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RETRENCHMENT AND THE LAW

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INTRODUCTION

Retrenchments belong to the class of termination of employment commonly described as "economic dismissals". This class is distinct in that on the one hand workers lose their jobs without any fault (such as misconduct) or other reason (such as through the operation of the contract of employment) attributable to them, while on the other, the employer may be compelled by unavoidable economic considerations to terminate the services of some workers. Rycroft and Jordan have expressed this distinctiveness in the following words:

Workforce reduction or retrenchment, because of recession, technological change, unionisation, disinvestment, transfer of the business or decentralisation has become a major issue of law and social policy. For the retrenched worker at a time of rising unemployment, the loss of a job frequently means "disappearance into the large mass of the unemployed". For the employer at a time of recession, to retrench is often the only way to ensure economic survival.¹

It is also important to emphasize that while a retrenchment is merely one of the forms of termination of employment, its social, economic and political ramifications tend to be of a greater scale than other forms of termination of employment. Accordingly, it is not surprising that many countries have specific and sometimes elaborate legal provisions on retrenchment.

RATIONALE OF RETRENCHMENT LAW

A question which arises at the outset is: what are the objectives of the law in this area? This is a controversial issue given the irreconcilable interests of workers and the employer. The employer has the traditional claim to managerial prerogatives in determining the size and character of the workforce.² In *Lesney Products Co Ltd v Nolan*³ Lord Denning underscored managerial prerogatives as follows:

It is important that nothing should be done to impair the ability of employers to reorganise their workforce and their terms and conditions of work so as to improve efficiency.

On the other hand, "there is a growing refusal by workers to accept that retrenchment is the inevitable consequence of economic forces or technological change over which they have no control. Workers have come to expect procedural and substantive safeguards against retrenchment".⁴

1. Rycroft and Jordan, *A Guide to South African Labour Law*, 2nd edition 1992, p. 230.

2. See Simon Deakin and Gillian Morris, *Labour Law* (1995), p. 446.

3. [1974] ICR 170 [CA].

4. See Rycroft and Jordan, *op.cit.*, p.230.

It has been said that the purpose of retrenchment law is to "ensure that economic dismissals never occur, or at least make it economically inadvisable for employers as long as the business remains solvent".⁵ A number of justifications have been given for such a purpose of the law. The chief one is that an employee has a property right in his or her job. It was explained in an English case in this way:

Just as a property owner has a right in his property and when he is deprived, he is entitled to compensation, so a long-term employee is considered to have a right of property in his job, he has a right to security and his rights gain in value with the years.⁶

Another justification is of distributive justice. The employer benefits by improved productivity after reducing labour costs through retrenchment. It is then argued that those workers who have "sacrificed their jobs should partake of some of the benefits to general welfare derived from superior productivity".⁷

It appears, however that retrenchment law is not designed to prevent employers from retrenching but is mainly premised upon the need to strike a balance between the competing interests of employers and workers with a view to (i) preventing an unwarranted resort to retrenchment, (ii) cushioning workers from the economic effects of losing a job through compensation, and (iii) encouraging workers to accept retrenchment in desirable circumstances.⁸

The lack of certainty over what retrenchment law is designed to achieve has led to some questionable decisions by Zimbabwean courts. In *Continental Fashions (Pvt) Ltd v Mupfuri and Ors*,⁹ the Supreme Court failed to grasp the clear difference between the objectives of retrenchment as an economic concept and the objects of retrenchment law. In that case, the Supreme Court held that where retrenchment is aimed at avoiding liquidation, the ability of the company to pay a proposed retrenchment package is the ultimate criterion in determining whether or not that package is reasonable. While it may be true that where retrenchment is designed to "avoid the collapse and liquidation of the company," the ability of the company to pay is an important factor, it does not follow that this is the ultimate consideration because retrenchment law has a different compass, namely striking a balance between the two competing interests of the employer and the employee.

However, some cases have shown a commendable grasp of the rationale of retrenchment law. In *Chidziva v ZISCO*,¹⁰ Mucchechete JA noted:

It should be borne in mind the clear and broad intention of the said Regulations was to prevent unnecessary and wholesale retrenchments of employees by employers. And where retrenchment had been justified to ensure that this had to be done in a fair and transparent manner taking into account all the personal circumstances of the persons to be affected. In the case where a large number of employees, such as in the

5. Referred to in Hugh Collins, *Justice in Dismissals* p. 144.

6. See *Wynes v Sonthrepps Hall Broiler Farm Ltd* [1968] ITR 407.

7. Hugh Collins, *op.cit.* p 157.

8. See generally. Hugh Collins, *op.cit.*; John Bowers and Simon Honeyball, *Textbook on Labour Law*, 2nd edition, Blackstone Press Limited, p.184-186.

9. 1997 (2) ZLR 405 (S).

10. *Supra*.

present case, was to be retrenched there is greater need for the strict compliance with the said Regulations because the lives of many people who had spent most of their working lives with the respondent was at stake.¹¹

HISTORY AND SOURCES OF RETRENCHMENT LAW IN ZIMBABWE

The common law knows no retrenchment. Termination of employment on notice is acceptable under the common law, whether the reason be economic considerations or otherwise. Retrenchment is therefore a matter of labour legislation. The Master and Servants Act¹² which governed individual employment law in Zimbabwe from 1901 to 1980 did not have any provision on retrenchment. It was repealed by the Employment Act,¹³ but this latter Act also had no provision on retrenchment and the common law continued to apply. However, the 1980 Minimum Wages Act¹⁴ specifically prohibited any employer from terminating the services of an employee "solely on the ground of a requirement to pay him a minimum wage".¹⁵ This effectively outlawed any retrenchment on the sole basis of failure to pay a minimum wage and this may be taken as the first inroad into the wide ambit given by the common law over dismissals on notice. A more direct regulation of retrenchment had to wait for the enactment of the Labour Relations Act (chapter 28:01).¹⁶ The Act itself does not contain any provisions on retrenchment but empowers the Minister to make regulations on a variety of matters, including retrenchment.¹⁷ The first regulations made by the Minister which covered retrenchment were the Labour Relations (General Conditions of Employment) (Termination of Employment) Regulations.¹⁸ Section 4(1) of the regulations simply provided:

No employer shall — (a) impose work on a short-time basis on; or (b) lay-off or retrench, any employee or group or class of employees without the prior written approval of the Minister.

Except for the further requirement that the Minister had to consult the appropriate trade union and the employers' organisation before granting the approval to retrench,¹⁹ the regulations had no other details such as the procedure to be followed, any notice period before retrenchment and retrenchment packages payable. All such aspects were presumably left to the Minister. With the advent of the economic structural adjustment programme in 1990 and in the face of more widespread retrenchments, the above provisions were repealed by SI 400 of 1990 and more detailed regulations were gazetted on the same day as the repeal.²⁰ The regulations have been amended only twice and remain the main source of the

11. At p380D.

12. Act No. 4 of 1980.

13. Act No. 13 of 1980.

14. Act No. 4 of 1980.

15. Section 7 (1) of the Act.

16. Promulgated as Act. No. 16 of 1985.

17. See section 17 (3) of the Act.

18. SI 371/85.

19. Section 4(3).

20. The regulations are the Labour Relations (Retrenchment) Regulations, 1990: SI 404 of 1990 which were gazetted on 21 December 1990.

law on retrenchment in Zimbabwe.²¹ A substantial body of case law is developing on retrenchment.

WHAT IS RETRENCHMENT?

The regulations define "retrench" as follows: "in relation to an employee, means to terminate the employee's employment for the purpose of reducing expenditure or costs, adapting to technological change, closing down or reorganising the undertaking in which the employee is or was employed, or for similar reasons".²²

Although this definition has been in the regulations since 1990, it is shocking to read McNally JA in *Continental Fashions (Pvt) Ltd v Mupfuri*²³ saying:

Retrenchment, when used in the context of labour relations, means a cutting back of expenditure on the employment of workers by reducing their number. (The definition is mine. There is none in the Regulations).²⁴

The definition of "retrench" in the regulations shows that retrenchment in our context covers most conceivable forms of economic dismissals — dismissals involving reorganisation, closing down, technological changes and saving costs. What makes a dismissal a "retrenchment" is the reason for it. If the reason for a dismissal is one of those specified in the definition, that dismissal is a retrenchment within the scope of the regulations. It would appear that the purpose of "reducing expenditure" covered by the definition means that an employer may retrench simply to increase profits.²⁵ Obviously, it should be permissible for a court to go behind the purported reasons given by an employer if there is a basis to suspect that some other reasons are being given in order to circumvent retrenchment law. An attempt was made in the South African case of *Hlongwane and another v Plastix (Pty) Ltd*²⁶ to distinguish between "retrenchment" and "redundancy" with the former being a dismissal on the basis that the employee has become superfluous due to an economic downturn and the latter covering dismissals due to technological changes or reorganisation.²⁷ This distinction is not helpful. In Zimbabwe, the definition is wide enough to cover both situations.

It is not clear whether termination for purposes of a sale or transfer of business can be characterised as a retrenchment under the regulations. Under the common law, a purchaser of a business is under no obligation to continue with employment contracts of the existing employees, save that the employee can sue the old employer for constructive dismissal, the sale of the business being taken as repudiatory breach of the contract of employment.²⁸ Section 16 of the Labour Relations Act alters this common law position by deeming the contracts of employment to be transferred to the purchaser on terms and conditions which

21. The amendments were effected by SI 252/90 (Amendment No.1) and SI 137/94 (Amendment No. 2).

22. See section 2 of the Regulations.

23. *Supra*.

24. See page 407 E.

25. See *Food and Allied Workers Union & Others v Kellogg SA (Pty) Ltd* (1993) 14 ILJ 406 at 413A.

26. (1990) 11 ILJ 171 (IC).

27. See the reference to the case in John Grogan, *Workplace Law* (3rd edition, 1998), p.159.

28. See *Nokes v Doncaster Amalgamated Collieries* [1940] 3 All ER 549 (HL).

are not less favourable than those applicable to the employees at the time of the sale or transfer. It is submitted that section 16 does not affect the question of whether or not a termination of employment to facilitate a sale or transfer of business is a retrenchment. It may be a retrenchment on the basis of either being a "closing down" within the contemplation of the regulations or as being "similar" to a closing down. If the new owner decides to terminate the services of the employees whom he/she has inherited for purposes of reorganisation, that is still retrenchment regardless of the length of time the employees have served the new owner.

RETRENCHMENT PROCEDURE

The main effect of the retrenchment regulations is to impose a mandatory procedure for the retrenchment process. Section 9 of the regulations makes it clear that no employer shall retrench any employee outside the approval process in the regulations. The Supreme Court has held, emphatically, that any purported retrenchment not in compliance with the regulations is null and void.²⁹ In *Chidziva and Ors v Zimbabwe Iron and Steel Co Ltd*,³⁰ Mucchechete JA expressed this as follows:

In the circumstances, I agree with the submission that the retrenchment exercise was improper. It was carried out in contravention of the provisions of the said Regulations. It was therefore illegal and void.³¹

The effect of the retrenchment being null and void is that the employees are regarded as still being employed with the consequent obligation of the employer to pay them wages.³² Section 10 of the Regulations makes this position beyond doubt by declaring: "For the avoidance of doubt, it is declared that any purported retrenchment of an employee which is carried out otherwise than in accordance with an approval granted in terms of these regulations, shall be of no effect whatsoever."

An employer who realizes that the retrenchment was unlawful, may reinstate the employees with full pay and benefits and re-institute fresh retrenchment proceedings.

The process involved in retrenchment is as follows:

1. An employer wishing to retrench must first give written notice of the intention to retrench to either the works council or where there is no works council, to the employment council.³³ However, even where a works council exists, if the majority of the employees being proposed for retrenchment agree, the notice may be given to the employment council instead of the works council.³⁴ In *The Late K.C Matema & Others v Zimoco*³⁵ it was established that at the meeting of the works council that approved retrenchments, there had been more workers committee members than representatives of management. The workers sought to have

29. See *Kadir and Sons (Pvt) Ltd v Panganai and Anor* 1996 (1) 598 (S); *Chidziva and Ors v Zimbabwe Iron and Steel Co Ltd*. 1997 (2) ZLR 368 (S).

30. *Supra*.

31. At p.378B.

32. See generally *Kadir and Sons (Pvt) Ltd v Panganai and Anor* 1996 (1) ZLR 598(S) at 604.

33. Section 3 (1) of the Regulations.

34. Section 3 (1) (a) (ii).

35. SC 118/99,.

retrenchment set aside on the basis that the works council was improperly constituted. This was rejected by the Supreme Court as follows:-

... the stipulation in the regulations that there should be equality of employer and employee representatives is a provision purely for the benefit of employees. Accordingly, it can never have been the intention of the legislature that it could lie in the mouth of one of the two sets of protagonists to complain that the other protagonist was under-represented... it is such a glaring absurdity that it could never have been intended. In the circumstances the fact that the workers representatives were more than those of the employers did not constitute a breach of the regulations.³⁶

In the unlikely situation that there is neither a works council nor an employment council for the undertaking concerned, the written notice must be given to the retrenchment committee set up in terms of section 4 of the regulations.³⁷ The written notice is required to give details of the reasons for the retrenchment and the employees being proposed for retrenchment. It is mandatory that the notice contains the names of the proposed employees and the employer cannot withhold the names even where he/she strongly feels that the release of the names might be premature or sensitive.³⁸ The rationale for this appears to be to enable the workers concerned to consult or seek advice or even seek alternative employment given that the selection of employees for retrenchment may itself be subject to bargaining. There is no minimum notice period specified in the regulations, but it has been held that what is required is a reasonable period of notice to enable the works council or other authority, as the case may be, to have meaningful deliberations on the matter.³⁹

The sending of the notice has no legal effect on the employment contracts of the employees concerned. They remain employees until the retrenchment has been approved. Gubbay CJ made this point clear in *Kadir and Sons (Pvt) Ltd v Panganai* as follows:

It is clear to me that until the critical stage of the Minister's decision has been reached, the employees whom the employer proposes to retrench remain on the pay-roll. They have not been retrenched. The fact that in the interim period the employer may have ceased to operate the business does not rid him of the legal obligation to pay the employees their wages. That this is so is underscored by the use of the phrase "proposed retrenchment" in ss 5, 6 and 7 of the Regulations.⁴⁰

2. On receipt of the notice from the employer, the authority in question (works council or employment council or retrenchment committee or person authorised by the retrenchment committee⁴¹ as the case may be) is required, within a maximum period of one month, to "attempt to secure agreement between the employer and employees concerned, or their representatives, as to whether or not the employees should be retrenched and, if they are to be retrenched, the terms and conditions on which they may be retrenched". The role of the works council has been the subject of recent cases. The works council is defined as "a

36. at. p4-5.

37. See proviso to section 3 (1).

38. See *Chidziva v ZISCO* (*supra*).

39. See *Kadir and Sons (Pvt) Ltd v Panganai and Anor.* 1996 (1) ZLR 598 (S).

40. See page 604C.

41. As already noted, in cases where there is neither a works council nor employment council, notice is sent to the retrenchment committee. However, the retrenchment committee is entitled to authorise some other person to act as an authority.

council composed of an equal number of representatives of an employer and representatives drawn from members of a workers committee".⁴²

Given the fact that both the works council and the employment council are composed of equal numbers of workers and employer representatives, does the role of these entities end with merely acting as mediators and leaving the agreement to be struck between the employer and the employees concerned or should agreements within works councils or employment councils themselves not be sufficient? Put differently, once a notice to retrench has been received by the authority (works council or employment council), is it not competent for the authority to rely on its bipartite membership to bargain over and, where possible, reach agreement on the retrenchment?

These aspects were addressed by Muchechetere JA in *Chidziva v ZISCO*.⁴³ He held that the regulations referred to three parties: the authority, the employer and employees concerned or their representatives. It followed that the authority (works council or employment council) is independent with the sole role of being a mediator or facilitator and an agreement of its members cannot be taken to be an agreement of the employer and employees concerned. More fundamentally, workers on the works council are not to be regarded as representing the interests of workers to be retrenched. He made the point in the following words:

I am of the view that worker's representatives on the works council had neither the statutory authority nor the mandate to represent the workers who were facing retrenchment. As I have already indicated above, they were appointed on the works council as representatives of all the workers but once appointed they became part of the council and separate from the workers.⁴⁴

Muchechetere JA was not breaking new ground. The same views had been expressed by Bartlett J in *Barry Thomas Prosser and 35 others v ZISCO*⁴⁵ where he noted:

The works council effectively in terms of section 3(2) was supposed to act in some respects as a mediator between the employer and the employees (or their representatives) to try and decide whether there should be retrenchment and if so on what terms and conditions. It accordingly would not be possible for the managerial members of the works council to wear two-hats one as members of the works council trying to secure an agreement and the other as the representatives of the persons about to be retrenched.⁴⁶

This interpretation of the retrenchment regulations demolishes a common practice in industry, namely the use of the works council itself as the negotiating forum whereby the agreement of members of the council is taken to be the agreement between the employer and employees to be retrenched. It is submitted that while the interpretation is attractive from a technical and literal reading of the regulations, it is ultimately unsound in principle. The features which support the interpretation are (i) the express words of the regulations which specify the duty of the authority to be "to secure agreement between the employer

42. See section 2 of the Labour Relations (workers committees) (General) Regulations, 1985; SI372/1985. See also section 2 of the Labour Relations Act (chapter 28:01).

43. *Supra*.

44. At p. 376G.

45. HH 201/93.

46. At p 7-8 of cyclostyled judgement.

and employees concerned"⁴⁷ and (ii) the emphasis by the regulations on the concept of the "employees concerned", suggesting that they have to be treated as a distinct entity. An example of the latter emphasis is in section 3 (1) (a) (ii) where it is only a "majority of the employees concerned" who can decide that the written notice of retrenchment be sent to an employment council instead of a works council.

The retrenchment regulations appear to be a victim of poor drafting and unclear policy articulation. The situation is worsened by a Supreme Court which interprets labour statutes without due regard to the practice which has shaped key institutions of the labour market. The structure of the works council follows that of an employment council, where the equal numbers of employer and employee representatives is designed to make the institution a bargaining chamber. The basic philosophy is that of "representative democracy" where each party consults its constituency before and during the negotiations until an agreement acceptable to both parties is struck. As a matter of principle, an agreement of members of the works council or employment council, arrived at after constant consultations during the period of negotiations should translate into an agreement of the employer and employees concerned. Indeed, this is how the collective bargaining process has been regulated in this country since 1934.⁴⁸ To use such a structure merely for mediation is both nonsensical and unrealistic. It is nonsensical because one does not need a bipartite body for mediation: in mediation, the parties are not bound by the advice of the mediator. It is unrealistic because it is difficult to imagine how the mediation should proceed: are the workers on the works council expected to persuade the employer? Or is the works council itself expected to debate the proposals, arrive at some agreed position and then use that position as a guide to its mediation role?

More fundamentally, to use the works council as a mediator leads to a glaring absurdity in one critical respect. Whereas it is possible to separate worker representatives on the works council from the employees proposed for retrenchment, it is absurd to separate "employer representatives" on the works council from the employer. Employer representatives on the works council are almost invariably the managers or directors who represent the employer in or outside the works council so that there is no employer outside the works council with whom a mediation can happen. This absurdity, it is submitted, is so glaring that it could never have been intended. Further, the use of the works council or employment council merely as a mediator means that the workers committee or trade union, as the case may be, is disempowered and this may have serious implications for worker organisations. According to the interpretation, employees proposed for retrenchment have no access to assistance by the workers committee whose members are by definition, the only persons who qualify to be members of the works council. This may require the creation of an alternative worker leadership for purposes of retrenchment disputes because the approach in *Chidziva* makes the workers committee virtually impotent in retrenchment disputes. It is doubtful whether such a result could have been intended in a labour environment where the workers committee is expected to be the main representative of workers, hence the insistence by law that the only workers who qualify to be members of the works council

47. See section 3 (2) of the Regulations.

48. See Industrial Conciliation Act, 1934 (Act No. 10 of 1934).

are members of the workers committee. More fundamentally, the view that worker representatives on the works council do not represent employees is contrary to the clear position in section 24(1) (d) of the Act where it is stated that a workers committee shall "elect some of its members to represent employees on the works council".

The better approach is to hold that the role of the works council is to be a bargaining chamber, with the representatives of both parties being empowered, after consulting their respective "constituencies", to agree on whether or not there should be retrenchment and if so, on what terms. There is support for this approach in the regulations. First, section (2a) compels the authority to "secure agreement" on a variety of matters such as restricting overtime, job-sharing or the reduction of working hours, and where retrenchment is unavoidable, the phasing of retrenchments over a period of time and the criteria for selecting employees. It is difficult to "secure agreement" on any of these matters in a role of mediation. Secondly, section 7 has the following expression:

In deciding whether or not to approve the retrenchment of employees . . .

This is only consistent with a role for the works council being more than just mere mediation. Yet it can easily be read to imply that the works council is a bargaining chamber where an agreement of the members thereof becomes an "approval" of the retrenchment. Thirdly, the works council is required to keep minutes of its deliberations⁴⁹ a situation which is inconceivable where the works council is merely acting as a mediator.

A serious weakness of the negotiation process is that there is no legislative basis for employees proposed for retrenchment to demand full financial disclosure by the employer. This was clearly illustrated in *Continental Fashions v Mupfururi* 1997 (2) ZLR 405 (S) where employees relied on section 76 of the Labour Relations Act to demand full financial disclosure. This was rejected by the Supreme Court on the basis that section 76 only applied to collective bargaining agreements and not retrenchment.

3. If an agreement is "secured", the authority shall send a written approval to the employer concerned.⁵⁰ A copy of the approval is required to be sent to the retrenchment committee.⁵¹ Clearly, the sending of the copy of the approval to the retrenchment committee is merely for record purposes: the committee has no powers whatsoever, to interfere with the agreement even where it might appear to the committee that the retrenchment terms are unfair to one of the parties. An important point to note is that the regulations impose a time-limit within which the agreement should be secured. This should be within one month⁵² and the works council has no jurisdiction to approve a retrenchment where an agreement for it has been secured outside the one month period. However, this does not mean that such an agreement is entirely useless: it may be taken into account by the retrenchment committee at the next stage of the process.

4. If no agreement is secured within one month of the serving of notice to the authority, the matter is referred to the retrenchment committee.⁵³ This committee is established in terms

49. See section 3(3) of the Regulations.

50. Section 3(5)(a).

51. Section 3(5)(b).

52. Section 3(5).

53. Section 3(6).

of section 4 of the regulations and has a tripartite composition: four government representatives, two worker representatives and two employers. The function of the committee is to consider the proposed retrenchment and recommend to the Minister of Labour whether or not the retrenchment should be approved. Although section 5(2) provides that the "retrenchment committee may in its discretion invite and receive representations, whether oral or written, from any interested parties", it is submitted that this does not oust the general principles of natural justice, particularly the *audi alteram partem* rule. Accordingly, the parties to the retrenchment dispute have a right to be heard. This is more so when regard is had to the fact that the committee is statutorily obliged to consider a variety of factors specified in section 7, almost all of which cannot be satisfactorily considered without hearing the parties. The committee is required to make its recommendations within two weeks,⁵⁴ failing which the Minister is obliged to make his/her decision as if the committee had made a recommendation.⁵⁵ If the retrenchment committee fails to act within the stipulated time and the Minister has not intervened to act in terms of Section 5(3) of the Regulations, an interested party is entitled to apply to the High Court for an order directing the Minister to Act.⁵⁶

5. The recommendations of the retrenchment committee are made to the Minister, who in terms of section 6(1) is required not only to consider them but also to have regard to the factors in section 7 and then make a decision either approving or refusing the proposed retrenchment. As already noted, the Minister is also required to act in terms of the same section where the retrenchment committee has failed to make its recommendations within the two-week period specified in the regulations. A question which may arise is: are the parties entitled to be heard by the Minister? The answer depends on the view one takes of the entire scheme of the regulations. It is submitted that given the composition of the retrenchment committee, the Minister is, in general, expected to accept its recommendations and only rejecting or changing them where there is an obvious misdirection. This should be so because the tripartite nature of the retrenchment committee places it in a better position than the Minister to weigh the factors specified in section 7. Given this role for the Minister, it is not necessary where he or she is considering the recommendations of the retrenchment committee, to give a hearing to the parties. A hearing before the Minister, apart from being impracticable, also renders the retrenchment committee redundant, a result which could never have been intended. The position should be different where the Minister is acting without the benefit of the recommendations of the retrenchment committee in terms of section 5(3). In such a case, the parties must be given an opportunity to be heard, but the circumstances of impracticability of organising oral hearings before the Minister suggest that an oral hearing is not required. It suffices for the Minister to consider written submissions from the parties.

In *Kadir & Sons (Pvt) Ltd v Pangana*⁵⁷ the Supreme Court held that the Minister has no powers to approve a retrenchment retrospectively. In that case, the Minister, in approving retrenchment, had purported to backdate it. This is what the Supreme Court held to be

54. Section 5(1).

55. Section 5(2).

56. See *Suns Manufacturers v Retrenched Employees* SC120/99.

57. 1996 (1) ZLR 598 (S):

unlawful. Gubbay CJ focussed on the use of the word "proposed" in sections 5, 6 and 7 of the Regulations and noted:

It is clear to me that until the critical stage of the Minister's decision has been reached, the employees whom the employer proposes to retrench remain on the payroll. They have not been retrenched. . . . To backdate the retrenchment conflicts with the intendment of the Regulations. A contrary view would cause an injustice to employees who, awaiting the Minister's decision on whether or not they were to be retrenched, are obliged not to seek and obtain other employment.⁵⁸

The Minister has power to order that his/her approval of the retrenchment be effective from a date in the future.⁵⁹

Initially there was no right of appeal against the Minister's decision because this was not provided for in the Act and the Regulations. This was changed in 1994 and the position now is that any party may appeal against the Minister's decision to the Labour Relations Tribunal.⁶⁰ The regulations are silent on the effect of an appeal from the Minister's decision but the Supreme Court has held that the noting of an appeal against the Minister's decision, suspends the decision appealed against.⁶¹ In *Phiri & Ors v Industrial Steel and Pipe*⁶² the Minister had approved retrenchment, subject to a number of conditions which included a retrenchment package of: (i) six months severance pay and (ii) two weeks pay for every completed year of service.

The employer appealed against this decision to the Labour Relations Tribunal. Pending the hearing of the appeal, the workers instituted proceedings in the High Court contending that the noting of the appeal had the effect of suspending the Minister's determination and they were therefore still employed and entitled to their salaries and benefits until the appeal had been determined by the Labour Relations Tribunal.

Although the Supreme Court agreed that the effect of an appeal is to suspend the decision appealed against, the workers failed in their argument because the appeal was not against the Minister's approval of retrenchment but related only to the retrenchment package. As the retrenchment itself had not been appealed against, it stood and therefore their employment had been terminated. The position of the law is therefore clear, namely that where an appeal is noted against the decision to retrench, workers remain on the payroll and as long as they tender their services, the employer is obliged to pay them their salaries and benefits until the appeal is determined.

6. Once an agreement between the parties has been secured or approval has been granted, as the case may be, the employees to be retrenched are entitled to be given not less than one month's written notice of the retrenchment.⁶³ It must be emphasized that this notice only takes effect either after the Minister's decision or after the securing of the agreement between the parties.⁶⁴

58. See p. 604.

59. See *Kadir & Sons v Panganai & Anor* 1996 (1) ZLR 598 (s).

60. See section 6(2) of Retrenchment Regulations as amended by SI 137/94.

61. See *Phiri & Ors v Industrial Steel and Pipe (Pvt) Ltd* 1996 (1) ZLR 45 (S).

62. *Ibid.*

63. See sections 8A and 9(1) of the Regulations.

64. See *Kadir & Sons v Panganai & Anor* 1996 (1) ZLR 598 (s).

It must be evident from the above description of retrenchment procedures that a distinctive feature of Zimbabwean law is that the final decision as to whether or not to retrench is not made by the employer. Either the employer secures an agreement with the employees concerned or the Minister makes the final decision. In most countries, the employer has the final decision and this is supported by international labour standards as recorded by ILO Convention 158.⁶⁵ In South Africa, the legislation requires an exhaustive consultation process but the employer ultimately makes the decision whether or not to retrench.⁶⁶ The Zimbabwean approach provides a better protection to workers by undercutting the managerial prerogative while the employer's interests are safeguarded by the right of appeal to the Labour Relations Tribunal or the review procedure in the High Court.

RETRENCHMENT PACKAGES

One of the most striking deficiencies of retrenchment law in Zimbabwe is that the legislation does not set out any minimum or recommended retrenchment packages. It must be noted that in the absence of legislative provisions, an employer has no duty to pay any retrenchment package at all. In the South African case of *Young & Others v Lifegro Assurance Ltd*⁶⁷ it was said:

Severance pay, although a common and desirable feature of modern retrenchment practice in South Africa, is, in the absence of legislation or embodiment in the contract of employment, the outcome of collective or individual bargaining, not legal rights.⁶⁸

The furthest that Zimbabwean legislation goes is to require those involved in the retrenchment process (that is, an authority, retrenchment committee or the Minister) to have regard to "the terminal benefits" to which the proposed retrenchees will become entitled, before approving the retrenchment.⁶⁹ The expression "terminal benefits" does not necessarily refer to a distinct retrenchment package separate from the benefits that would accrue to an employee on normal termination, such as pay in lieu of leave, gratuity and so on. In fact, on a narrow reading of the current legislation, a retrenched employee may get exactly the same exit packages as he/she would have got on normal termination of employment.

An example of a minimum retrenchment package is provided by Section 41(1) of the South African Basic Conditions of the Employment Act, 1997⁷⁰ which provides as follows:

An employer must pay an employee who is dismissed for reasons based on the employer's operational requirements severance pay equal to at least one week's remuneration for each completed year of continuous service with that employer . . .

65. See Termination of Employment Convention, 1982 (No. 158). However, the Convention requires extensive consultations and that an impartial body be empowered to overturn the employer's decision in appropriate cases.

66. See Section 189 of the Labour Relations Act, 1996.

67. (1991) 12 ILJ 1256 (LAC).

68. At 1265F-I.

69. See section 7 of the Regulations.

70. Act No. 75 of 1997.

Although the legislation does not provide for a minimum retrenchment package, it is submitted that it makes it mandatory for a retrenchment package to be paid. This is evident from section 3(2) of the Regulations which provides that the employer and the employees concerned must seek to agree on two aspects, namely (i) whether or not the employees, should be retrenched and (ii) if so, the terms and conditions on which they may be retrenched. The regulations further provide that where retrenchment is unavoidable the terms and conditions on which agreement is required should include "the benefits to be paid on retrenchment including redundancy or severance payments and relocation allowances".⁷¹ If there is no agreement on benefits to be paid, the matter is referred to the Retrenchment Committee, and thereafter to the Minister, who is required to "approve the proposed retrenchment subject to such terms and conditions as he may consider necessary or desirable to impose".⁷²

In view of the fact that the Regulations require an agreement to be reached on a retrenchment package, the Minister cannot approve a retrenchment without prescribing a retrenchment package. This follows logically from the fact that he/she only enters the retrenchment scene when the parties have failed to reach an agreement on *inter alia*, retrenchment packages and his/her role is to impose a reasonable retrenchment package.

An employer who wishes to retrench is therefore obliged to pay a retrenchment package, the only issue being the quantum of that package. The Supreme Court in *Continental Fashions (Pvt) Ltd v Mupfuri & Ors*⁷³ purported to set out some guidelines. In that case, a company which was in serious financial problems and on the verge of liquidation, sought to retrench some of its employees to avoid liquidation. McNally JA held that the ability of the company to pay the retrenchment package was the ultimate criterion in determining the quantum of the package. The words of his Lordship were as follows;

Clearly therefore, although it is not stated in the Regulations, the ability of the company to pay the retrenchment package is the ultimate criterion – the bottom line. If the company cannot pay what it is ordered to pay it must go into liquidation, which is what the retrenchment exercise was designed to avoid.⁷⁴

This approach is misconceived. There can be no such thing as "the ultimate criterion" in the assessment of a retrenchment package, if one takes into account the rationale of retrenchment law. As already argued, the main rationale of retrenchment law is, or should be, to strike an appropriate balance between the competing interests of the employer and those of the employees to be retrenched. The ability of the employer to pay a proposed package is merely one of the factors to be taken into account in the assessment of the quantum of a retrenchment package. The other important factor is the mitigation of the adverse consequences falling on the employees to be retrenched.

The latter actually appears to be the more important factor. This is fortified by section 7 of the regulations which requires an authority, the retrenchment committee and the Minister, as the case may be, to pay "due regard" to the consideration that "the consequences of

71. See Section 3(2a)(b) of the Regulations, SI 404/90 as amended by SI 252/92.

72. Section 6(1) of the Regulations.

73. 1997 (2) ZLR 405 (S).

74. At p.407H-408A.

retrenchment to employees should be mitigated so far as possible". This implies that the factor of "inability of the employer to pay" should play second fiddle to the need to ensure a reasonable package for the employees to be retrenched.

It is submitted that the other factor to be taken into account should be the prevailing practices in the industry concerned. A court or authority being called upon to make an assessment of a retrenchment package must impose a reasonable package, having ultimate regard to the factors mentioned above. The ultimate test is one of reasonableness.⁷⁵ It has also been said that the retrenchment package should simply not be "unduly oppressive or discriminatory".⁷⁶ The result of this approach is that even where retrenchment has been resorted to for purposes of avoiding liquidation, inability to pay cannot be a defence to an order to pay a "reasonable" package. The employer may have to borrow to pay a retrenchment package as long as that package is adjudged to be reasonable. A question which may be raised is; when is a package reasonable? The answer is that this is a matter of discretion for the court or authority making the assessment. In terms of general principles of law, an assessment would be regarded as unreasonable and therefore liable to be set aside on review, if it is such that no reasonable person, applying his/her mind to the facts, would have arrived at it.

There is, therefore, no basis for the suggestion by the Supreme Court in *Continental Fashions* that different criteria apply in the assessment of retrenchment packages depending on whether the retrenchment results out of the mechanization of operations or from loss of profitability. The nature of the retrenchment may only affect the relevant weight to be placed on the key factors of (i) ability of the employer to pay and (ii) the mitigation of the adverse consequences falling on employees to be retrenched. For instance, where the retrenchment emanates from mechanization, the ability of the employer to pay may be less important than the need to cushion the employees concerned from the adverse consequences of retrenchment. This may translate into a high retrenchment package. On the other hand, where the retrenchment emanates from loss of profitability, the inability of the employer to pay may be more significant than the other factor and this may translate into a low retrenchment package. Each case depends on its own facts.

It is difficult to tell from the legislative provisions what are the main objectives of the retrenchment package. It has been said of severance allowances in general:

There has been much discussion about the nature of severance allowances. Are they an element of wages, payment of which has been postponed? Or are they the worker's 'share' in the understanding, increasing with his length of service? Or a valuation of his job property rights? Or simply a means of income protection during a period of unemployment, helping him to adjust and move to new employment.⁷⁷

It appears that the aspects mentioned in this passage are not mutually exclusive. In the case of Zimbabwe, the legislation, in seeking to minimize the consequences of retrenchment

75. See *Chinyerere & Others v The Cotton Company of Zimbabwe* SC 113/99.

76. *Ibid.*

77. See B. Hepple, "Flexibility and Security of Employment" in R. Blanpain and C. Engels, *Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (1998, Kluwer International) p.277. at 286.

can be said to accommodate both income protection for the retrenched employee while at the same time realizing his/her value in the undertaking.

The absence of a legislative criterion for assessing retrenchment packages was severely criticized by McNally JA in *Continental Fashions* where he called upon the state to "make up its mind as to the extent to which it wishes to interfere with the operation of free market forces".⁷⁸

In *Chidziva & Ors v ZISCO*,⁷⁹ the Supreme Court introduced the concept of waiver as follows: notwithstanding the fact that the retrenchment regulations have not been followed, employees who accept retrenchment packages may be taken to have waived the right to object to the procedural irregularities. In other words, a retrenchment will be regarded as valid even where the provisions of the regulations have not been complied with, if the employees accept their retrenchment packages in circumstances where such acceptance amounts to a waiver.

The use of the concept of waiver in this context is problematic. Waiver requires full knowledge of the legal rights being abandoned. Most workers involved in retrenchment disputes would not take the acceptance of a retrenchment package as an abandonment of any rights they may have to challenge the retrenchment. The views expressed in the minority judgment of Muchechetere JA in *Chidziva* are worth reproducing:

In considering this question of waiver sight must not be lost of the fact that the retrenchment packages were presented to the appellants as a *fait accompli* to persons who were not financially able to pass up the respondent's offer. And as submitted by Mr Morris given the high cost of litigation, the real difficulties experienced in finding alternative employment, the fact that the appellant are laymen unversed in the provision of the law of contract, it was not unreasonable for the appellants to take retrenchment packages.⁸⁰

MEASURES TO PREVENT, OR MINIMISE EFFECTS OF RETRENCHMENT

An important aspect of retrenchment law in Zimbabwe is the emphasis given to either preventing retrenchment altogether or minimizing its effects. First, an authority to whom a retrenchment notice has been served is required to attempt to secure agreement between parties on avoiding retrenchment.⁸¹ The legislation, without being exhaustive, suggests various ways in which retrenchment may be avoided and these include restricting overtime, transferring employees between departments or enterprises, job-sharing, reduction of working hours, rotational unpaid leave and voluntary retirement.⁸² If the parties agree on these measures, retrenchment is avoided. If there is no agreement on the measures, and the workers are strongly of the view that retrenchment is avoidable, a dispute may be declared and referred to the Minister via the Retrenchment Committee.⁸³ The Minister has

78. At p.411G.

79. 1997(2) ZLR 368(S).

80. At p.380C.

81. See Section 3(2a) of the Regulations.

82. *Ibid.*

83. See section 3(6) of the Regulations.

the power to refuse to approve a proposed retrenchment if he/she is satisfied that it is avoidable.⁸⁴ Secondly, the legislation permits an employer, with the agreement of the employees concerned or with a workers committee representing them, to have recourse to a number of measures that may avoid retrenchment.⁸⁵ These measures include placing employees on short-time, instituting a system of shifts and reducing or deferring payment of remuneration of the employees concerned.⁸⁶ However, such measures can only be implemented for a maximum period of twelve months.⁸⁷ It is important to note that any agreement entered into for purposes of implementing measures to avoid retrenchment overrides any collective bargaining agreement to the contrary.⁸⁸ This shows the legislative policy of attempting, as far as possible, to avoid retrenchment.

There is a potential room for abuse in any system which permits an employer to resort to measures of the sort outlined above to avoid retrenchment. For instance, an employer may resort to the measures as a cost cutting measure while pretending that it is seeking to avoid retrenchment. Retrenchment legislation seeks to minimize this abuse in two ways. The first is that the employees concerned must agree to the measures and secondly, the employer must serve a 14-day notice on the Retrenchment Committee, giving reasons supported by evidence as to why the measure is necessary.⁸⁹ The Retrenchment Committee is empowered either to prohibit the employer from resorting to the measure or to order the suspension of the measure pending the provision of further reasons for resorting to measures.⁹⁰ Thirdly, every employer is obliged to inform its employees of any major changes that are likely to entail the retrenchment of any of its employees. This is stated in section 8 of the Regulations in the following words:

Every employer shall ensure that, at the earliest possible opportunity, his employees are kept informed of, and consulted in regard to, any major changes in production, programmes, organizations or technology that are likely to entail the retrenchment of any of his employees.

This duty on the employer is designed to keep employees in the picture about the state of the employer so that retrenchment does not come as a surprise. In that way, it is a provision aimed at lessening the effects of retrenchment by making employees generally prepared for this eventuality, should it occur. However, its effectiveness is a matter of doubt. The legislation does not provide remedies for breach of this duty nor does it make clear the scope of consultation envisaged. It is submitted that where this duty has been breached, employees may use that fact as a basis for resisting a proposed retrenchment, the argument being that the employer has not given the employees sufficient warning of the pending retrenchment. In other words, the employees may use that fact to refuse to agree, in which case, the dispute will have to reach the Minister, who should use the same fact to decline to approve the proposed retrenchment.

84. See section 6, as read with Section 5 of the Regulations.

85. See Section 8 B(1) of the Regulations.

86. *Ibid.*

87. *Ibid.*

88. See Section 8B(2) of the Regulations.

89. See Section 8B(6).

90. See Section 8B(7) of the Regulations.

What is consultation? Although the regulations do not say what it entails, it is suggested that it must be *bona fide*, must seek to achieve consensus between the employer and the employees and must afford the employees a fair and reasonable opportunity to express their views and proffer suggestions.⁹¹ While it is clear that consultation does not require the reaching of an agreement, it would appear that it entails the provision of relevant information by the employer.⁹² The employer may be held to have complied with the duty to consult if actual consultations fail because of unreasonable preconditions set by the employees.⁹³

Fourthly, in cases where retrenchment is unavoidable, the workers are entitled to insist on the phasing of retrenchments over a period and on an equitable criteria for selecting employees to be retrenched.⁹⁴ The Supreme Court has said that the criteria used to choose employees for retrenchment should be fair and reasonable.⁹⁵ It indicated, *obiter*, that the principle of "last in, first out" (LIFO) would be a suitable starting point.⁹⁶ This is not stated in the Regulations and therefore, in principle, parties are entitled to agree on any criterion which, in the circumstances of the situation, is fair and reasonable. However, the LIFO principle is generally accepted in other countries as fair and reasonable.⁹⁷

CONCLUSION

This article demonstrates that the Zimbabwean law on retrenchment is largely a continuation of the post-independence efforts at job protection/security for workers, that gives it some strong worker protection features. However, it suffers from some fundamental defects arising mainly from an unclear policy articulation in labour law. For instance, the absence of a minimum retrenchment package is inconsistent with the strict regime which requires every retrenchment to be approved by a body other than the employer. On the other hand, the courts have been able to use the loopholes in the legislation to make substantial inputs of their own which may contradict the original legislative intentions.

91. See *Hadebe & Others v Rometex Industriex Ltd* (1986) 7 ILT 726 (1c); *Atlantis Diesel Engines (Pty) Ltd v National Union of Mine Workers of SA* (1994) 14 ILJ 1247 (A).

92. See *NUMSA & Others v Comark Holdings Limited* (1997) 5 BLLR 589 (LC).

93. See *NEHAWU v University of Fort Hare* (1997) 8 BLLR 1054 (LC) where the South African Labour Court refused to interdict a retrenchment, then the union declined consultation on the basis that it wanted the issue of the chairing of the consultation meetings to be resolved before the process could begin.

94. See section 3(2a)(b).

95. See *Chidziva & Ors v ZISCO* 1997(2) ZLR 368 (S).

96. *Ibid.*

97. See J. Grogan, *Workplace Law* 3rd edition (1998)p.169.



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