advantage of these factors to pounce on women. Women, married and unmarried, students, graduates and non graduates, house maids and gardeners all are all potential victims of sexual harassment.

The major problem in Zimbabwe is that the Labour Laws are inadequate in terms of the content of the law and they lack clear policy and special procedure for detecting and resolving sexual harassment cases. The Constitution, the Labour Act, the Public Service Act and all labour regulations lack clarity or specificity with regard to sexual harassment and how to deal with it.

The Constitution of Zimbabwe No 20 of 2013

The Supreme law in the country is the Constitution of Zimbabwe No 20 of 2013.[9] However, the Constitution does not expressly provide for the right to be protected against sexual harassment, although there are provisions which can be relied upon to protect women against sexual harassment. The Constitution in section 14 makes it an obligation for Zimbabwe to promote full gender balance in society and, in particular, that the State must promote the full participation of women in all spheres of Zimbabwean society on the basis of equality with men.[10] This entails further that the State must take all measures, including legislative measures, needed to ensure that both genders are equally represented in all institutions and agencies of government at every level and women constitute at least half the membership of all commissions and other elective and appointed governmental bodies established by or under the Constitution or any Act of Parliament. It is critical to note that the provisions cited above can be interpreted broadly to

[6] See also section 3.4 of the UN Handbook for Legislation on Violence Against Women (UN Division for the Advancement of Women)
[7] Deirdre McCann, 'Sexual harassment at work: National and International Response' Conditions of Work and Employment Series No2, International Labour Office, Geneva,2005, p4-6, see Malawi's Gender Equality Act, sections 6, 7 as discussed by Ruth Kanyongolo in her unpublished PowerPoint presentation at University of Zimbabwe 's SEARCWL Centre, March 2017.
[8] See section 14 of the Constitution of Zimbabwe and section 24 of Malawi's Constitution.
[9] Later referred to as the Constitution
[10] Compare with Malawi Constitution section 20 and Malawi's Employment Act section 20.

include eradicating all prohibitive practices against equality and non-discrimination, including sexual harassment.

Section 14 of the Constitution further provides that 'the State and all institutions and agencies of government at every level must take practical measures to ensure that women have access to resources, including land, on the basis of equality with men.' In ensuring an inclusive approach, it is obvious that oppressive vices like sexual harassment ought to be excluded. Section 14 prohibits all forms of discrimination against women.[11] Like CEDAW, section 14 of the Constitution requires the State to take positive measures to rectify gender discrimination and imbalances resulting from past practices and policies. Hence the broad constitutional framework to strengthen specific statutes dealing directly with sexual harassment is available. What is lacking is alignment of those statutes to the Constitution.

Further, section 24 reinforces section 14 of the Constitution, in extending the equality and non-discrimination of women to the workplace. In section, 24 it is provided that 'the State and all institutions and agencies of government at every level must adopt reasonable policies and measures, within the limits of the resources available to them, 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.' The Constitution further requires that the State and all institutions and agencies of government at every level must endeavour to secure full employment, the removal of restrictions that unnecessarily inhibit or prevent people from working and otherwise engaging in gainful economic activities, vocational guidance and the development of vocational and training programmes, including those for persons with disabilities and the implementation of measures such as family care that enable women to enjoy a real opportunity to work.[12] These are essential provisions that can help in the creation of a conducive environment that eradicates sexual harassment at the workplace.

More instructive is section 80 of the Constitution which provides for the rights of women. In section 80 (1), it is provided that every woman has full and equal dignity of the person as with men and this includes equal opportunities in political, economic and social activities. This is specific to women's rights and empowerment. With hindsight, the legislature could have expressly inserted the provisions specific to sexual harassment in this section. In section 80 (3) of the Constitution there is a clear outlaw or bar against all laws, customs, traditions and cultural practices that infringe on the rights of women conferred by this Constitution. What is therefore apparent from the provisions of the Constitution is that is inclined towards complete eradication of sexual harassment. However, its biggest deficiency is that it lacks the specific provisions of

[11] Compare with The Convention on the Elimination of All Forms of Discrimination against Women, 1979, ratified by Zimbabwe without reservations.
[12] See section 24 of the Constitution of Zimbabwe and compare with Beijing Declaration and Platform for Action, 1995.

complaint procedures, remedies for victims of discrimination, and sanctions for perpetrators of discrimination.[13]

The Labour Act (28:01)

The Labour Act is the most comprehensive piece of legislation in Zimbabwe that covers the employee-employer relationship. It is more comprehensive than the Public Service Act although it has also its deficiencies. There is no definition of sexual harassment in the Labour Act (28:01). Sexual harassment is narrowly defined under section 8 as an unfair labour practice. It is defined in 58 (h) of the Labour Act (28:01) as:

> "Any employer or for the purpose of paragraphs (g) and (h), an employee or any other person, commits an unfair labour practice if, by act or omission, he –
>
> (h) engages in unwelcome sexually-determined behaviour towards any employee, whether verbal or otherwise, such as making physical contact or advances, sexually coloured remarks, or displaying pornographic materials in the workplace."

This definition does not explicitly provide for sexual harassment definition, but the conduct it defines as unfair labour practice is actually sexual harassment. That lack of explicitness on its own is a cause of concern. However, the draft Labour Bill has the definition of sexual harassment.[14]

The penalties for unfair labour practices in terms of section 6(1)(2) as read together with section 89 of the Labour Act are cessation of the unfair labour practice, compensation, and criminal sanction. These remedies are clearly general and applicable to all unfair labour practices. The challenge that exists in generalising remedies is that the underlying rationale will be that all unfair labour practices are the same, which is not correct. Sexual harassment on its own is a huge monster to which general remedies may not suffice. The generalisation of these remedies could be the answer to why, despite those remedies being available in our jurisdiction, the cases of victims seeking compensation or criminal sanction recorded are very low. Again, like the constitutional provisions, the Labour Act does not provide mechanisms for complaint procedures, for counselling, and procedures for compensation. It lags behind the laws of other jurisdictions.

The Public Service Act

The Public Service Act covers all government employees and, in some cases, government agencies. All Zimbabwean government employees are regulated under this law. The frightening thing is that the Public Service Act does not have a provision on sexual harassment.

The Public Service Act though is yet to be aligned with the Zimbabwean Constitution Amendment No 20 of 2013. The Public Service Regulations, SI 1 of 2000 does not provide a

[13] See article 2 of CEDAW (1995), see also SADC Protocol on Gender and Development (1997) and The Protocol to the African Charter on Human Rights and People's Rights on the Rights of Women in Africa (2003).

[14] See Rodgers Matsikidze and Caleb Mucheche's draft *Zero Labour Draft* crafted for the Republic of Zimbabwe in March 2017.

definition and specific procedure for sexual harassment. However, SI 1 of 2000 tersely includes sexual harassment as a misconduct. In section 4, misconduct is defined as the following:

> "Improper, threatening, insubordinate or discourteous behaviour, including sexual harassment, during the course of duty towards any member of the Public Service or any member of the public."

That provision does not in any manner define what sexual harassment is. Furthermore it demeans the gravity of sexual harassment by expressing it as a species of improper behaviour, which it is, but more than that. Further, there are no specific procedures for investigations, hearings and counselling for the victim of sexual harassment.

Codes of Conduct for universities.

While a number of universities in Zimbabwe have developed workplace codes of conduct not so many have dedicated their codes of conduct to include mechanisms on how to deal with sexual harassment. The University of Zimbabwe Code of Conduct defines sexual harassment as unwarranted conduct of a sexual nature that affects the dignity of men and women at work. It includes physical, verbal and non-verbal conduct that is sexually coloured, offensive, intrusive, degrading or intimidating. The definition, just like the one in the Labour Act, is inadequate in that the content of the definition itself is insufficient and it does not include the mechanisms to detect and resolve the cases of sexual harassment, for example the boards of inquiry, counselling services, post-harassment support centre. The penalty that is available to the perpetrators is dismissal from employment. Some Zimbabwean universities seem to have such provisions in their codes of conduct.[15]

General deficiencies in the Labour Act, Public Service Act and Codes of Conduct in combating sexual harassment

The Labour Act provides for compensation to the victim but it does not state how the compensation is computed viz the act perpetrated. The other remedy available is cessation of the behavior but that does not address the injury caused or trauma the victim may be experiencing. The Labour Act also fails to place mechanisms that ensure that in future there are no retributive actions by the perpetrator and his/her sympathizers who may be still in authority. The Labour Act totally fails to provide any counselling, or protective mechanisms to the victim of sexual harassment.

The University of Zimbabwe Code of Conduct does not provide for any compensation, and specific counselling services to sexual harassment victims. There are no clear cut protection mechanisms for sexual harassment victims. There is no clear inclusion of students in the code of conduct as potential victims of sexual harassment at the University as a workplace. Lecturers and other employees can easily predate on the vulnerable innocent students. The University of Zimbabwe Students' Charter comprehensively provides for the combat of sexual harassment

[15] Evernice Munando, Director Female Students Network in her presentation at SEARCWL in March 2017 revealed startling statistics which showed that 98% of tertiary universities in Zimbabwe have students who face sexual harassment.

but what is needed still is to transform those noble intentions into satisfactory regulations.[16] The other universities may derive their regulations from the University of Zimbabwe Students Charter.

Recommendations

The way forward for Zimbabwe will be to push for the amendment of the Labour Act to provide for a wider definition and mechanisms to prevent, detect and resolve sexual harassment cases efficiently and promptly. The government should come up with a clear government policy on combating sexual harassment at workplaces, universities and colleges as workplaces.[17] The way forward for the University of Zimbabwe and other universities will be to amend their codes of conduct and expressly provide for a wider definition of sexual harassment and put in place a policy and procedures for handling and compensating the victims of sexual harassment. What is clear is that Zimbabwe as a company needs to revamp its labour laws with regard to sexual harassment as a disempowering tool to all gains made by women in Zimbabwe. There is need for codes of conduct at workplaces forbidding sexual harassment, independent individual complaint procedure, legal and psychological counselling for sexual harassment victims, and reparation for victims and sanctions for perpetrators.[18] There is further need to change both men and women's attitudes and integrate information about sexual harassment in curriculae.[19]

Bibiliography

Articles and books

Kanyongolo, Ruth in her unpublished PowerPoint presentation at University of Zimbabwe SEARCWL Centre, March 2017.

Matsikidze, Rodgers and Mucheche, Caleb draft *Zero Labour Draft* crafted for the Republic of Zimbabwe in March 2017.

McCann, Deirdre 'Sexual harassment at work: National and International Response' Conditions of Work and Employment Series No 2, International Labour Office, Geneva, 2005.

Munando, Evernice Director Female Students Network in her presentation at SEARCWL in March 2017.

Professor Anne Hellum's recommendations in her presentation, Sexual Harassment as an equality and non-discrimination issue. The CEDAW approach, NORHED/SEARCWL seminar, 2017.

Rubenstein, M 'Dealing with sexual harassment at work: The experience of industrialised countries' in *Conditions of Work Digest: Combating sexual harassment at work*, Vol 11, No, 1992.

UN Handbook for Legislation on Violence Against Women (UN Division for the Advancement of Women)

Beijing Declaration and Platform for Action, 1995

[16] The University of Zimbabwe Students Charter in clauses 1.14 to 1.14.5 set the definition, the various undertakings to put in place mechanisms to detect, resolve and combat sexual harassment.
[17] Already Zimbabwe is a member of ILO and is bound by all conventions, recommendations and opinions of the experts.
[18] See also Professor Anne Hellum's recommendations in her presentation, Sexual Harassment as an equality and non-discrimination issue. The CEDAW approach, NORHED/SEARCWL seminar, 2017.
[19] *Ibid*.

Constitution of Zimbabwe, 2013

Labour Act (*28.01*)

Malawi's Constitution

Malawi's Employment Act section 20

Malawi's Gender Equality Act

Public Service Act

Public Service Regulations SI 1 of 2000

SADC Protocol on Gender and Development (1997) and The Protocol to the African Charter on Human Rights and People's Rights on the Rights of Women in Africa (2003)

The Convention on the Elimination of All Forms of Discrimination Against Women,1979

The University of Zimbabwe Students Charter

www.ilo.org/ declaration on fundamental principles and rights at work accessed 19 March 2017- sexual harassment at work

Back to Contents Page

Case note on Hosho v Hasisi HH-491-15

By Slyvia Chirawu-Mugomba[1]

Introduction

The payment of the bride price (known as *roora/lobola)* in Zimbabwe has been one of the most contentious issues recently, especially since the Supreme Court declared in the case of *Katekwe v Muchabaiwa*[2] that *lobola* is not a legal requirement. This is against the backdrop of the dual legal system in Zimbabwe that recognises the application of both customary and general law side by side.

The facts

At the centre of the dispute lay a house located in Norton. The plaintiff N purchased the property from one Z. N sought the eviction of one L from the premises on the basis that the property was registered in his name and he had title deeds. L opposed the application on the basis that she was entitled to the house by virtue of being a surviving spouse of one R. The property had been sold to Z by one C[3] who was a step son to L and a son to R. In turn, Z had sold the same property to N.

L stated that she was in an unregistered customary law union with R but did not have any children with him. The house was acquired in 1997 during her marriage to R though it was registered in the name of R only. Documents had been stolen from her by R's sisters and used for purposes of entering into the agreement of sale with Z. L further stated that she was in an unregistered customary law union with R but that all the witnesses who were present at the lobola payment ceremony were deceased. She produced the deceased's medical aid card but it is not clear from the facts whether or not it showed any evidence of a marriage. She also produced a loan application form filed during the life time of the deceased which reflected the name 'Lilian' as the spouse, which was her first name. The death certificate also showed the deceased as being married.

L had not received the deceased's pension which has instead gone to his sister. The deceased's family did not recognise her as a spouse. The Magistrate court had not recognised her or confirmed her as the surviving spouse because she was not made aware of the registration of the estate of the late R.

The decision and legal issues arising

The case turned on the issue of whether or not there was in existence a customary law union between L and R. If there was, L would be entitled to the property on the basis of her being a surviving spouse who was present at the house at the time of death. The court held that L had

---

[1] LLB(S)(UZ); MScIR(UZ); LLM(AUWCL), Deputy Dean, Faculty of Law; Lecturer and chairperson, Department of Private Law, University of Zimbabwe

[2] S-87-84

[3] C had been appointed as executor of his late father's estate at an edict meeting held on 20 May 2004. He had been issued with letters of administration and the property had been subsequently issued to him and the property had been subsequently transferred to him by the local authority. He then sold the house to Z who in turn sold it to N.

been unable to prove that an unregistered customary law union was in existence between her and R. It is however the court's observations on the issue of *lobola* that are important.

As rightly observed by the court, Zimbabwean law has moved further in recognising the right of a woman married under a customary law union but such union not having been solemnised[4] to inherit from her late husband's estate. The absence of a marriage certificate does not bar such a woman from inheriting. The law is therefore in keeping with the tenets of the Constitution and the international human rights framework.

In the event of a woman proving that she was married under customary law and in the event of a dispute, she is then entitled to inherit depending on other factors such as where she was living at the time of death, the number of wives; and whether or not there are any children.[5] One critical factor though is proving the existence of the customary law union, a fact which has proved to be in some instances an uphill task. It is more often than not, left to the relatives of a deceased's man to 'support' the assertion that one was married to the deceased under customary law.

The Honourable Justice Tsanga observed that:

> "For a marriage to qualify as a customary marriage, certain cultural practices which involve the payment of *roora/lobola* are attendant upon its formation. Payment consists of a lump some payment of money (called *rutsambo* among the shona) as well as cattle though increasingly the money equivalent is paid in today's society. Its payment is part of the culture for the majority of the citizens who adhere to customary ways of marrying. Constitutionally, in terms of s 63, every person has a right to participate in the cultural life of their choice although such freedom cannot be exercised in a manner which violates fundamental human rights and freedoms that are guaranteed in the constitution."[6]

Despite concerns about payment of *lobola,* it remains the only way of establishing that a customary law union has come into being. There are inherent contradictions between the payment of *lobola* and certain rights such as rights to equality. Nonetheless, if it has not been paid, there is no customary law union to talk about.

> "Still despite these observations, suffice it to say that where it has not been paid there is strictly speaking, no customary marriage to talk about. There are considerable limits to the extent to which in practice law can effectively run ahead of people's thinking in society. The continued payment of *roora/lobola* for women in Zimbabwe, regardless of legislative inroads, bears testimony to this. Its continued existence is about a way of life and a distinct sense of "African" identity – it is an unspoken resistance to what is often perceived as cultural imperialism from the rapid westernisation of African societies. What

[4] Section 3(1)(a) of the Customary Marriages Act [*Chapter 5:07*] states that no marriage contracted in terms of customary law shall be valid unless it is solemnised. However, section 3(5) of the act states that a marriage contracted according to customary law which is not a valid marriage in terms of this section shall, for the purposes of customary law and custom relating to the status, guardianship, custody and rights of succession of the children of such marriage, be regarded as a valid marriage.
[5] See generally section 68F of the Administration of Estates Act [*Chapter 6:01*] on the actual permutation
[6] On page 4 of the cyclostyled judgement

> is therefore fundamental where an unregistered customary marriage is averred, is proof of the existence of a recognisable customary union."[7]

The fact that L failed to prove the existence of a customary law union meant that she did not have any defence against the claim by N. The court went on to state that:

> "Payment of *roora /lobola* remains the most cogent and valued proof and indicator of a customary union/marriage particularly when it has not been formally registered. It is this that the defendant has failed to prove given the basis of her claim to being a surviving spouse by virtue of such."[8]

Despite international instruments placing the duty upon states to ensure that every marriage is recorded in writing and registered in accordance with national laws[9], the case under discussion shows that it is easier said than done. The time has come perhaps, for Zimbabwe to come up with home grown solutions to address the non-registration of marriages. South Africa has in place the Recognition of Customary Marriages Act 120 of 1998 which Zimbabwe could learn from but not follow wholesale as conditions in the two countries are different and the act has been problematic in some instances. However, the need is shown for Zimbabwe to develop home grown solutions to respond to its own unique situation.

Back to Contents Page

[7] On page 5.
[8] *Ibid*
[9] Article 6(d) of the Protocol to the African Charter on the rights of women in Africa

Guilt by association: the over-extension of the doctrine of common purpose

By G. Feltoe

Introduction

What is the criminal liability of the members of a group in a situation where some of the group members cause the death of a person? There is no problem in deciding upon the criminal liability of the members who actually carry out the killing; they are guilty of murder provided they satisfy the essential ingredients of the crime of murder. They must have caused the death with actual intention to kill or must have continued with their attack realising the real possibility that their attack might cause death. What is more difficult to decide is whether the other members of the group are guilty of murder on the basis of the doctrine of common purpose.

This article warns against the danger of extending the doctrine of common purpose too far. It points out that this danger is particularly pronounced when the group involved is comprised of many people.

The common purpose doctrine

The doctrine of common purpose is used both in Zimbabwe and post-apartheid South Africa. If a murder is carried out by one or more members of a group of persons the question that arises is whether some or all of the other members of the group can be found guilty of murder on the basis of the doctrine of common purpose.

The mental element (the *mens rea*)

In South African law a person can still be convicted under the common purpose doctrine on the basis of *dolus eventualis*. The Constitutional Court unanimously ruled in *Thebus* 2003 (6) SA 505 (CC) that this was not unconstitutional if the limits set out in the *Mgedezi* case 1989 (1) SA 687(A) were adhered to. The latter case lays down that a person can be convicted of murder on the basis of the common purpose doctrine if he intended that the actual perpetrator would kill, or he must have foreseen the possibility of the victim being killed and performed his own act of association with recklessness as to whether or not death was to ensue.

By contrast in English law, from which system the South African and Zimbabwean law was derived, the mental element of the doctrine of common purpose has been narrowed down. In the case of *R* v *Jogee* [2016] UKSC 8; [2016] WLR (D) 84 the Supreme Court unanimously decided that—

> "The requisite conduct element was that the accessory had assisted or encouraged the commission of the offence by the principal. The mental element was an intention to assist or encourage the commission of that crime. Foresight that the principal might commit the offence charged was not to be equated with intent to assist. The correct approach was to treat foresight as evidence, for the jury to consider, of intent to assist and encourage. The law had taken a wrong turn in *Chan Wing-Sui* v *The Queen* [1985] AC 168, when it had equated foresight with intent to assist, as a matter of law. It was not legitimate to treat foresight as an inevitable yardstick of common purpose; in doing so the law had departed from the rule which had been well established over many years that the mental element

required for accessory liability was an intention to assist or encourage the principal to commit the offence charged."

The physical ingredient (the *actus reus*)

The test to determine whether a person had common purpose with the actual perpetrator of a murder is usually expressed as being that the person must have actively participated in the murder. However, Burchell in *Principles of Criminal Law* pp 488-489 maintains that the concept of active participation is inherently vague and argues that that Alkema J in *Mzwempi* 2011 (2) SACR 237 (ECM) is correct when he says that … "association with the general design in the absence of a prior agreement is insufficient; to qualify as an *actus reus* it must be an active association with the particular conduct which caused the death or other consequence crime." (emphasis added). Burchell then says this:

> "…if X merely associated with the general activities of a group of persons (say, by being a member of a political party, faction or tribe that sanctioned non-criminal as well as criminal activity, even perhaps violence), does not inevitably amount to active association in a specific killing that another member of the group may commit in the name of the group, especially where A is not present at the killing and has not been party to any prior agreement, expressed or implied, to kill."

The doctrine of common purpose thus must not be stated in a manner that creates the risk that it will be applied too widely. In a recent Zimbabwean case which involved a murder during a political gathering, the judge described the doctrine of common purpose as follows:

> "…the law ascribes joint criminal responsibility to people who collude or act with a common intent in furtherance of the commission of a crime regardless of who the actual perpetrator of the crime is. What this means is that every associate in crime is criminally liable for the criminal compatriot in crime. This is meant to discourage and punish fellowship in crime. The underlying principle is that he who does a thing through another does it himself."[1]

The judge should have made it clear that the association has to be of a direct and active nature. Also the term "fellowship in crime" needs to be far more precisely articulated. Mere collusion or association with others cannot be an appropriate basis for liability for the most serious crime of murder. Conviction should follow only if they play an active role in the commission of the murder, for example, by inciting or encouraging the killing. Where the degree of participation of the individual members of the group is unknown, and it is also not known what the intention or agendas of the individual members were, there is no room for applying the doctrine of common purpose. The approach that what you do through others you do yourself can only apply where you give a specific mandate to another to do the specific deed.

The onus of proof

The onus rests squarely on the State to prove beyond reasonable doubt the essential ingredients to establish liability for murder on the basis of common purpose. The judge was

[1] *S* v *Madzokere & Ors* HH-523-16

therefore wrong where in a recent case in which one of the accused was charged, he said that the onus was on the accused to satisfy the court that "his association was innocent."[2]

Agreement or plan to murder

If a group of persons agree that they will go together to murder a person, the member of the group who does the actual killing is guilty of murder and the rest of the group members may be found guilty on the basis that they assisted in the perpetration of the murder.

The assistance may take various forms; it may be direct physical assistance, for instance, by holding down the victim to enable the actual perpetrator to carry out the killing. It may take other forms such as directing, inciting or encouraging the actual perpetrator to kill the victim after he or she had been located or simply being present at the scene of the murder to give support, if necessary, to the perpetrator in carrying out the murder. In all these instances, the members of the group have participated in the murder with actual intent to kill.

Another common situation is where people go to carry out a robbery and all the gang members carry loaded firearms to enable them to carry out a robbery. If one of the robbers shoots and kills a person who puts up resistance, the actual perpetrator will be guilty of murder but so will the others − either on the basis that they agreed in advance of the robbery that they would shoot and kill any person who tried to stop their robbery, or that although they did not specifically discuss this before the robbery, by carrying loaded firearms, they had all envisaged that the firearms would be used to shoot and kill if necessary. If only one of the robbers was armed with a loaded firearm but the other robbers know that one of their numbers has a loaded firearm and the armed robber shoots and kills someone during the course of the robbery, the fellow robbers are likely to be found guilty of murder. The basis of their conviction would be they participated in a robbery when they knew that the armed robber would be likely to kill anyone who put up resistance.

The plan to murder does not necessarily have to be formed in advance; it may be formed at the location where the murder occurs. Thus if a group of persons spot a person whom they hate, they may decide then and there to attack and kill that person. Those group members who physically cause the death intending to do so are guilty of murder and those members who participated in the killing in various ways intending that the victim will be killed may also be guilty of murder on the basis of the common purpose doctrine.

The problem with large groups

The above situations are reasonably straightforward. What is far more difficult is where a large group of persons are gathered together and some members of the group take it upon themselves to engage in violence that results in the death of a person.

Take, for instance, a situation where fifty members of a political party are gathered together for a rally and some party members spot members of another political party who appear to want to disrupt the gathering. Some of the members then attack and kill one of the members of the rival party. Another situation could be where police officers arrive and order the fifty members of the

[2] *S* v *Madzokere & Ors* HH-523-16

political party to disperse and some members of the party members attack the police and cause the death of one of the police officers.

If the attackers have acted unilaterally without being ordered to carry out the attack or incited or encouraged to do so, and none of the other members participated in the attack, only the attackers can be held liable for the murder.

What if the members of the party gathered together were addressed by a party leader who ordered them to kill any member of another party who tried to disrupt the rally? The leader is guilty of murder if some of his party members do what they were instructed to do. But it would be impermissible to convict all the other members of murder simply on the basis that they did not express disagreement with this order and failed to prevent the actual perpetrators from carrying it out. The other members must have done something active such as inciting or encouraging the actual perpetrators to commit the murder. The uttering of threats against the intruders is not enough to amount to incitement or active participation in the murder.

Another possible situation is that at the start of the rally the members discussed and agreed that if people tried to disrupt their rally he or she must be physically attacked, and they went as far as to agree that they should be killed. If when the murder was perpetrated, the members did not in any way participate: could they be convicted of murder on the vague basis of the initial agreement? What if the members charged say that they did not agree with the plan to murder but simply pretended to agree so they would not be condemned by the other members for their "weakness"?

Certainly the other members cannot be found guilty of the murder simply because they were present at the gathering when the murder took place. Obviously, it would be completely wrong to seek to impose collective responsibility on all the others for the actions of the perpetrators. The guilt of the other members would have to be considered individually. Each member can only be convicted of murder if they actively associated with the actual perpetrators intending that they would kill the victim.

The fiasco that occurred in the *Marikana* case in South Africa illustrates the absurd lengths to which the common purpose doctrine can be taken. At the *Marikana* Mine, striking mine workers confronted the police and the police responding by shooting dead 34 of the workers. The 270 workers who were arrested after these disturbances were then charged with the murder of the 34 dead workers on the basis of the common purpose doctrine. Fortunately, sense finally prevailed and these ridiculous charges were withdrawn by the National Prosecuting Authority. None of the police officers who were involved in the shooting have been charged with murder.

Back to Contents Page

Case note on the case of *Mapingure v Minister of Home Affairs & Ors* S-22-14

By G. Feltoe

The facts

The appellant was raped by robbers at her home. She immediately lodged a report with the police and requested that she be taken to a doctor to be given medication to prevent pregnancy and any sexually transmitted infection. Later that day, she was taken to hospital and attended to by a doctor. She repeated her request, but the doctor only treated her for an injured knee. He said that he could only attend to her request for preventive medication in the presence of a police officer and that the medication had to be administered within 72 hours of the sexual intercourse having occurred. She went to the police station the following day and was advised that the officer who dealt with her case was not available. She then returned to the hospital, but the doctor insisted that he could only treat her if a police report was made available. Three days after the rape, she attended the hospital with another police officer. At that stage, the doctor informed her that he could not treat her as the prescribed 72 hours had already elapsed.

Eventually, a month after the rape, the appellant's pregnancy was formally confirmed. Thereafter, the appellant went to see the investigating police officer who referred her to a public prosecutor. She told the prosecutor that she wanted her pregnancy terminated, but was told that she had to wait until the rape trial had been completed. Four months after the rape, acting on the direction of the police, she returned to the prosecutor's office and was advised that she required a pregnancy termination order. The prosecutor then consulted a magistrate who stated that he could not assist because the rape trial had not been completed. She finally obtained the necessary magisterial certificate nearly six months after the rape, but the hospital matron who was assigned to carry out the termination felt that it was no longer safe to carry out the procedure and declined to do so. Eventually, after the full term of her pregnancy, the appellant gave birth to her child.

The applicant brought an action against the Ministers of Home Affairs, Health and Justice for damages for physical and mental pain, anguish and stress suffered and for maintenance for the child until the child turned 18. The basis of the claim was that the employees of the three Ministries concerned were negligent in their failure to prevent the pregnancy or to expedite its termination. The particulars of negligence were itemised. Her claim was dismissed.

The questions for determination on appeal were whether or not the respondents' employees were negligent in the manner in which they dealt with the appellant's predicament; and if they were, whether the appellant suffered any actionable harm as a result of such negligence and, if so, whether the respondents were liable to the appellant in damages for pain and suffering and for the maintenance of her child.

Legal consequences for the failure of the woman to obtain contraception to prevent the pregnancy

There was a professional relationship between the appellant and the doctor. His duties required him to attend to all the physical injuries arising from the sexual assault inflicted

upon her. Consequently, he was under a special duty to be careful and accurate in everything that he did and said pertaining to his relationship with her. He should have exercised that level of skill and diligence possessed and exercised at the time by the members of his profession. A reasonable person in his position would have foreseen that his failure to administer the contraceptive drug, or his failure to advise the appellant on the alternative means of accessing that drug, would probably result in her falling pregnant. He should have taken reasonable steps to guard against that probability. However, despite the appellant's quandary and persistent pleas for treatment, he stubbornly failed to take any steps to mitigate her condition.

The situation before the police was that of a victim of sexual violence requiring their urgent assistance. They were called upon either to compile a report on the assault or to accompany the appellant to the doctor within a specified period. The circumstances were such as to create a legal duty on the part of the police to assist the appellant in her efforts to prevent her pregnancy. They failed to comply with that duty, which they could have done with relative ease. Their inaction amounted to unlawful conduct by reason of their omission to act positively in the circumstances before them. They were under a legal duty to act reasonably and they dismally failed to do so.

The Ministry of Health and the Ministry of Home Affairs were held delictually liable for the negligent failure by the doctor and the police officer respectively in respect of the failure to avoid the pregnancy. Although the originating cause of the appellant's pregnancy was the rape, its proximate cause was the negligent failure to administer the necessary preventive medication timeously. But for that failure, the appellant would not have fallen pregnant. The police and the doctor failed in their duties. These unlawful omissions took place within the course and scope of their employment with the first and second respondents respectively, who must be held vicariously liable to compensate the appellant in respect of the harm occasioned through the failure to prevent her pregnancy. The appellant's claim for damages must be limited to the period between the date of her rape and the date of confirmation of her pregnancy. The matter would be remitted to the trial court for assessment of the damages to which the appellant was entitled.

Legal consequences of the failure of the woman to obtain a termination of her pregnancy

The court held, however, that there was no delictual responsibility arising out of the conduct of the prosecutor and the magistrate in respect of the matter of the obtaining of a termination of pregnancy. In terms of sections 4 and 5 of the Termination of Pregnancy Act [*Chapter 15:10*] permission for the termination of pregnancy pursuant to unlawful intercourse may only be granted by the superintendent of a designated institution. The precondition for that permission is the production of a certificate from a magistrate within the same jurisdiction. The issuance of a magisterial certificate is preceded by a complaint having been lodged with the authorities and the submission of relevant documents by those authorities. The term "authorities" is not defined in the Act but, in the context of unlawful intercourse, *i.e.* rape or incest, it would ordinarily apply to mean the police authorities.

The critical question was whether the responsibility for instituting proceedings in the magistrates court lies with the relevant authorities or the victim of the alleged unlawful

intercourse. On a correct reading of the Act and the case law, the victim of the alleged rape must depose to an affidavit or make a statement under oath *in addition* to being present for possible interrogation by the magistrate. Given the *ex parte* nature of the procedure, an affidavit on its own may not always suffice to enable the magistrate to make the necessary determination, on a balance of probabilities, that the applicant was raped and that her pregnancy resulted therefrom.

However, the applicant's affidavit or statement under oath is essential and required in every case, whether or not the magistrate decides to examine the applicant or any other person as he may deem necessary. It is the responsibility of the victim of the alleged rape to institute proceedings for the issuance of a magisterial certificate allowing the termination of her pregnancy. The role of the police and the prosecutor, upon request by the victim or in response to a directive by the magistrate, is to compile the relevant reports and documentation pertaining to the rape for submission to the magistrate. The role of the magistrate is to issue the requisite certificate upon being duly satisfied in terms of s 5(4), while that of the superintendent of the designated institution is to authorise its medical practitioner, upon production of the certificate, to terminate the unwanted pregnancy.

Even on the broadest interpretation of the Act, taken as a whole, it is not within the scope of prosecutorial or magisterial functions to give legal advice on the procedural steps required to terminate a pregnancy. It was for the appellant to have sought that advice *aliunde*, as soon as possible after she became aware of her pregnancy. The prosecutors and magistrate could not be held liable for failing to take such reasonable steps as may have been necessary for the issuance of the requisite certificate. In coming to this conclusion the court adopted the approach in the South African case of *Minister of Law and Order* v *Kadir* 1995 (1) SA 303 (A).

The Appeal Court was clearly correct about the prescribed roles of the prosecutor and magistrate under the Termination of Pregnancy Act and that the Act did not impose upon them a duty to provide legal advice to a victim. But the facts show that advice was indeed offered to the victim by both the prosecutor and through the magistrate and the advice offered was erroneous. She was told by the prosecutor that she would have to wait until the rape trial had been completed for her pregnancy to be terminated. When she returned to the prosecutor to the direction of the police, she was advised that she required a pregnancy termination order. The prosecutor in question then consulted a magistrate who stated that he could not assist because the rape trial had not been completed. By the time the victim obtained the termination certificate, it was too late to carry out a safe termination.

Reliance on this erroneous advice could well have caused the victim to delay initiating the proceedings for the issuance of the magisterial certificate for authorising the termination of the pregnancy, leading to the issuing of the certificate when it was too late to have a safe termination. If it had been established that this is what had in fact happened, the appellant would have had a basis for her claim based upon reliance upon completely misleading advice which led to her not being able to have a termination of pregnancy in time.

Although the prosecutor and magistrate had no legal obligation to offer advice, once they decided to do so, they had a duty to give proper advice and not to give advice that may have

led to the denial of a termination of pregnancy in time. If this was the situation there would have been no danger of opening up the floodgates to a deluge of claims.

It is regrettable that this issue was not properly investigated by the trial court leading the Appeal Court to state that there was insufficient evidence on record to show what had occurred between the appellant and these functionaries. The Appeal Court could also have referred the matter back to the trial court for the production of further evidence on this matter.

Amendments to the Termination of Pregnancy Act

The *Mapingure* case clearly points to the urgent need to amend the Termination of Pregnancy Act as soon as possible to place the duty squarely upon the police and other authorities dealing with rape victims to guide and assist rape victims through the processes necessary to obtain contraception to avoid pregnancy or, where the victims wish this, to obtain termination of pregnancies. The amendment should require the authorities to act with expedition in this sort of case.

Back to Contents Page