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THE CONSTITUTIONAL GUARANTEE TO FAIR LABOUR PRACTICES: THE RECOMMENDATIONS TO INFORM POLICY

SUBMITTED BY

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DEDICATION

I have dedicated this work to God Almighty and a pedigree of persons- Innocent Maja, Agnes Makuyana, Tapiwa Kasuso for the unprecedented assistance in coming up with this work that required much time, Tranos Goronga, Olinda Makuyana, Wilfred Chirambwe, Ethel Nhundu, Tanyaradzwa Chingombe, Theresa Muchinguri, Tafadzwa Gwenzi, Mukudzei Moyo, Nathan Phikanibona, Rodney Manyepa, Isheanesu Chaka, Allen Kadye and the lord's house Prophetic Ministry International Church.

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CHAPTER I

INTRODUCTION

1.1 SECTION 65 (1): INTRODUCTORY REMARK

On the 22nd of May 2013, Zimbabwe adopted a new Constitution[1] with an expanded Bill of Rights. The most important section in the new Constitution[2] relevant to labour law is Section 65 which specifically deals with labour rights. Section 65 (1) specifically provides for *every* person's right to *"fair and safe labour practices and standards and to be paid a fair and reasonable wage."* The new governance charter compels a mind shift from a linear common law approach to a poly-centric socio-economic approach.[3] The right to fair labour practices is an unusual Constitutional guarantee.[4] It is also found in sections 23[5] and 31[6] of the Constitutions of South Africa and Malawi respectively. *In exitu* is the fact that the full import and potential of the right has to be harnessed as it appears that its exact interpretation, extent and scope remain enshrouded in obscurity.

Accordingly, this dissertation provides a concrete model of interpretation of the right to fair labour practices. As Conradie[7] puts it:

> *"It has therefore become necessary to determine the exact scope of this Constitutional right in order to investigate whether there is any room for an extended view of this right and to which limitations (If any) it should be subjected to."*

[1] Constitution of Zimbabwe Amendment (NO 20) Act 2013
[2] Constitution (n1 above)
[3] *Jonker v Okhahlamba Municipality & Ors 2005 26 ILJ: 569 - 570*
[4] V Niekerk:- *Law at Work* (2012) 38
[5] Constitution of the Republic of South Afr ica
[6] Constitution of the Republic of Malawi
[7] Unpublished: M Conradie 'A critical analysis of the right to fair labour practices' Unpublished LLM thesis, University of the Free State, 2013 @ 2

Since the fair labour practice concept is a fairly recent concept in Zimbabwean labour law, there is need to arrive at the exact scope of the right. Holmes J[8] had to say:

> *"The word 'right' is one of the most deceptive of pitfalls, it is easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion."*

Moreover, there are a myriad of uncertainties that surround this right which remain unattended to and cannot be further postponed.

1.2 BACKGROUND

Under the common law, the uncertain realms of equity were unknown and the courts – endowed with carte blanche – would not go beyond the narrow confines of contract law. Therefore, it was the inability of the classic application of the common law to deliver fairness and equity to the employment relationship that the new constitutional and statutory dispensation was conceived. The right to fair labour practices was unknown at common law. The common law contract of employment was based on contractual freedom and the employer could pressurize the employee into agreeing to almost anything.[9] For a trenchant criticism of the common law, Brassey[10] notes:

> *"The common law, in short, offers little protection against arbitrariness. It allows the party with the greater bargaining power to extract any bargain he wants, however oppressive, perverse or absurd it may be, provided that it is not illegal or immoral. It allows him to change it when it no longer suits him, by threatening to terminate the relationship unless the other party submits to that change. It allows him to flout the bargain whenever he likes, provided that he does not mind paying a paltry sum, which is invariably all the*

[8] *American Bank & Trust Co. v Federal Reserve Bank of Atlanta* 256 US 350 41 S.Ct 499, 500 (1921)
[9] A Van Niekerk:- *Law at Work* (2008)
[10] Brassey et al:- *The New Labour Law: Strikes, dismissals and the unfair labour practice in South African Law* (1987)5

damages amount to. And all this (he) is allowed to do without consulting the other party first, or paying him the slightest heed"

The court had occasion to consider that the common law contract of employment contains no implied duty of fairness, and more specifically not an implied right not to be unfairly dismissed, in *SA Maritime Safety Authority v Mc Kenzie.*[11] Zimbabwe has witnessed a dramatic shift from the repressive legislation of the colonial times to the present-day fair labour practice dispensation. The key features of this system, described in subsequent cases such as *S v Kefusi*[12] as an *'infamous charter of serfdom'* from the dark ages included reliance on direct state force and criminal law to enforce employment relationships. More than half of the Master and Servants Ordinance[13] constituted penal sanctions. After independence, the Labour Relations Act[14] and subsequent amendments introduced the fairness concept. However, even though the unfairness of the concept was regulated in section 8 of the Labour Relations Act,[15] now the Labour Act, there was absolutely no general right to fair labour practices in the Lancaster House Constitution.[16] *Ab identitate rationis*, there had to be a stand-alone right to fair labour practices which culminated in section 65(1) of the Constitution. It is this right that implores interpretation.

1.3 STATEMENT OF THE PROBLEM

There is a prevailing uncertainty with regards to the scope, extent and/or meaning of the right to fair labour practices in section 65 (1) of the Constitution. The right is there in the Constitution but it has not been interpreted. It appears as if certain elements concerning this right are still enshrouded in obscurity. There is a looming danger of speculation and misinterpretation of the right since it is a fairly new concept in our labour law. The focus of this dissertation is therefore to determine the exact scope of this right in relation to the word 'everyone,' analyzing the exact meaning of the word 'fairness' and thereafter to give

[11] *SA Maritime Safety Authority v Mc Kenzie 2010 31 ILJ*
[12] M Gwisai:- *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-colonial Capitalism* (2006)
[13] Master and Servants Ordinance NO. 5 of 1901
[14] Labour Relations Act, now Labour Act (Chapter 28:01)
[15] Labour Act (n14 above)
[16] Lancaster House Constitution

recommendations. The ambiguities that appear to taint the right have implored this dissertation to provide meaning to it. The right must be delineated so as to avoid a miscellany of judgments, too distinct to form a precedent, and too variegated to provide a meaningful guideline.

1.4 RESEARCH AIMS AND OBJECTIVES

- To determine the exact scope, extent and/or meaning of the right to fair labour practices under the Constitution

- To assess whether or not the right has any relationship with the Labour Act (Chapter 28:01)

- To carry out a comparative analysis with the interpretation of section 23 of the South African Constitution.

- To determine the effect of the constitutional guarantee to fair labour practices on the Labour Act (Chapter 28:01)

- To provide recommendations on, inter alia, the manner in which the right must be interpreted

1.5 METHODOLOGY

The research methodology of this dissertation will be restricted to the desktop research. In the circumstances, leading textbooks, legislation, journals, scholarly articles, case authorities, international conventions and internet sources shall be employed.

1.6 LITERATURE REVIEW

Grogan[17] asserts that the general guarantee to fair labour practices has far-reaching effects on the civil court's approach to interpretation of the rights of parties to employment contracts. Gwisai[18] says that section 65 of the Constitution has the potential for a dramatic overhaul of labour jurisprudence in the country by the incorporation of advances made by the working class regionally and internationally. This is the *raison d'etre* behind the agreement among scholars that the general right to fair labour practices needs interpretation so as to determine its scope, extent and meaning. Conradie[19] says that a determination of the scope of this constitutional right is necessary in order to enhance legal certainty as to its application.

Kasuso[20] maintains that even though the right to fair labour practices is unique, it is not defined in the Constitution. Cheadle[21] argues that the focus of the enquiry into the ambit of the labour rights should not be on the meaning of 'everyone' but rather on 'labour practices' reasoning as follows;

> *"Labour practices are the practices that arise from the relationship between workers, employers and their respective organizations. Accordingly, the right to fair labour practices ought not to be read as extending the class of persons beyond those classes envisaged by the section as a whole."*

Conradie[22] however says that in order to determine the exact meaning and scope of the constitutional right to fair labour practices, not only the right itself should be analysed but

[17] J Grogan:- *Workplace Law* (2007) 13
[18] M Gwisai:-'Enshrined labour rights under s65 (1) of the 2013 Constitution of Zimbabwe: The right to fair and safe labour practices and standards and the right to a fair and reasonable wage' *Volume 3 Issue 1 University of Zimbabwe Student Journal*
[19] Unpublished: M Conradie (n7 above) 19
[20] T G Kasuso:- 'Transfer of undertaking under section 16 of the Zimbabwean Labour Act (Chapter 28:01)' Volume 1 *Midlands State University Law Review* 22
[21] I Currie and J De Waal:- *The Bill of Rights Handbook* (2005)
[22] Unpublished: M Conradie (n7 above)

also the historical development that led to the origin of the right. Although Vettori[23] argues that the right to fair labour practices is not capable of precise definition, Kasuso argues[24] that the right is not incapable of precise definition. Even though the constitutional right to fair labour practices is a giant step towards the amelioration of the harsh common law position where no such right exists, Gwisai[25] maintains that the common law remains as 'residual law' to fill in areas where legislation has gaps, is silent or vague.

In order to harness the full meaning of the constitutional guarantee to fair labour practices, legal experts are generally in favour of adopting a purposive interpretation which is incorporated by virtue of section 2 A (2) of the Labour Act.[26] Madhuku[27] says that the art of constitutional interpretation is no different from the art of construing a statute. Tsabora[28] argues that the modern trend in construing constitutional provisions supports a purposive approach over a strict adherence to a literalist approach. To expand the reach of the right as opposed to attenuating its meaning, therefore, the courts will have to interpret the term everyone to include a very broad category of persons, including criminals convicted of despicable crimes.

1.7 EXPOSITION OF CHAPTERS

CHAPTER 1

This provides the introduction, background to the study, statement of the problem, the research aims and objectives, overview of the literature or current legal framework on the subject, the research methodology as well as the synopsis of chapters.

[23] Unpublished:- M S Vettori 'Alternative means to regulate the employment relationship in the changing world of work' Unpublished LLD thesis, University of Pretoria, 2005 @ 297
[24] T G Kasuso (n19 above)
[25] M Gwisai:- *Labour and employment law in Zimbabwe- relations of work under neo-colonial capitalism* (2006)
[26] Labour Act (Chapter 28:01)
[27] L Madhuku:- 'Constitutional interpretation and the Supreme Court as a political actor: Some comments on United Parties v Minister of Justice, Legal and Parliamentary Affairs' Vol 10.1 *Legal Forum* 51
[28] J Tsabora:- 'The challenge of constitutional transformation of society through judicial adjudication: Mildred Mapingure v Minister of Home Affairs and Ors SC 22/14' Vol 1 *Midlands State University Law Review*

CHAPTER 2

This chapter determines the exact scope of the right in relation to the word “everyone.” An analysis of the different beneficiaries of this right shall be lodged so as to provide meaning to the right.

CHAPTER 3

This chapter investigates the general fairness concept in relation to the right to fair and safe labour practices. The main aim and purpose of section 65 (1) is to curb unfairness. It is therefore extremely necessary to provide meaning to this all-encompassing concept of fairness in an attempt to determine the exact scope of section 65 (1).

CHAPTER 4

This chapter establishes limitations that attach to the right to fair labour practices, determines its effect on labour law, deals with constitutional litigation and provides an appropriate interpretation model.

CHAPTER 5

This chapter ties the major arguments made in this dissertation and consequently concludes the dissertation. It further provides recommendations as to how the right may be interpreted so that it does not become anything short of empty rhetoric.

CHAPTER II

DETERMINING THE REACH, EXTENT OR SCOPE OF SECTION 65 (1)

2.1 INTRODUCTION

A plethora of legal opinions exist as to whether the word everyone has broadened the ambit of protection to also cover relationships other than the traditional employer-employee relationship. Whether or not section 65 (1) of the Constitution[29] must be accorded an open-ended meaning remains unsettled. There is therefore a looming danger that the courts will be largely left to their devices hence interpreting the right to fair labour practices with disturbing incongruity. Accordingly, this chapter sheds some clarity as to who can turn to section 65 (1) for relief. Important in this analysis is the constitutionalization of labour rights in section 65 which in its own words reads:

> *'Labour Rights*
>
> (1) *Every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage.*
> (2) *Except for members of the security services, every person has the right to form and join trade unions and employee or employers' organizations of their choice, and to participate in the lawful activities of those unions and organizations.*
> (3) *Except for members of the security services, every employee has the right to strike, sit in, withdraw their labour and to take other similar concerted action, but a law may restrict the exercise of this right in order to maintain essential services.*
> (4) *Every employee is entitled to just, equitable and satisfactory conditions of work.*

[29] Constitution of Zimbabwe Amendment (NO 20) Act 2013

(5) *Except for members of the security services, every employee, employer, trade union, and employee or employer's organization has the right to-*

(a) Engage in collective bargaining;

(b) Organize; and

(c) Form and join federations of such unions and organizations

(6) *Women and men have a right to equal remuneration for similar work.*

(7) *Women employees have a right to fully paid maternity leave for a period of at least three months.'*

2.2 SCOPE OF SECTION 65

Even though section 65 (1) says that every person is entitled to the right to fair labour practices, there are qualifications that flow from subsections (2) to (7).[30] This has therefore spurred uncertainty as to whether or not the use of every person actually implies everyone to the exclusion of no one even if they are not involved in an employment relationship. Since section 23 of the South African Constitution[31] heavily influenced the drafting of section 65 of the Constitution of Zimbabwe, Cheadle's[32] observation on section 23 is adopted:

> *'Although the right to fair labour practices in subsection (1) appears to be accorded everyone, the boundaries of the right are circumscribed by reference in subsection (1) to 'labour practices.' The focus of enquiry into ambit should not be on the use of 'everyone' but on the reference to 'labour practices.' Labour practices are the practices that arise from the relationship between workers, employers and their respective organizations. Accordingly, the right*

[30] Constitution of Zimbabwe Amendment (NO. 20) Act 2013

[31] Constitution of South Africa

[32] H. Cheadle, *'Labour Relations'* in Cheadle, Davis and Haysom, *South African Constitutional Law: The Bill of Rights* (2006) at 18-3. Leading authorities have adopted this position as legally sound: See A Van Niekerk *et al, Law at Work* (2012) @ 37

to fair labour practices ought not to be read as extending the class of persons beyond those classes envisaged by the section as a whole'

Since section 65 makes reference to labour practices and standards, the scope of the section is restricted to the employer-employee relationship and their respective collective organs. This therefore means that the term every person must not be interpreted to mean everybody even if they are not involved in an employment relationship. This generally flows from the fact that the purpose of section 65 and labour law in general is the regulation of the employment relationship on terms that are fair to both the employer and the employee.[33]

2.3 SCOPE OF THE RIGHT HOLDERS

2.3.1 THE STATUS OF NATURAL PERSONS

According to section 45 (3) of the Constitution,[34] natural persons are entitled to the freedoms and rights drawn and defined in the bill of rights. Every human being is a natural person; however, although all human beings have legal capacity, their status and contractual capacity may differ. Qualities and circumstances such as age, sex, marriage and insolvency of a natural person are determinative of such a person's status. Possible factors that pertain to contractual capacity that will limit the natural person's capacity to be involved in an employment relationship are age, mental capacity and insolvency.

Section 2 of the Constitution[35] says that the obligations itemized in the Constitution are binding on every person, natural or juristic. It is however foreseen that although the above-mentioned factors may bear an influence on the validity of a contract of employment, the employees involved will be entitled to enjoy section 65 (1) protection. As Van Jaarsveld[36] says:

[33] M Gwisai:- *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-colonial capitalism* (2006)
[34] Constitution of Zimbabwe Amendment (NO. 20) Act 2013
[35] Constitution (n6 above)
[36] Van Jaarsveld et al:- 'Principles and practice of labour law' *Service Issue 22 para 689*

"Because the Constitutional right to fair labour practices guarantees everyone this right, any victim of an unfair labour practice would be entitled to relief in terms of the Constitution and the common law."

Consequently, no employer may enforce a contract of employment against a young person under section 11 of the Labour Act[37] but the young person may enforce any rights that have accrued to him by or under such contract. What this means is that even a mentally incapacitated person may enjoy the protection of section 65 (1). Despite his or her contractual capacity, any natural person is therefore entitled to section 65 (1) protection as long as an employment relationship is established.

2.3.2 LEGAL PERSONS- ENTITLED OR NOT?

In *NEHAWU v University of Cape Town and Others*[38] the Constitutional Court of South Africa held that a juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of the juristic person. Similarly, section 45 (3) of the Zimbabwean Constitution[39] states that '*juristic persons are entitled to the rights and freedoms drawn in the bill of rights.'* For comparative purposes, section 8 (4) of the Constitution of South Africa[40] reads, *'A juristic person is entitled to the Bill of Rights to the extent required by the nature of that juristic person.'*

The argument was raised that only natural persons can be entitled to the protection of constitutional rights because an extension of the rights to juristic persons would diminish the rights of natural persons- but this argument was rejected.[41] In *Denel v Gerber*[42] it was however held that:

"*Although services were rendered through entities and although these tax-efficient tactics had to be sorted out with the Receiver of Revenue prior to*

[37] Labour Act (Chapter 28:01)
[38] *NEHAWU v University of Cape Town and Others* (2005) 24 ILJ 95 (CC).
See also GE Devenish:- *A commentary on the South African Bill of Rights* (1999) at 22-23
[39] See section 2 of the Constitution of Zimbabwe
[40] Constitution of South Africa
[41] *In re Certification of the Constitution of the Republic of SA, 1996 1996 4 SA 744 CC*
[42] *Denel (Pty) Ltd v Gerber 2005 25 ILJ 1256 LAC*

awarding money, it is indeed possible that where one person owns a legal entity and that entity renders services to another entity, that person may also be regarded as an employee of the latter entity."

The reality of the relationship between the juristic person and an employer should be the deciding factor. It is becoming more common to experience people performing services under the guise of a separate legal entity. Due to the fact that it is indeed the person rendering the services, although the conclusion of the contract is done between a legal entity and the employer, this phenomenon has been termed as self-employed persons.

2.3.3 EMPLOYERS

A myriad of scholars including Cheadle,[43] Van Jaarsveld[44] and Joubert et al[45] confirm that employers are entitled to the right to fair labour practices. This is particularly true considering that at the heart of the Labour Act[46] is the advancement of social justice and democracy in the workplace. Section 2A (1) of the Act[47] as read with section 65 (1) of the Constitution[48] demonstrates that employers are also legitimate beneficiaries of the right. In the words of Smalberger JA:[49]

"Fairness comprehends that regard must be had not only to the position and interests of the workers, but also those of the employer, in order to make a balanced and equitable assessment."

There is no good reason to afford protection only to employees.[50] An employee may, in limited circumstances, commit conduct vis-à-vis an employer that may be lawful but unfair[51]. An employer has the right to expect that in certain circumstances an employee will not merely comply with his or her rights in regard to the employer but will also act

[43] Cheadle:- *South African Constitutional Law: The Bill of Rights* (2005)
[44] Van Jaarsveld (n 3 above)
[45] WA Joubert:- *The Law of South Africa* (2001)
[46] Labour Act (Chapter 28:01)
[47] Labour Act (n11 above)
[48] Constitution (n1 above)
[49] *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & Ors 1996 4 SA 577*
[50] Du Toit and Potgieter:- 'Bill of rights compendium: Labour and the bill of rights' *Service Issue 21 of October 2007*
[51] *NEWU v CCMA & Ors (2003) 24 ILJ 2335 (LC) 2339*

fairly.[52] This conduct may qualify as an unfair practice, i.e. a practice that is contrary to that contemplated by section 65 of the Constitution. However, the fact that the Labour Act does not make provision for an unfair labour practice by an employee does not necessarily render the Labour Act unconstitutional. It merely means that the Act does not give full effect to section 65 (1) of the Constitution.

That the Labour Act[53] does not give full effect to the Constitution is a serious gap in the law that must be urgently dealt with. The preamble to the Labour Act[54] specifically mentions that it is *'An ACT to declare and define the fundamental rights of employees.'* This has left employers exposed yet the Constitutional right covers everyone.

2.3.3.1 THE STATE AS AN EMPLOYER

The Labour Act has in no uncertain terms excluded the State from recognition as an employer. This is despite the fact that the State qualifies as a juristic person at law capable of suing and being sued. Exacerbating this misnomer is the fact that the Constitution mentions that its obligations are also binding on juristic persons. This points to the fact that the Labour Act has become a crippled machine that has failed to fully give effect to the Constitution.

The state also qualifies as an employer because the right belongs to everyone. This therefore means that in as much as the state employs civil servants and other people employed under governmental institutions it is also guaranteed that right. It has become possible therefore for the state to approach the courts for relief based on the right to fair labour practices. Conversely, it has become possible for state employees to sue the state in the courts of law based on this right.

[52] *NEWU* (n16 above)
[53] Labour Act (Chapter 28:01)
[54] Labour Act (Chapter 28:01)

2.3.4 EMPLOYEES

The right to fair labour practices could be utilized by both typical and atypical employees in order to protect their legitimate interests.[55] The court's traditional approach to defining an employee is unimaginative with the result that there is a considerable amount of lack of protection for a significant proportion of employees. Various types of atypical employees have been identified including part-time work, temporary work, day work, outsourcing, sub-contracting, homework, self-employment and so forth. These atypical employees can conceivably turn to section 65 (1) for redress even if excluded by legislation or where the alleged unfair labour practice does not fall within the ambit of section 8 of the Labour Act.[56]

Adjudicators should look beyond the form of the contract to ascertain whether there is an attempt to disguise the true nature of the employment relationship. It is necessary to look beyond the legal structuring to ascertain the reality of the employment relationship. The Labour Act must therefore have a rebuttable presumption in favor of an employee. Such a presumption is incorporated in terms of section 200A of the Labour Relations Act[57] of South Africa. In determining whether someone is entitled to fair labour practices, the definition of an employment relationship should therefore be given preference over the reliance on the existence of an employment contract.[58]

2.3.4.1 STATUTORY EXCLUSIONS IN THE LABOUR ACT: RECONSIDERING THE DEFINITION OF AN EMPLOYEE

[55] Unpublished:- MS Vettori 'Alternative means to regulate the employment relationship in the changing world of work' Unpublished LLD Thesis, University of Pretoria, 2005 @ 297

[56] Labour Act (n11 above)

[57] Labour Relations Act of South Africa

[58] What is required in determining whether one is an employee is a conspectus of all the relevant facts including relevant contractual terms, and a determination of whether these holistically viewed establish a relationship of employment as contemplated by the statutory definition.

The Labour Act[59] is the principal legislation in Zimbabwe regulating labour law. It defines an employee in section 2 this way:

> *'Any person who performs work or services for another person for remuneration or reward on such terms and conditions as agreed upon by the parties or as provided for in this Act, and includes a person performing work or services for another person-*
>
> *(a) In circumstances where, even if the person performing the work or services supplies his own tools or works under flexible conditions of service, the hirer provides the substantial investment in or assumes the substantial risk of the undertaking; or*
>
> *(b) In any other circumstances that more closely resemble the relationship between an employee and employer than that between an independent contractor and hirer of services'*[60]

The Labour Act does not apply to those employees whose conditions of employment are otherwise provided for in the Constitution.[61] It excludes state employees or members of the Civil Service.[62] Staff of parliament, employees of the National Prosecuting Authority and members of the Judicial Service Commission other than judicial officers are some examples of those employees who are excluded by virtue of their conditions of employment being provided for in the Constitution.

The Labour Act in section 3 also excludes from its application members of a disciplined force of the state.[63] Since section 65 (1) of the Constitution accords every person the right to fair and safe labour practices and standards, employees of the state whose conditions of service are otherwise provided for in the Constitution qualify as employees despite statutory exclusion. Only members of the security services are

[59] Labour Act (Chapter 28:01)
[60] Section 2 of the Labour Act
[61] Section 3 of the Labour Act
[62] Established under Chapter 10 of the Constitution
[63] The Labour Act defines disciplined force in section 2 as:
A) a military, air or naval force
B) a police force
C) a prison service
D) persons employed in the President's office or security duties

excluded from the ambit of section 65 only to the extent that subsections (2), (3) and (5) provide. Besides these subsections, section 65 is applicable to every person involved in an employment relationship including those specifically excluded by the Labour Act.[64]

2.3.4.2 EXCLUSION OF INDEPENDENT CONTRACTORS FROM THE AMBIT OF SECTION 65 (1) OF THE CONSTITUTION

It may be argued that the reasons why an independent contractor was excluded from the employee definition in the Labour Act[65] are not applicable for purposes of section 65 (1). There is however respectful disagreement with this argument. The relationship should be akin to an employment relationship prior to affording protection under the ambit of section 65 (1). Personal delivery of services and dependency are key factors that should be present for a relationship to be regarded as a relationship akin to an employment relationship. It is therefore submitted that contractors are not included under the protection afforded by section 65 (1).

As Conradie[66] says:

> *"Contractors are not performing services under the auspices of a relationship akin to an employment relationship"*

Independent contractors do not pass the preliminary supervision and control test enunciated in *Smit v Workmen's Compensation Commission*.[67] And after everything has been said about independent contractors, the heading of section 65 in the Constitution specifically refers to labour rights.

[64] Labour Act (Chapter 28:01)
[65] Labour Act (n11 above)
[66] Unpublished: M Conradie (n7 above)
[67] *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51

2.4 CONCLUSION

Conclusively, the term everyone must be determined with reference to being involved in an employment relationship. The law has moved from the narrow confines of contract to wide constitutionality. Where section 56 of the Constitution which guarantees equal protection of the law is read conjunctively with section 65 (1) the Constitution the legal conclusion is this one: the right to fair labour practices is not limited to many restrictions and can therefore be perceived as open-ended, broad and accommodative. The term everyone will have to be interpreted to include a very broad category of persons, including criminals convicted of despicable crimes. A century ago,[68] it was held:

> *"Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of Constitutions."*

[68] *Weems v United States [217 US 349]*

CHAPTER III

WHAT IS THE MEANING OF FAIRNESS?

3.1 INTRODUCTION

The Constitution does not define the concept of fairness. Gwisai[69] says that since the Constitution does not define the term fair labour practices, the concrete parameters of the content of section 65 have to wait for elaboration by judicial practice. This convoluted, complicated and often confusing concept must therefore be defined if determining the exact scope of the right to fair labour practices is not to remain a grandiose dream. Since Chapter 2 has dealt with the various beneficiaries of this right, this chapter neatly summarizes the strength and nature of the fairness concept. The different safe and fair labour practices shall also be analyzed *seriatum*.

3.2 CONSTRUING THE FAIRNESS CONCEPT IN SECTION 65 (1)

This dissertation would be incomplete if an interrogation was not made on the fairness[70] concept and its legal implications. It is therefore undeniable that what connotes to fairness has to be determined because the term fairness has in itself become a central theme in labour law today.

The incontrovertible search for the meaning of fairness which began in the corridors of the Academy of Athens remains unsettled to this day. It can therefore not be further postponed in this chapter. It is to be however appreciated that fairness is one of the most difficult words to define. It may be synonymous with words like just, equitable, reasonable,

[69] M Gwisai:-'Enshrined labour rights under s65 (1) of the 2013 Constitution of Zimbabwe: The right to fair and safe labour practices and standards and the right to a fair and reasonable wage' *Volume 3 Issue 1 University of Zimbabwe Student Journal*

[70] Investigation has shown that employees are more prone to accept negative outcomes if they are treated in a fair and reverential manner. Fairness is more than what has been tabulated as lawful. It is much wider and takes all surrounding circumstances into account. The complex nature of labour practices does not allow for a rigid regulation of what is fair or unfair in any particular circumstance.

fair-minded and righteous.[71] In labour terms, the quagmire is further confounded by the inherent tension between interests of the employer and those of the employee.[72]

3.3 THE WISDOM OF LEGAL WRITERS ON FAIRNESS

Olivier[73] puts it this way, '*fairness for everyone would be possible only if everyone's interests were the same.'* Du Toit et al[74] however define fairness as a practice that is not capricious, arbitrary or inconsistent. Justinian[75] defined this concept as the set and constant purpose to give every man his due. Cheadle[76] says it is really no more than the balance of the respective interests of the employer and the employee in a capitalist society. Gwisai[77] has this to say regarding fairness, particularly with reference to section 65 (1) of the Constitution:

> *"The new Constitution of Zimbabwe is clearly based on the vision of substantive equality as opposed to formal equality. The concept of fairness should be interpreted by reference to the norm or standard referred to in s56 (5) of the Constitution by which conduct is judged as fair or unfair. Conduct can only be deemed as fair if it is justifiable under the norms of '…a democratic society based on openness, justice, human dignity, equality and freedom.'"*

Fairness can be viewed dualistically: on the one hand it was based on the direct principles of truth, justice and the fair and good; on the other hand it entailed an exchange of a recompense which, in the case of a kindness is called thanks and in the case of a wrong revenge.[78] According to the positive law theory fairness is adhering to positive law. The

[71] Unpublished: M Conradie 'A critical analysis of the right to fair labour practices' Unpublished LLM thesis, University of the Free State, 2013

[72] *NEHAWU v University of Cape Town & Ors 2003 24 ILJ 33-35 CC*

[73] HJ Olivier:- *Dissipline, Ontslag en Menseregte- Handleiding* (2006)

[74] D Du Toit et al:- *Labour Relations Law- A Comprehensive Guide* (2006)

[75] Unpublished: M Conradie (n1 above) 153

[76] H Cheadle:- 'The first unfair labour practice case' Industrial Law Journal 1: 200-202

[77] M Gwisai:-'Enshrined labour rights under s65 (1) of the 2013 Constitution of Zimbabwe: The right to fair and safe labour practices and standards and the right to a fair and reasonable wage' *Volume 3 Issue 1 University of Zimbabwe Student Journal*

[78] Unpublished M Conradie (n1 above)

natural law doctrine views fairness as based upon the law of nature. The social interest theory however says that fairness is the promotion of social interest.

Fairness is the *equal treatment of equals and the unequal treatment of unequals*.[79] It is not the same as morality and it means more than good intentions. Fairness can never be equated with equity. This is because equity relates to the result of decisions while fairness is a concomitant of the manner in which such decisions are taken. The concept of fairness is equated with *unbiased, reasonable, impartial, balanced, just, honest, free from irregularities and according to the rules.*[80]

Being fair is a central interest among today's employers concerned about providing equal employment opportunities, fair labour practices and paying a fair day's pay for a fair day's work.[81] The differing perspectives, interests and goals of managers and employees, however, make it difficult to determine what employees regard as fair treatment.[82] The multidimensionality of fairness is evident when one considers how people disagree when asked what is fair.[83] However, fairness is not limited to employer-employee interests. It has recently been accepted that societal interests such as health, safety, the environment and the economy as a whole are also crucial.[84]

3.4 WHAT IS THE LEGAL IMPORTANCE OF SECTION 8 OF THE LABOUR ACT?

This clause may be said to give effect to the Constitutional guarantee to fair labour practices. It regulates certain unfair labour practices by the employer which can either be an act or an omission.[85] Fair labour practices may be seen as the opposite of the tabulated unfair labour practices.[86] Although this may seem appropriate, mention must be made of

[79] M Mc Gregor et al:- *Labour Law Rules! Cape Town: Siber Ink* (2012)
[80] *Verslag van die Kommissie van Ondersoek na Arbeidswetgewing. Deel 5. RP 27/1981:PAR 4.127.3*
[81] M Coetzee and L Vermeulen:- 'When will employees perceive affirmative action as fair?' *South African Business Review*17(1): 17-20
[82] M Coetzee et al (note 10 above)
[83] M Coetzee et al (note 10 above)
[84] Unpublished: M Conradie 'A critical analysis of the right to fair labour practices' Unpublished LLM thesis, University of the Free State, 2013
[85] Labour Act (Chapter 28:01)
[86] Van Jaarsveld et al:- 'Labour law' *Joubert and Scott* 1995:Vol 13

the fact that fairness means more than the opposite of unfairness. The unfair labour practices are subject to the prescription of further unfair labour practices by the Minister in terms of section 10 of the Act.[87]

At page 78 of his book, Madhuku[88] says:

> *'The constitutional right to fair labour practices belongs to both employees and employers. The right necessarily imposes a duty on both parties not to infringe the right. The Labour Act specifies a number of acts that are regarded as 'unfair labour practices.' Not everything that is 'unfair' is an unfair labour practice under the Labour Act. To be an 'unfair labour practice' an action must be specifically described as such by the Act. In other words, one has to point to a specific provision within the Act that prescribes the action as an 'unfair labour practice.' If a practice is not specified as unfair in the Labour Act, it cannot be raised as an unfair labour practice under the Act; but it may be an infringement of the right to fair labour practices protected by the Constitution'*

3.5 HOW MUST THE COURTS DETERMINE FAIRNESS?

The courts will have to refer to legislation. The Labour Act establishes unfair labour practices and as such it is a vital instrument that the courts of law may use in order to determine fairness. Also, the use of mechanisms created by statute other than courts or tribunals may help the courts in determining fairness.

For example, section 17 of the Labour Act[89] says:

> *'Subject to this Act, the Minister, after consultation with the appropriate advisory council, if any, appointed in terms of section nineteen, may make regulations providing for the development, improvement, protection, regulation and control of employment and conditions of employment.'*

[87] Labour Act (Chapter 28:01)
[88] L Madhuku (n2 above)
[89] Labour Act (Chapter 28:01)

Furthermore, labour statutes may become handy because they create bodies and courts like Arbitrators, Conciliators and the Labour Court with power to determine fairness.

If no legislative provision giving effect to the constitutional guarantee exists, the courts may be required to develop the common law to do so. This is seriously crippled by the fact that the Labour Act is a creature of statute whose powers are significantly limited to the four corners of the Act. Moreover, other legislation such as the Public Service Act[90] do not contain guidance as to what connotes to fairness. The absence of a definition of fairness in such critical legislation may pose a drawback that may stifle progress towards interpreting fairness by the courts of law.

3.6EXAMPLES OF FAIR AND SAFE LABOUR PRACTICES UNDER SECTION 65

The fact that the rights mentioned hereunder are in the Constitution, particularly the Bill of Rights, ensures that they cannot be removed or altered arbitrarily. Furthermore, the Bill of Rights requires a referendum for it to be amended. Since they form part of the Bill of Rights, they are justiciable in a democratic society based on equality and justice. The mere fact that the Constitution of Zimbabwe is entrenched means that the society has a guarantee that its rights may not be tampered with by whim or caprice.

COLLECTIVE LEVEL:

3.6.1 RIGHT TO STRIKE

This right is an antidote to the often vilified employer's power to dictate.[91] Just as warfare is an extension of diplomacy, strike action is an extension of collective bargaining.[92] The right to strike is an indispensable means for workers and their organizations for the

[90] Public Service Act (Chapter 16:04)
[91] *MAWU v Halt Ltd* (1985) 6 ILJ 478 (IC)
[92] *MAWU v Halt Ltd* (1985) 6 ILJ 478 (IC)

promotion and protection of their economic and social interests.[93] Gwisai says that there is need for relative equilibrium of power between the parties and the use of legitimate economic weapons such as strikes by workers.[94]

Regard must be had to the Right to Organize Convention[95] as well as the Freedom of Association and Protection of the Right to Organize Convention.[96] Article 8 (1) (d) of the International Covenant on Economic Social and Cultural Rights[97] provides for the right to strike. Back home, section 65 (3) of the Constitution[98] provides for this right. It reads:

> *"Except for members of the security services, every employee has the right to participate in collective job action, including the right to strike, sit in, withdraw their labour and to take other similar concerted action, but a law may restrict the exercise of this right in order to maintain essential services."*

It may be argued that the right has not been meaningful since it is only exercised subject to section 104 of the Labour Act which provides for this right and other provisions in the same statute.[99] For the right to be enjoyed, cumbersome technicalities have to be fulfilled. According to section 2 of the Act, the right is limited to disputes of interest. The right does not apply to employers, employees engaged in essential services and members of the security services.

3.6.2 RIGHT TO BARGAIN COLLECTIVELY

To bargain means to haggle or wrangle so as to arrive at some agreement in terms of give and take.[100] A characteristic of bargaining, then, is that the parties strive to reach agreement by compromise.[101] Once compromise is abandoned by either party, they must

[93] M Gwisai:- *Labour and employment law in Zimbabwe: Relations of work under the neo-colonial capitalism* (2007)
[94] M Gwisai (note 22 above)
[95] Right to Organize and Collective Bargaining Convention 1949
[96] Freedom of Association and Protection of the Right to Organize Convention 1948
[97] International Covenant on Economic Social and Cultural Rights
[98] Constitution of Zimbabwe Amendment (No. 20) Act 2013
[99] Labour Act (Chapter 28:01)
[100] *MAWU v Halt Ltd* (1985) 6 ILJ 478 (IC)
[101] *MAWU* (note 29 above)

either part company or resort to dictation.[102] At that point, agreement can only be reached if one of the parties succumbs to the dictates of the other.[103]

It has been well said that, unless employers treat employees as equals in the bargaining arena, collective bargaining is nothing more than collective begging.[104] According to the Constitution, every employee, employer, trade union and employee or employer's organization has the right to engage in collective bargaining.[105] As Grogan[106] says:

> *"But modern day collective labour law has gone a step further: it now seeks not only to regulate, but also actively to promote collective bargaining by entrenching individual freedom of association and collective organizational rights."*

3.6.3 COLLECTIVE JOB ACTION RIGHTS

Section 65 (3) of the Constitution stipulates that every employee, except for members of the security services, has the right to strike, sit-in, withdraw their labour and to take other similar collective action.[107] Collective job action rights are further amplified by sections 58 and 59 of the Constitution which provide for freedom of assembly and association and freedom to demonstrate and petition, respectively. Any collective job action that is not in tandem with the Act[108] triggers criminal liability. Giving effect to this right is the Labour Act,[109] particularly sections 27-55 which provide a comprehensive framework. Madhuku[110] however asserts that the express mention in section 65 (3) that a law may restrict the exercise of this right is in fact superfluous because the Constitution contains a general limitation clause already.

[102] *MAWU* (note 29 above)
[103] *MAWU* (note 29 above)
[104] *MAWU* (note 29 above)
[105] Constitution (note 27 above)
[106] J Grogan:- *Collective Labour Law* (2007)
[107] Constitution (note 27 above)
[108] Labour Act(Chapter 28:01)
[109] Labour Act (Chapter 28:01)
[110] L Madhuku:- *Labour Law in Zimbabwe* (2015) 78

3.6.4 ORGANISATIONAL RIGHTS

Every person is entitled to form and join trade unions and employee or employers' organizations of their choice.[111]This includes the right to participate in the lawful activities of those unions and organizations.[112] Only members of the security services are excluded from this right. Except for members of the security services every employee, employer, trade union and employee or employer's organization has the right to engage in collective bargaining, organize and form and join federations of such unions and organizations.[113]

INDIVIDUAL LEVEL:

3.6.5 RIGHT TO FAIR WAGE

The employer's duty to pay an employee wages is also extended to buttress situations where the employment relationship is terminated for whatever cause under the Act.[114] This is good considering that the purpose of the Act itself is not only to advance democracy in the work place but to promote social justice.[115] To amplify such a core labour standard, section 65 of the Constitution says that everyone is not only entitled to a wage but a fair and reasonable one.[116] What amounts to reasonable wage may not be *prima facie* determinable but it can be judged on a case-to-case basis.

Here, account is taken of the Labour Relations (Specification of Minimum Wages) Notice.[117] This notice was inspired by the Minimum Wage Fixing Recommendation.[118] The law must however transform to guarantee a fair and reasonable remuneration and not to only cover a fair and reasonable wage since remuneration is wider than wages. The Act[119] gives effect to the constitutional guarantee in section 6 (1) (a):

> *'No employer shall-*

[111] Section 65 (2) of the Constitution
[112] Section 65 (2) of the Constitution
[113] Section 65 (5) of the Constitution
[114] Labour Act (Chapter 28:01)
[115] Section 2A of the Labour Act (Chapter 28:01)
[116] Constitution (note 27 above)
[117] Labour Relations (Specification of Minimum Wages) Notice 1996
[118] Minimum Wage Fixing Recommendation 1970 (No. 135)
[119] Labour Act (Chapter 28:01)

(a) *Pay any employee a wage which is lower than that to fair labour specified for such employee by law or by agreement made under this Act'*

3.6.6 WOMEN RIGHTS: MATERNITY LEAVE AND EQUAL REMUNERATION

The Constitution of Zimbabwe guarantees every woman the right to fully paid maternity leave for a period of at least three months.[120] Section 65 (7) is undoubtedly inspired by the Maternity Protection Convention[121] and the Declaration on Equality of Opportunity and Treatment for Women Workers.[122] This is important if it is considered that the Constitution has a stand-alone equality and non-discrimination clause.[123] Even section 3 (f) on the founding values of the Constitution recognizes gender equality.[124]The inception of section 65 (7) of the Constitution[125] made section 18 of the Labour Act[126] unconstitutional as it made the granting of maternity leave conditional on at least one-year service and the number of pregnancies.

Women and men are entitled to equal remuneration for similar work. This is in tandem with the equality clause in section 56 of the Constitution[127] which is given effect to in section 5 of the Labour Act.[128] Maternity leave remuneration is a duty of the employer-this is a potential area for legal havoc. That is why Madhuku[129] notes that there is no social security or social insurance system catering for maternity benefits.

[120] Constitution (note 27 above)
[121] Maternity Protection Convention 2000 (No.183)
[122] Declaration on Equality of Opportunity and Treatment for Women Workers 1975
[123] Constitution (note 27 above)
[124] Constitution (note 27 above)
[125] Constitution (n27 above)
[126] Labour Act (Chapter 28:01)
[127] Constitution (n27 above)
[128] Labour Act (Chapter 28:01)
[129]L Madhuku (n2 above)

3.6.7 RIGHT TO JUST, EQUITABLE AND SATISFACTORY CONDITIONS OF WORK

Every employee is entitled to just, equitable and satisfactory conditions of work under section 65 (4) of the Constitution.[130] Every employer is therefore duty-bound to provide safe conditions of work. Section 6 (1) (d) of the Labour Act says that no employer may require any employee to work under any conditions or situations which are below those prescribed by law or by conventional practice of the occupation for the protection of such employee's health or safety.[131]

3.7 CONCLUSION

What has been seen from the analysis above is that the fairness concept is a central theme in section 65. It was concluded that the concept has to be defined so as to interpret the constitutional right in section 65. It is to be noted that the term fairness is hard to define and/or construe. However, the chapter above is a wholesome attempt at defining it, borrowing the wisdom of reputable scholars and visiting legislation and case law authorities. A catalog analysis of fair labour practices both at the individual and collective level was also done in a bid to venture into the content of the right itself.

[130] Constitution (note 27 above)
[131] Labour Act (Chapter 28:01)

CHAPTER IV

LIMITATION, EFFECT AND INTERPRETATION MODEL OF THE RIGHT INCLUDING CONSTITUTIONAL LITIGATION

4.1 INTRODUCTION

The gravamen of this chapter is to examine limitations that attach to the right to fair labour practices, determine the effect of section 65 of the Constitution[132] on labour law and deal with constitutional litigation. Last resort shall be aimed at adopting an appropriate model of interpreting the constitutional guarantee so as to grant the right its full meaning.

4.2 WHAT IS THE EFFECT OF SECTION 65 ON LABOUR LAW?

The constitutional guarantee to fair labour practices occupies a central position in labour law. It has undoubtedly become the grund norm of all labour matters. Its exact effect on labour law may therefore be seen as tripartite in nature:

4.2.1 LEGISLATIVE BENCHMARK

The right to fair labour practices operates as a legislative benchmark to test the validity of any legislation that seeks to give effect to fundamental rights. Therefore, it has become the litmus test for all labour legislation. For example, when the 2013 Constitution came into effect, section 18 of the Labour Act[133] became unconstitutional. It makes the granting of maternity leave dependent upon the number of pregnancies and the time that a female employee has served.

Accordingly, it is immutable that any law which is ultra vires the supreme law of the land must be struck off by way of application as unconstitutional.

[132] Constitution of Zimbabwe Amendment (No.20) Act 2013
[133] Labour Act (Chapter 28:01)

4.2.2 INTERPRETIVE TOOL

Courts of law in Zimbabwe have for a long time been caught up in the whirlwinds of interpreting legislation. The Labour Act[134] is no exception. Section 65, therefore, has become a necessary arm for the courts when seeking to interpret labour legislation. Any labour legislation must be accorded an interpretation which aligns with what the Constitution says.

4.2.3 DEVELOPING THE COMMON LAW

The right to fair labour practices will in no doubt assist in developing the common law. It will ordinarily go a long way in enriching the common law since the wording and content of section 65 is in line with what one would expect to find in the Constitution of any contemporary democracy. It provides a further spur to semantic ingenuity in the courts of law.

4.3 THE CONCEPT OF CONSTITUTIONAL LITIGATION

Section 85 of the Constitution[135] grants *locus standi* to anybody on his or her own behalf or on behalf of third parties- including members of an association, group or class of persons- to approach a court for relief and compensation if a right or freedom is being- or is likely to be infringed.

4.3.1 APPROACHING THE CONSTITUTIONAL COURT

A litigant may not directly rely on a constitutional right where legislation has been passed to give effect to that right. This principle is established in many jurisdictions of which Zimbabwe is no exception. To illustrate this rule, a litigant may not rush to the Constitutional Court to assert their right to strike ignoring the Labour Court since section 104 of the Labour Act[136] gives effect to this right. Such a litigant must approach the Labour

[134] Labour Act (Chapter 28:01)
[135] Constitution (n1 above)
[136] Labour Act (Chapter 28:01)

Court for remedial action except where they are challenging the constitutionality of the said section.

4.3.2 RATIONALE FOR THE RULE

In dealing with the rationale for the rule, a greater part of guidance is drawn from South African judgments. This is not to assert that Zimbabwe has no case law on the issue of constitutional litigation. It is acknowledged that South African courts have holistically dealt with the issue. Moreover, South Africa has developed a hybrid constitutional jurisprudence. It is acknowledged that South Africa's constitutional jurisprudence has been further developed by the courts of law meaning to say that Zimbabwe can draw lessons from the manner in which South African courts have interpreted constitutional issues.

SANDU V MINISTER OF DEFENCE[137]

The Constitutional Court of South Africa held that it had already adopted the principle that where legislation has been enacted to give effect to the provisions of the Constitution, it is impermissible for a litigant to bypass that legislation and rely directly on the provisions of the Constitution in the absence of a constitutional challenge to the legislation so enacted. Explaining the rationale for this principle the court said:

> *"Accordingly, a litigant who asserts his or her right to collective bargaining under section 23(5) should in the first place base his or her case on any legislation enacted to regulate the right, not on section 23(5). If the legislation is wanting in its protection of the section 23(5) right in the litigant's view, then that legislation should be challenged constitutionally. To permit the litigant to ignore the legislation and rely directly on the constitutional provision would be to fail to recognize the important task conferred upon the*

[137] *SANDU v MINISTER OF DEFENCE CCT 27/98*

legislature by the Constitution to respect, promote, protect and fulfill the rights in the Bill of Rights."

MINISTER OF HEALTH v NEW CLICKS SA PROPRIETARY[138]

It was held that resort must not be made in the first instance to the Constitutional Court. The Court pronounced that neither was it possible to sidestep legislation giving effect to constitutional rights by resorting to the common law. The Court said that this is logical since statutes inevitably displace the common law.

The principle avoids two parallel streams of labour law. This makes sense considering that there is only one system of labour law grund-normed in the constitutional right to fair labour practices. It will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies it provides.

The Court held that legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question.

NAPTOSA & ORS v MINISTER OF EDUCATION, WESTERN CAPE & ORS[139]

The Court cast doubt on the correctness of the proposition that a litigant can rely upon the Constitution, where there is a statutory provision dealing with the matter without challenging the constitutionality of the provision concerned.

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[138] *Minister of Health v New Clicks SA (Pty) Ltd & Ors* (CCT 59/2004) [2005] ZACC 14

[139] *NAPTOSA & Ors v Minister of Education, Western Cape & Ors* 2001 (2) SA 112. Also *Ingledew v Financial Services Board* [2003] ZACC 8

A similar approach in interpreting the Constitution was once adopted by the Supreme Court of appeal under the erstwhile Lancaster House Constitution:

SPORTS AND RECREATION COMMISSION v SAGITTARIUS WRESTLING CLUB & ANOR[140]

The court held that the case that was in issue should never have been considered as a constitutional one at all. The court considered that it will not normally consider a constitutional question unless the existence of a remedy depends on it

4.4 LIMITATION OF RIGHTS

The right to fair labour practices is not absolute. This is not unique to the right itself as it is trite at law that rights are not immutable. Part 5 of the Constitution[141] contains a general limitation clause. Section 86 of the Constitution specifies that rights and freedoms in the Bill of Rights must be exercised reasonably and with due regard to the rights and freedoms of other persons.

Only a law of general application may limit fundamental rights to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.[142] Any right may therefore be limited where it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest.[143]

In addition to the limitations permitted under section 86 of the Constitution, rights may be limited in situations of public emergency to the extent provided for in section 87 and the 2ND Schedule of the Constitution.[144] The 2ND Schedule defines *'emergency law'* as a:

[140] Sports and Recreation v Sagittarius Wrestling Club 2001 (2) ZLR 501 (S)
[141] Constitution (n1 above)
[142] Constitution
[143] Constitution
[144] Constitution

> *'Written law that provides for action to be taken to deal with any situation arising during a period of public emergency.'*[145]

The Constitution however says that if a state of emergency is declared under section 113 in relation to only a part of Zimbabwe, an emergency law may not limit fundamental human rights or freedoms under this Schedule in any other part of Zimbabwe.[146] Certain rights in section 65 are not applicable to members of the security services- defence forces, police forces, intelligence services, prisons and correctional services.[147] These are subject to the authority of the Constitution, the President and are subject to parliamentary oversight.[148]

4.5 INTERPRETATION

The *Constitution* is a bridge away from a culture of authority to a culture of justification- a culture in which every exercise of power is expected to be justified. To fully harness its meaning therefore an interpretation must be accorded which is generous, accommodative and expansive. This is true of section 65 of the Constitution which is widely worded to cover everyone.

According to the Privy Council:[149]

> *"A constitution ought to be treated sui generis, calling for principles of interpretation of its own, suitable to its character without necessary acceptance of all the presumptions that are relevant to legislation of private law.'*

A wide construction of the right to fair labour practices would be in tandem with what the constitutional drafters intended.

[145] Constitution
[146] Constitution
[147] Section 207 of the Constitution
[148] Section 207 (n16 above)
[149] Per Lord Wilberforce in Minister of Home Affairs (Bermuda) & Anor v Fisher & Anor [1979] 3 All ER 21 (PC)

In fact, the purposive approach is endorsed in section 15B of the Interpretation Act[150] made in terms of the General Laws Amendment Act.[151] This allows extrinsic material to be used in interpreting statutes. The purposive rule is incorporated by virtue of section 2A (2) of the Labour Act[152] which says that:

> *"The Act shall be construed in such a manner as best ensures the attainment of its purposes referred to in subsection (1)"*

Chief Justice Chidyausiku[153] has held that the Constitution must be interpreted as a living instrument and given a generous and purposive construction. A similar observation by Chief Justice Gubbay[154] (As he then was) in the Smyth case:

> *'In arriving at the proper meaning of a constitutional provision the court should endeavor to expand the reach of the right rather than attenuate its meaning. What is to be accorded is a generous and purposive interpretation with an eye to the spirit as well as the letter of the provision, one that takes full account of changing conditions, social norms and values. The aim must be to move away from formulism and make human rights a practical reality.'*

4.6 CONCLUSION

The chapter above examined limitations that attach to the right to fair labour practices, determined the effect of section 65 of the Constitution[155] on labour law and dealt with constitutional litigation. Last resort was aimed at adopting an appropriate model of interpreting the constitutional guarantee so as to grant the right its full meaning.

[150] Interpretation Act (Chapter 1:01)
[151] General Laws Amendment (NO. 2) Act NO. 14 of 2002
[152] Labour Act (Chapter 28:01)
[153] Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & Ors S-128-02
[154] Smyth v Ushewokunze & Anor 1997 (2) ZLR
[155] Constitution of Zimbabwe Amendment (No.20) Act 2013

CHAPTER V

CONCLUSION AND RECOMMENDATIONS TO INFORM POLICY

INTRODUCTION

What was found weaving in and out of the chapters is an unbendable search for a legal conclusion that will not only assist today's legal fraternity but that of tomorrow. And even though a conclusion has to be drawn by way of must, the author did not cast a blind eye when it comes to making recommendations to inform policy. It seems safe to conclude that in determining *'everyone'* reference must be made to whether or not they are involved in an employment relationship. This chapter therefore ties the major arguments made in the above chapters, draws a conclusion and provides recommendations.

CONCLUDING REMARKS

From the analysis of the word *'everyone'* the conclusion is that our law has travelled to a place beyond the common law contract of employment to accommodative constitutionality. Broader protection is afforded by section 65 of the Constitution[156] where a person is involved in an employment relationship. Whether or not one is engaged in an employment relationship therefore becomes the determining factor for protection to be granted.

Cheadle's[157] observation on section 23 is therefore adopted:

[156] Constitution of Zimbabwe Amendment (No. 20) Act 2013

[157] H. Cheadle, *'Labour Relations'* in Cheadle, Davis and Haysom, *South African Constitutional Law: The Bill of Rights* (2006) at 18-3. Leading authorities have adopted this position as legally sound: See A Van Niekerk *et al, Law at Work* (2012) @ 37

> *'Although the right to fair labour practices in subsection (1) appears to be accorded everyone, the boundaries of the right are circumscribed by reference in subsection (1) to 'labour practices.' The focus of enquiry into ambit should not be on the use of 'everyone' but on the reference to 'labour practices.' Labour practices are the practices that arise from the relationship between workers, employers and their respective organizations. Accordingly, the right to fair labour practices ought not to be read as extending the class of persons beyond those classes envisaged by the section as a whole'*

Hence, because section 65 makes reference to labour practices and standards, the scope of the section is restricted to the employer-employee relationship and the respective collective organs. This therefore means that the term every person must not be interpreted to mean everybody even if they are not involved in an employment relationship.

Nonetheless, the right to fair labour practices is not limited to a plethora of restrictions. It can therefore be perceived as open-ended, broad and accommodative. The term *'everyone'* will have to be interpreted to cover a broad category of persons including illegal workers, criminals convicted of despicable crimes, natural and juristic persons and employees in *utero*. Accordingly, the word *'everyone'* will have to be interpreted generously- an interpretation that does not deprive legitimate beneficiaries of protection yet not extending its scope to those outside an employment relationship.

It is concluded that the term *'fairness'* is not easy to define. However, it is to be generally associated with words like just, reasonable, equitable, righteous and fair-minded. The quagmire of defining it is further complicated by the inherent tension between the interests of the employer and those of the employee. However, Cheadle's[158] view is adopted by the author as legally sound, *'Fairness is really no more than the balance of the respective interests of the employer and employee in a capitalist society.'*

[158] H Cheadle:- 'The first unfair labour practice case' Industrial Law Journal 1: 200-202

While it is accepted that fairness means more than good intentions and that it is a multi-dimensional concept, it makes legal sense to conclude that it must generally be equated with unbiased, impartial, balanced, even-handed, rules-based and good. It is more than what has been tabulated as lawful.[159] It is much wider and takes all surrounding circumstances into account.

The law cannot conclusively anticipate all the parameters of fairness or unfairness of labour practices. The complex nature of labour practices does not therefore allow for a rigid regulation of what is fair or unfair in any particular circumstance. Giving effect to the right to fair labour practices is section 8 of the Labour Act.[160] Although it may not be seen as exhaustive, it regulates certain unfair labour practices by the employer which can either be an act or an omission. Examples of fair and safe labour practices analyzed by the author:

- Right to strike
- Right to collective bargaining
- Collective job action rights
- Organizational rights
- Right to a fair wage
- Right to maternity leave
- Health safety rights

Furthermore, it is concluded that section 65 of the Constitution[161] has a tripartite effect. It acts as a legislative benchmark, an interpretive tool and it shall help the courts in developing the common law. Nonetheless, a litigant may not directly rely on section 65 where legislation has been passed to give effect to that right. The right to fair labour practices is also not absolute. It may be limited in terms of the general limitation clause in

[159] I Currie and J De Waal:- *The Bill of Rights Handbook* (2005). Also AA Landman:- 'Fair labour practices: The Wiehahn Legacy' *Industrial Law Journal* 5(25):805-812
[160] Labour Act (Chapter 28:01)
[161] Constitution of Zimbabwe Amendment (No. 20) Act 2013

section 86 of the Constitution,[162] in situations of public emergency as provided for under section 87 of the Constitution[163] and in terms of the 2ND Schedule of the Constitution.[164]

Since interpretation must account for the transformative purpose of the text, the model of interpretation that must be accorded to the right to fair labour practices is the purposive interpretation model. It is realized that the right was not intended to preserve a pre-existing society but to make a new one, to put in place new principles that the prior legal community had not sufficiently recognized. The modern trend in construing constitutional provisions supports a purposive approach over a strict adherence to a literalist approach.[165]

However, adopting the purposive rule of interpretation does not mean that the plain language of section 65 will be disregarded.[166] While a purposive approach to constitutional interpretation is progressive, such construction must always be supported by the language of the text. As Kentridge JA[167] puts it:

> *"While we must always be conscious of the values underlying the Constitution, it is nonetheless our task to interpret a written instrument. I am well aware of the fallacy of supposing that general language must have a single 'objective' meaning. Nor is it easy to avoid the influence of one's intellectual and moral preconceptions. But it cannot be strongly stressed that the Constitution does not mean whatever we might wish it to mean… If the language used by the law-giver is ignored in favor of a general resort to values, the result is not interpretation but divination"*

[162] Constitution of Zimbabwe Amendment (No. 20) Act 2013
[163] Constitution of Zimbabwe Amendment (No. 20) Act 2013
[164] Constitution of Zimbabwe Amendment (No. 20) Act 2013
[165] J Tsabora:- 'The challenge of constitutional transformation of society through judicial adjudication: Mildred Mapingure v Minister of Home Affairs & Ors SC 22/14' Volume 1 *Midlands State University Law Review* 54
[166] L Madhuku:- 'Constitutional interpretation and the Supreme Court as a political actor: Some comments on United Parties v Minister of Justice, Legal and Parliamentary Affairs,' 1998 Vol 10.1 Legal Forum p.51
"The purposive approach which is urged in constitutional interpretation is no different from the well-known golden and mischief rules. The court must take us through the language of the relevant provision and show the manner in which that language supports the purposive meaning being decided upon"
[167] S v Zuma 1995 (2) SA 642

RECOMMENDATIONS: LEGAL REFORMS

In light of the above conclusion, the following recommendations are therefore made:

Over-reliance on the common law contract of employment or the *'common law medieval chains'* must be done away with. This ensures that there will be sufficient coverage of the legitimate beneficiaries. The eminent importance of common law will have to be relegated as a source of labour law given its hostility to normative social justice.[168] Gubbay CJ aptly referred to this in Delta Corporation v Gwashu[169] wherein he took a strict approach from any deviations from the provisions of registered employment codes, holding:

> *"Departures from these codes only serve to undermine the labour standards agreed by employees and employers and risk reviving the old master and servant laws of the common law. As the common law was titled in favour of the employer, continued reliance thereon in labour matters is, in my view, retrogressive"*

Also, the determination of fairness must be predicated upon the balancing of the respective interests of both the employer and the employee. This makes labour sense since the paramount objective of labour law is to countervail the inherent inequality between the employer and the employee.

Courts of law will have to adopt Brassey's[170] manner of determining a fair labour practice:

> *"A labour practice will only be regarded as fair if it bears both an economic rationale and also proves to be legitimate."*

[168] M Gwisai:-'Enshrined labour rights under s65 (1) of the 2013 Constitution of Zimbabwe: The right to fair and safe labour practices and standards and the right to a fair and reasonable wage' *Volume 3 Issue 1 University of Zimbabwe Student Journal*

[169] Delta Corporation (Pvt) Ltd v Gwashu S-96-00

[170] MSM Brassey et al:- *Employment Law* (1998)

It is also recommended that there be a general guideline as to what in essence constitutes fairness of labour practices as opposed to the mere regulation of unfair labour practices. This is very necessary because the fairness concept constitutes a central theme on the right to fair labour practices. If a guideline as to the meaning of fairness is to be provided then interpreting the right as a whole becomes relatively easy.

Furthermore, to ensure fairness in labour practices therefore the Labour Act must be amended to define a general, wide and clear right to fair labour practices in light of the ethos of the Constitution so as to avoid juridification. This would also constitute a giant legislative step towards aligning the Labour Act with the Constitution.

In addition, superior courts must not hesitate to or relax in employing the Constitution as a major source of labour law. The reluctance to interpret the Bill of Rights more creatively so as to give it both horizontal and vertical application must be done away with. This would go a long way in the creation, development and maintenance of a hybrid labour law jurisprudence.

Also, the rejection of hard and fast rules of evidence and procedure used by the formal courts must be done by way of must. It is to be appreciated that hard and fast rules of evidence coupled by procedural rules are an undue barrier where a person attempts to enforce their rights in courts of law.

Over-emphasis on the clean hands doctrine,[171] the presumption of constitutionality of statutes and the doctrine of exhaustion of local remedies must be relaxed.[172] This limits restrictive use of the Constitution by the bench so as to make the right effective. The right to fair labour practices must not be a paper-tiger, it must be realized- and fully. It must therefore pass through unnecessary strictures undeterred!

[171] Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of Information & Ors S-20-03

[172] Sports and Recreation Commission v Sagittarius Wrestling Club and Anor 2001 (2) ZLR 501 (S)
"Courts will not normally consider a constitutional question unless the existence of a remedy depends upon it"

To add on, all parties concerned with the employment relationship (before, during and after such a relationship) should therefore be subject to the scrutiny of the constitutional right to fair labour practices. This is because it can be concluded that as long an employment relationship exists, then the right can be utilized.

In addition to the above, there must be realignment of all the provisions of the Labour Act with the Constitution so as to guarantee and/ensure uniformity between parent legislation and the supreme law of the land. It appears that the Labour Act has been overtaken by events since the Constitution came way after the promulgation of the Labour Act.

CONCLUSION

The foregoing recommendations will, if adopted, go a long way in ensuring that the right to fair labour practices does not become an empty rhetoric, a song without meaning or a *brutum fulmen.* It has been seen that the celebrated right, without proper interpretation, may not be sufficiently utilized by rightful beneficiaries or that it may be turned to by those whom it does not cover. Whilst the attainment of this right came as a great moment of joy to Zimbabwe, its meaning, scope and/or extent had been an issue of perennial controversy bringing one to the reason why the above chapters proved to be relevant to today's labour law.

BIBLIOGRAPHY

TEXT BOOKS

1. Basson DA (1994): *South Africa's Interim Constitution-texts and notes*- Juta & Co. Ltd
2. Brassey MSM (1998): *Employment Law*- Juta & Co. Ltd
3. Brassey MSM (1987): *The new labour law- strikes, dismissals and the unfair labour practice in South African law*- Juta & Co. Ltd
4. Chaskalson M et al (1996): *Constitutional Law of South Africa*- Juta & Co. Ltd
5. Cheadle H et al (2005): *South African Constitutional Law: The Bill of Rights*- Lexis Nexis
6. Currie I & De Waal J (2005): *The Bill of Rights handbook*- Juta & Co. Ltd
7. Devenish Ge (1998): *A commentary on the South African Constitution*- Butterworths
8. Gwisai M (2006): *Labour and Employment Law in Zimbabwe: Relations of Work under neo-colonial Capitalism*- Zimbabwe Labour Centre and Institute of Commercial Law University of Zimbabwe
9. Grogan J (2007): *Workplace Law*- Juta & Co. Ltd
10. Joubert WA (2001): *The law of South Africa*- Butterworths
11. McGregor M et al (2012): Labour Law Rules- Siber Ink
12. Olivier HJ (2006): *Discipline, Ontslag en Menseregte*- Laboras
13. Poolman T (1998): Equity, the court and labour relations- Butterworths
14. Van Niekerk A (2008): *Law at work*- Lexis Nexis
15. Madhuku L (2015): *Labour law in Zimbabwe*- Weaver Press

JOURNAL ARTICLES

1. Calitz K *'Globalization, the development of constitutionalism and the individual employee'* (2007) Pochefstroom Electronic Law Journal 2:1-19
2. Du Toit M and Potgieter M *'Bill of rights compendium. Labour and the bill of rights'* (2007) Service issue 21 October
3. Grogan J 'Employees in utero- pre-employment termination' (2007) Employment Law Journal
4. Kasuso TG *'Transfer of undertaking under section 16 of the Labour Act (Chapter 28:01)'* Volume 1 Midlands State University Law Review 22
5. Tsabora J *'The challenge of constitutional transformation of society through judicial adjudication: Mildred Mapingure v Minister of Home Affairs & Ors SC 22/14'* (2015) Volume 1 Midlands State University Law Review
6. Madhuku L *'Constitutional interpretation and the Supreme Court as a political actor: Some comments on United Parties v Minister of Justice, legal and Parliamentary Affairs'* Vol 10.1 Legal Forum 51
7. Van Jaarsveld et al *'Principles and practice of labour law'* Service Issue 22
8. Landman AA *'Fair labour practices: The Wiehahn legacy'* (2004) Industrial Law Journal 5
9. Van Jaarsveld SR et al *'Principles and practice of labour law'* (2012) Service issue 22 (Updated to April 2012
10. Coetzee M and Vermeulen L *'When will employees perceive affirmative action as fair?'* South African Business Review
11. Gwisai M *'Enshrined labour rights under s65 of the 2013 Constitution of Zimbabwe: The right to fair and safe labour practices and standards and the right to a fair and reasonable wage'* (2015) Volume 3 Issue 1University of Zimbabwe Student Journal

DISSERTATIONS

1. Unpublished: M Conradie *'A critical analysis of the right to fair labour practices'* Unpublished LLM Thesis, University of the Free State 2013
2. Unpublished: MS Vettori *'Alternative means to regulate the employment relationship in the changing world of work'* Unpublished LLD Thesis, University of Pretoria 2005
3. Unpublished: M Moyo *'The right to strike in Zimbabwe's labour laws: "A liability or a trap at worst"'* Unpublished LLB Thesis, Midlands State University 2014

SOUTH AFRICAN CASES

1. *SA Maritime Safety Authority v Mc Kenzie* 2010 31 ILJ
2. *In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744
3. *Denel (Pty) Ltd v Gerber* 2005 25 ILJ 1256 LAC
4. *NEHAWU v University of Cape town & Ors* 2003 24 ILJ 95 CC
5. *National Union of Metalworkers of SA v Vetsak Co-operative Ltd & Ors* 1996 4 SA 577
6. *NEWU v CCMA & Ors* (2003) 24 ILJ 2325 (LC) 2339
7. *Rumbles v Kwa Bat marketing (Pty) Ltd* 2003 24 ILJ 1587 LC
8. *Whitehead v Woolworths (Pty) Ltd* 1999 20 ILJ 2133 LC
9. *Wyeth SA (Pty) Ltd v Manqele & Ors* 2003 7 BLLR 734 LC
10. *Discovery Health Ltd v CCMA & Ors* 2008 29 ILJ 1480
11. *Lawyers for Human Rights & Anor v Minister of Home Affairs & Anor* 2004 4 SA 125 CC
12. *Kylie v CCMA & Ors* 2010 31 ILJ 1600 LAC (3)
13. *MAWU v Halt* (1985) 6 ILJ 478 (IC)
14. *Sidumo & Anor v Rustenburg Platinum Mines Ltd & Ors* (CCT 85/06) ZACC 22
15. *Minister of Health v New Clicks SA (Pty) Ltd & Ors* (CCT 59/2004) [2005] ZACC 14
16. *NAPTOSA & Ors v Minister of Education, Western Cape & Ors* 2001 (2) SA 112
17. *Ingledew v Financial Services Board* [2003] ZACC 8

18. *S v Zuma 1995 (2) SA 642*

ZIMBABWEAN CASES

1. *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister of Information & Ors* S-20-03
2. *Smyth v Ushewokunze & Anor* 1997 (2) ZLR
3. *Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & Ors* S-128-02
4. *Sports and Recreation v Sagittarius Wrestling Club* 2001 (2) ZLR 501 (S)
5. Delta Corporation (Pvt) Ltd v Gwashu S-96-00

AMERICAN CASES

1. *American Bank & Trust Co. v Federal Reserve Bank of Atlanta* 256 US 350 S. Ct 499, 500 (1921)
2. *Weems v United States* [217 US 349]

ENGLISH CASE LAW

1. *Minister of Home Affairs (Bermuda) & Anor* [1979] 3 All ER 21 (PC)

CONSTITUTIONS

1. Constitution of Zimbabwe Amendment (No. 20) Act 2013
2. Constitution of South Africa
3. Constitution of Malawi
4. Constitution of Kenya

LEGISLATION

1. Labour Act (Chapter 28:01)
2. Interpretation Act (Chapter 1:01)
3. Public Service Act (Chapter 16:04)

CONVENTIONS AND RECOMMENDATIONS

1. Maternity Protection Convention 2000 (No. 183)
2. Declaration on Equality of Opportunity and Treatment for Women Workers 1975
3. Minimum Wage Fixing Recommendation 1970 (No. 135)
4. Right to Organize and Collective Bargaining Convention 1949
5. Freedom of Association and Protection of the Right to Organize Convention 1948
6. International Covenant on Economic Social and Cultural Rights