

**REPORTABLE (2)**

- (1) GREATERMANS STORES (1979) (PRIVATE) LIMITED t/a THOMAS  
MEIKLES STORES  
(2) MEIKLES HOSPITALITY (PRIVATE) LIMITED

v

- (1) THE MINISTER OF PUBLIC SERVICE, LABOUR AND SOCIAL WELFARE  
(2) THE ATTORNEY-GENERAL

CONSTITUTIONAL COURT OF ZIMBABWE  
MALABA DCJ, ZIYAMBI JCC, GWAUNZA JCC, GARWE JCC, HLATSHWAYO JCC,  
PATEL JCC, GUVAVA JCC, MAVANGIRA JCC & UCHENA JCC  
HARARE, SEPTEMBER 21, 2016 & MARCH 28, 2018

*T Mpofo*, with him *G R J Sithole*, for the applicants

*V Munyoro*, for the respondents

**MALABA DCJ:**

**INTRODUCTION**

This case raises for determination questions of the constitutionality of civil legislation's retrospective effect.

The applicants are companies duly incorporated in terms of the laws of Zimbabwe. They made an application to the Court in terms of s 85(1)(a) of the Constitution of Zimbabwe Amendment (No. 20) Act (“the Constitution”). They alleged that s 18 of the Labour Amendment Act (No. 5) 2015 (“the transitional provision”), as read with s 12 of the Labour Act [*Chapter 28:01*] (“the Act”), is unconstitutional. The main allegation was that the transitional provision is unconstitutional because it gives retrospective effect to a new obligation imposed on an employer who terminates a contract of employment on notice to pay the employee whose contract was terminated “the minimum retrenchment package” of not less than one month’s salary or wages for every two years of service as an employee. The obligation was retrospectively imposed on all employers who terminated employees’ contracts on notice on or after 17 July 2015. The applicants alleged in the alternative that the transitional provision violated the following of their fundamental rights: the right to equality (s 56(1)), the right to fair labour practices (s 65(1)), and the right not to be compulsorily deprived of property (s 71(3)).

The Court holds, on the main ground on which the constitutionality of the transitional provision is challenged, that there is no constitutional provision which prohibits the use by the Legislature of the method of retrospectivity to implement civil legislation. On the alternative ground of the challenge to the constitutionality of the transitional provision, the Court holds that the applicants failed to prove the alleged infringement of any of the fundamental rights they relied upon. The retrospective imposition of new financial obligations on the applicants to pay compensation to the employees whose employment they terminated on notice for loss of employment respects their rights enshrined in ss 56(1), 65(1) and 71(3) of the Constitution. The reasons for the decision now follow.

**BACKGROUND FACTS**

The applicants and many other employers were affected by the transitional provision because they had terminated contracts of employment on notice on the basis of existing law on different dates falling within the period from 17 July 2015 and the effective date of the enactment of s 12 of the Act. The terminations followed the judgment of the Supreme Court in the case of *Nyamande and Anor v Zuva Petroleum (Pvt) Ltd* SC-43-15, 2015 (2) ZLR 186 (SC) (“the *Zuva Petroleum* judgment”).

The appellants in the *Zuva Petroleum* judgment were employed by Zuva Petroleum (Pvt) Ltd (“the company”). The company wrote letters to the appellants giving them notice of its intention to terminate their employment at the end of three months. Thereafter the company paid the appellants cash in lieu of notice and terminated the employment relationship.

Aggrieved by the company’s action, the appellants approached a labour officer, alleging that the termination of their contracts of employment was unlawful. They accused the company of unfair labour practice. The labour officer failed to resolve the dispute by conciliation. He referred the dispute to an arbitrator, who subsequently found that the termination of the contracts of employment was unlawful because the appellants had not been dismissed in terms of a code of conduct.

The company appealed to the Labour Court on the ground that termination of contracts of employment on notice was lawful, as it was provided for in the contracts between the parties. The appellants had contended before the Labour Court that the provisions under s 12B of the Labour

Act on “unfair dismissal” had abolished the right of employers to terminate employees’ contracts on notice. The Labour Court allowed the appeal by holding that the provisions of the Act did not abolish the employer’s common law right to terminate employment on notice.

The appellants appealed to the Supreme Court. On 17 July 2015 the Supreme Court dismissed the appeal, thereby upholding an employer’s right at common law to terminate a contract of employment on notice as provided for in the agreement between the parties.

The reaction to the *Zuva Petroleum* judgment was a rush by employers, including the applicants, to terminate employment relationships on notice. Termination of employees’ contracts on notice became a strategy adopted by employers countrywide to get rid of employees to save costs in an environment of economic difficulties. Employees were only paid cash in *lieu* of notice, regardless of the length of service rendered to the employer. No further benefits accrued to the large numbers of employees whose employment contracts were terminated after 17 July 2015.

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

**LEGISLATIVE AMENDMENT**

The Legislature amended s 12 of the Act through s 4 of the Labour Amendment Act (No. 5) 2015. Section 12 of the Act provided for the duration, particulars and termination of employment contracts. In particular, s 12(4) of the Act regulated the notice periods to be given in respect of different types of employment contracts. Section 12(4) of the Act was amended by the insertion of subparas (4a) and (4b), which provide as follows:

“(4a) No employer shall terminate a contract of employment on notice unless -

- (a) the termination is in terms of an employment code or, in the absence of an employment code, in terms of the model code made under section 101(9); or
- (b) the employer and employee mutually agree in writing to the termination of the contract; or
- (c) the employee was engaged for a period of fixed duration or for the performance of some specific service; or
- (d) pursuant to retrenchment, in accordance with section 12C.

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

Section 12C of the Act was repealed and substituted as follows:

**“12C Retrenchment and compensation for loss of employment on retrenchment or in terms of section 12(4a)**

- (1) An employer who wishes to retrench any one or more employees shall -
  - (a) give written notice of his or her intention -
    - (i) to the works council established for the undertaking; or
    - (ii) if there is no works council established for the undertaking or if a majority of the employees concerned agree to such a course, to the employment council established for the undertaking or industry; or

- (iii) if there is no works council or employment council for the undertaking concerned, to the Retrenchment Board, and in such event any reference in this section to the performance of functions by a works council or employment council shall be construed as a reference to the Retrenchment Board or a person appointed by the Board to perform such functions on its behalf; and
- (b) provide the works council, employment council or the Retrenchment Board, as the case may be, with details of every employee whom the employer wishes to retrench and of the reasons for the proposed retrenchment; and
- (c) send a copy of the notice to the Retrenchment Board.

(2) Unless better terms are agreed between the employer and employees concerned or their representatives, a package (hereinafter called ‘the minimum retrenchment package’) of not less than one month's salary or wages for every two years of service as an employee (or the equivalent lesser proportion of one month's salary or wages for a lesser period of service) shall be paid by the employer as compensation for loss of employment (whether the loss of employment is occasioned by retrenchment or by virtue of termination of employment pursuant to section 12(4a)(a), (b) or (c)), no later than the date when the notice of termination of employment takes effect.

(3) Where an employer alleges financial incapacity and consequent inability to pay the minimum retrenchment package timeously or at all, the employer shall apply in writing to be exempted from paying the full minimum retrenchment package or any part of it to -

- (a) the employment council established for the undertaking or industry; or
- (b) if there is no employment council for the undertaking concerned, to the Retrenchment Board:

which shall respond to the request within fourteen days of receiving the notice (failing which response the application is deemed to have been granted).

(4) In considering its response to a request for exemption in terms of subsection (3) the employment council or Retrenchment Board –

- (a) shall, where the employer alleges complete inability to pay the minimum retrenchment package, be entitled to demand and receive such proof as it considers requisite to satisfy itself that the employer is so unable, and if so unable on the date when the notice of termination of employment takes effect, may propose to the employer a scheme to pay the minimum retrenchment package by instalments over a period of time;
- (b) shall, where the employer offers to pay the minimum retrenchment package by instalments over a period of time, consider whether the offer is a reasonable one, and may propose an alternative payment schedule;
- (c) may inquire from the employer whether he or she has considered, or may wish to consider, specifically or in general, the alternatives to termination of employment provided for in section 12D.”

The applicants were aggrieved by the fact that the new obligation on employers terminating contracts of employment on notice, including contracts without time limits, to pay compensation for loss of employment calculated in terms of s 12C(2) was given retrospective effect from 17 July 2015.

The transitional provision is as follows:

**“18 Transitional provision**

Section 12 of the Act [*Chapter 28:01*] as amended by this Act applies to every employee whose services were terminated on three months’ notice on or after the 17<sup>th</sup> of July, 2015.”

The contention by the applicants was that the *Zuva Petroleum* judgment confirmed that at common law an employer had a right to terminate a contract of employment on notice without any obligation to pay the employee any money other than what was due to him or her in respect of the remaining three months of employment to which the notice related. They argued that the transitional provision retrospectively imposed on them a financial obligation which did not exist at the time they lawfully terminated contracts of employment with their employees on notice. The applicants contended that the retrospectivity of the transitional provision is unconstitutional.

It is common cause that the transitional provision gives retrospective effect to the provisions of s 12 of the Act. As a result, it imposed on the applicants the new obligation to pay compensation for loss of employment to the employees whose contracts they terminated on notice on or after 17 July 2015 as if the obligation was part of the law on termination of contracts of employment on notice at the time they exercised the right to terminate the employees’ contracts.

The grounds on which the applicants challenged the constitutionality of the transitional provision were summarised by *Mr Mpofo* in argument as follows –

- (1) Law cannot retrospectively impose financial obligations;
- (2) Law cannot alter existing positive legislation retrospectively;
- (3) The legislation has the effect of forcing the applicants to pay workers without the benefit of labour; and
- (4) Retrospective application of s 12C(2) to the applicants through the transitional provision produced inequality in the treatment of the parties to the contract of employment.

The contentions on which the applicants' case is based are central to the debate concerning the extent to which the Constitution provides substantive protection against retrospective legislation.

### **PRINCIPLE OF RETROSPECTIVITY**

Retrospectivity involves the application of new rules to transactions that have already been consummated. A retrospective statute is one which gives to pre-enactment conduct a different legal effect from that which it would have had without the passage of the statute. The most obvious kind of retrospective statute is one which reaches back to attach new legal rights and duties to already completed transactions.



A retrospective law is therefore every statute which has the effect of taking away or impairing vested rights acquired under existing law or creating a new obligation, imposing a new duty, or attaching a new disability in respect to transactions or considerations already past. Retrospectivity is not about an application of a remedy. It is about when a substantive right came into being. Whatever meaning is attached to the term “retrospectivity”, it is the Constitution of a country which provides for limits on legislative power to enact retrospective laws. See Kameshwar Nath Chaturvedi “*Legislative Retrospectivity and Rule of Law*” Statute Law Review 34(3)(2013) at 207.

In considering the question of the constitutionality of the transitional provision, it is important to state that, with the exception of the area of criminal law, there is no provision in the Constitution that prohibits the enactment of retrospective civil legislation. Whilst the Constitution offers meaningful constitutional restraint against retrospectivity with regard to criminal legislation in terms of practical limitation upon the exercise of legislative power, this safeguard does not extend to civil legislation. In other words, there is no constitutional requirement of civil legislation prospectivity.

Section 70(1)(k) of the Constitution expressly prohibits the enactment of retrospective (*ex post facto*) criminal law by making an act or omission which was not an offence when it was committed an offence. It provides that any person accused of an offence has a right “not to be convicted of an act or omission that was not an offence when it took place”.

The rationale for the prohibition of *ex post facto* criminal law is that criminal law requires proof of personal knowledge of the crime at the time the offence is alleged to have been committed. A person must bear personal responsibility for conduct he or she committed intentionally in the sense of knowing in advance that the conduct is proscribed by law as an offence. The law creating the offence must exist before the offence is committed. Section 70(1)(k) of the Constitution is an absolute prohibition of *ex post facto* penal laws. It applies only to retrospective criminal legislation.

The legislative authority vested in the Legislature by the people in terms of s 117(2)(b) of the Constitution confers on it the power to make laws on any subject and at its discretion for the purposes of peace, order and good governance of Zimbabwe. Retrospectivity is one of the methods by which the Legislature chooses to implement civil legislation it enacts for the purposes of peace, order and good governance. The words “peace, order and good governance” are words of very wide import, giving wide discretion to the Legislature to pass laws for such purpose. The words have, of course, reference to the scope and not the merits of the legislation. See *Att. Gen. for Saskatchewan v Canadian Pacific Rly. Co* [1953] AC 594 at 613-614; *Bribery Comr. v Ranasinghe* [1965] AC 172 at 196-197; *Cobbs & Co Ltd v Kropp* [1967] AC 141 at 154 (PC). There is no constitutional provision that prohibits the Legislature from using retrospectivity as a method of giving effect to civil legislation.

Retrospective lawmaking has been part of instruments of governance of human affairs for many centuries. The only constitutional limitation to the exercise of that power is that the retrospective application of the law must not infringe the fundamental human rights and freedoms enshrined in *Chapter IV* of the Constitution. Concerns about the inexpediency and injustice of the

retrospectivity of legislation properly conveyed do not, therefore, raise any doubt as to the power of the Legislature under the Constitution to enact retrospective civil legislation. What this means is that a statutory provision cannot be held unconstitutional on the ground that it gives retrospective effect to a civil statute.

### **DUE RESPECT FOR VESTED RIGHTS AS A FOUNDING PRINCIPLE**

Section 3(2)(k) of the Constitution provides that it is a principle of good governance which binds the State and all institutions and agencies of government at every level that there be “due respect for vested rights”. Does this section prohibit the enactment of provisions like the transitional provision which give retrospective effect to legislation so as to take away or impair vested rights?

The argument by *Mr Mpofu* was that the applicants contracted to pay their employees remuneration in the form of salaries and wages for work done or services rendered. The applicants were not under any obligation to pay the employees whose contracts were terminated on notice any severance package based on length of service. Deduced from this reasoning was the proposition that the applicants had acquired a right not to pay any employee whose contract was terminated on notice any money other than remuneration for work done or services rendered during the notice period or in *lieu* of the notice.

On the basis of the theory of freedom of contract, *Mr Mpofu* argued that the applicants had a vested right under existing law not to pay the employees whose contracts were terminated on notice compensation for loss of employment. According to the argument, the applicants had a right

under existing positive legislation which the Legislature was barred by the Constitution from altering by retrospective application of the amendment. The effect of the argument was that the transitional provision gives retrospective effect to legislation that impairs the applicants' vested rights and is therefore unconstitutional.

The principle of due respect for vested rights under s 3(2)(k) of the Constitution does not prohibit retrospective civil legislation because it would have the effect of taking away or impairing vested rights. It is one of the principles of good governance which bind the State and all institutions and agencies of government at every level.

Section 3(2)(k) of the Constitution does not confer a fundamental right in itself. It is not justiciable. In *Minister of Home Affairs v National Institute for Crime Prevention and Re-Integration of Offenders (NICRO) and Ors* 2005 (3) SA 280 (CC). CHASKALSON CJ, referring to the founding values enunciated in section 1 of the Constitution of the Republic of South Africa, said:

“21. The values enunciated in section 1 of the Constitution are of fundamental importance. They inform and give substance to all the provisions of the Constitution. They do not, however, give rise to discrete and enforceable rights in themselves. This is clear not only from the language of section 1 itself, but also from the way the Constitution is structured and in particular the provisions of *Chapter 2* which contains the Bill of Rights.”

Only specific constitutional norms can confer effective rights on individuals or generally have autonomous legal effect. That is not to say that the principle cannot be regarded as a source of legal solutions. The principle has, of course, constitutional force. Section 3(2)(k) of the

Constitution is an objective principle characteristic of the historical conception of the ways and attitude of every democratic government.

The principle must be read in conjunction with the substantive provisions of the Constitution. Section 117(2)(b) of the Constitution, which vests in the Legislature the authority to make laws for the good governance of Zimbabwe, prescribes the context in which the principle of due respect for vested rights would apply. It is only in relation to the exercise of the powers vested in it by the Constitution that the conduct of the Legislature, as an institution of government, may be judicially reviewed for constitutionality.

Section 3(2)(k) of the Constitution is of interpretative value. It provides the context in which the other constitutional provisions are to be interpreted. The use of the word “due” to qualify the kind of respect for vested rights suggests an approach that has regard to the requirements of legality and of the acceptable limitation to a fundamental human right prescribed under s 86(2) of the Constitution. By way of example, the basic right to property is conferred under s 71(2) of the Constitution. This section relates to a specific area of protection. The principle under s 3(2)(k) of the Constitution would have to be considered when ss 71(2) and 71(3) of the Constitution are interpreted, as required by s 46 of the Constitution. That means that the application of the principle behind s 3(2)(k) of the Constitution would have to take into account the limitation to the right to property provided for under s 71(3) of the Constitution.

The principle must therefore be recognised as playing a role in the assessment of the constitutionality of legal rules and in the interpretation of constitutional provisions protecting

fundamental human rights. As a principle of good governance, it is not simply interpretative. Good governance means putting in place measures, including legislative measures, that advance and protect public interest. The Constitution requires that good governance be carried out in terms of laws enacted by the institution vested with the power to make the necessary laws in compliance with the fundamental principle of governance under the rule of law. Section 3(2)(k) of the Constitution requires that the principle be borne in mind by the State and all institutions of government at every level when action that has the potentiality of impairing vested rights is contemplated or taken.

The doctrine of “due respect for vested rights” has long been recognised as the progenitor of the modern law of substantive protection of the law or substantive due process. The modern jurist has essentially long moved beyond being concerned with retrospectivity. He or she treats retrospective application for practical purposes no differently from any other legislative determination in assessing whether there has been due observance of the requirements of permissible limitation of the exercise of legislative power prescribed by the Constitution. In other words, the question is whether there has been a violation of substantive protection of the law in the enactment of retrospective legislation that impairs vested rights. The question is never, why has the statute been retrospectively applied?

This is not a case of retrospective impairment of rights. It is a case of retrospective imposition of a new obligation with respect to transactions already completed. The acts of terminating contracts of employment on notice had already been completed. The transitional provision did not make the termination of employees on notice which was lawful when it occurred

unlawful conduct. It attached an important new legal burden in the nature of the financial obligation on employers who terminated employees' contracts on notice to pay them the minimum retrenchment package based on length of service as compensation for loss of employment. The obligation had not formed part of the existing law.

Under the existing law at the time the contracts of employment were terminated on notice, the employers were at liberty not to pay "terminated" employees compensation for loss of employment. They had the right to do as they pleased without committing a legal wrong. The Legislature spoke clearly in retrospectively imposing through the transitional provision the financial obligation on employers who terminated employees' contracts on notice on or after 17 July 2015.

The retrospective effect of the statute was the imposition of a new financial obligation and *ipso facto* creation of rights which did not exist at the time the employees' contracts were terminated on notice at the initiative of the employers. The transitional provision is an example of a retrospective civil legislation that confers new legal consequences on acts that occurred before its enactment without depriving persons of vested rights acquired under existing laws.

### **PRESUMPTION AGAINST RETROSPECTIVITY**

There is a principle of construction of statutes which has been adhered to with great strictness by the courts in deciding whether a statute is or is not retrospective in effect. It is to the effect that laws by which human action is to be regulated look forward not backwards. The Legislature should be presumed to intend its legislation to operate prospectively. It is an aspect of

the rule of law and is the most important practical constraint on retrospective civil legislation. Statutes should be so construed as to prevent them from operating retrospectively, unless the Legislature expresses the intention that the statute operates retrospectively in sufficiently clear and unambiguous language. In that case, the statute is effective according to its terms. Clarity and unambiguity of legislation are requirements of the principle of legality which is an aspect of the rule of law.

A number of reasons have been suggested as bases for the hostility to retrospective legislation. The most fundamental reason why retrospective legislation is said to be suspect stems from the principle that a person should be able to plan his or her conduct with reasonable certainty of the legal consequences. Closely allied to this factor is mankind's desire for stability with respect to past transactions. To the extent that statutory law should serve as a guide to individual conduct, the purpose is thwarted by retrospective enactments. See Charles B Hochman "*The Supreme Court and the Constitutionality of Retroactive Legislation*" 73 Harv. L. Rev. 692 (1960) pp 692-693.

It must be emphasised that the presumption against retrospectivity of a statute applies in the absence of clear evidence of the intention of the Legislature to have the civil legislation operate retrospectively. The reason is that the objections to retrospective statutes are neither totally absent from prospective legislation nor are they totally persuasive. Where the statute expressly provides that it operates retrospectively, the presumption is rebutted and falls away. There is no question of interpretation. See *Curtis v Johannesburg Municipality* 1906 TS 308 at 311; *Nkomo and Anor v Attorney-General and Others* 1993 (2) ZLR 422 (S); *Zimbabwe Phosphate Industries Ltd v Elias Matora & Others* 2005 (2) ZLR 233 (S).



The authorities show that retrospectivity as a method of implementing civil legislation is a proper tool of modern government, provided it is used with appropriate restraints.

In *British Columbia v Imperial Tobacco Canada Ltd* [2005] 2 SCR 473 the Supreme Court of Canada held that:

“The absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust: see E. Edinger, ‘*Retrospectivity in Law*’ (1995), 29 U.B.C.L. Rev. 5, at p. 13. Those who perceive it as such can perhaps take comfort in the rules of statutory interpretation in that they require the legislature to indicate clearly any desired retroactive or retrospective effect ...”.

In *Gustavson Drilling (1964) Ltd v The Minister of National Revenue* [1977] 1 SCR 271, cited by the respondents’ counsel, the same Court held at p 279 that:

“The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act. An amending enactment may provide that it is to be operative with respect to transactions occurring prior to its enactment. In those instances, the statute operates retrospectively.”

P. W. Hogg in *Constitutional Law of Canada* 3 ed (1992) at p 1111 wrote:

“Apart from s. 11(g), Canadian constitutional law contains no prohibition of retroactive (or *ex post facto*) laws. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common. The power to enact retroactive laws, if exercised with appropriate restraints, is a proper tool of modern government. Section 11(g) diminishes this power only by excluding the creation of retroactive criminal offences. Other kinds of laws may still be made retroactive.”

Section 11(g) of the Canadian Charter of Rights is in substance similar to s 70(1)(k) of the Constitution.

The transitional provision expressly provided that s 12 of the Act operated retrospectively. The constitutionality of the retrospectivity of the transitional provision could not without more be challenged. To put it simply, unlike criminal liability retrospective civil liability is not unconstitutional. The Legislature must be presumed to have applied its mind to the possible effects of the use of retrospectivity to implement the legislation it enacted and determined that the benefits of its employment outweighed the potential for unfairness.

The argument by *Mr Mpofu* that the transitional provision is invalid, because it had a financial obligation imposed on the applicants retrospectively, suggests that the nature of the obligation is a material and determinant factor in the consideration of the question of the constitutionality of the retrospective effect of the legislation.

The correct principle is that there is no constitutional provision which forbids the Legislature, in the exercise of its powers, to impose financial obligations retrospectively by means of civil legislation. The validity of the retrospective effect of legislation cannot be measured in terms of the nature of the obligation imposed. In the exercise of its power under s 117(2)(b) of the Constitution, the Legislature can legislate any subject matter and order retrospective application of civil legislation as long as doing so is for the purposes of peace, order and good governance of Zimbabwe. The Legislature is at liberty to decide whether the civil legislation enacted is to have retrospective application.

The fact that the transitional provision ensured that the retrospective application of the law to the applicants had the effect of imposing a financial burden in place of a benefit enjoyed under the existing law is no valid ground for impugning its constitutionality. Every civil legislation which is retrospectively applied would by nature have the effect of changing the existing law. Tax laws invariably impose financial obligations retrospectively on citizens.

### **RETROSPECTIVITY AND FUNDAMENTAL HUMAN RIGHTS**

Retrospectivity is a ground for holding civil legislation invalid only if it contravenes one of the provisions of the Constitution which enshrine fundamental human rights and freedoms. One of the grounds on which the alternative case was advanced by the applicants for the alleged unconstitutionality of the transitional provision was that, in retrospectively imposing the new financial obligation on employers who terminated employees' contracts on notice, the Legislature impaired the employer's right to terminate the contract of employment on notice without treating the employee in a similar manner.

The contention was that the law of contract provided equal protection to the employer and employee engaged in a contract of employment by giving them the freedom to terminate the relationship upon giving each other the requisite notice. The allegation was that, in violation of s 56(1) of the Constitution, the retrospective application of s 12 of the Act by the transitional provision denies employers the protection provided to both parties by the law of contract of the right to terminate the employment relationship on notice.

Section 44(1) of the Constitution imposes on the Legislature an obligation to respect, protect, promote and fulfil the fundamental human rights and freedoms enshrined in *Chapter IV* when exercising the legislative powers in terms of s 117 (2)(b) of the Constitution.

### **RIGHT TO EQUAL PROTECTION OF THE LAW**

The gist of the argument presented by *Mr Mpofo* was that the financial obligation imposed on the applicants violates their right to equal protection of the law because it is imposed retrospectively under the transitional provision. As with any law, retrospective legislation enjoys a presumption of constitutionality. The challenger bears the burden of proving that the retrospective legislation violates the protection of the fundamental human right or freedom guaranteed to him or her or it by the Constitution. If infringement is established and the right or freedom is derogable, the State has the burden of justifying the limitation of the fundamental human right or freedom in terms of s 86(2) of the Constitution.

Section 56(1) of the Constitution provides as follows:

#### **“56 Equality and non-discrimination**

(1) All persons are equal before the law and have the right to equal protection and benefit of the law.”

It is common cause that the purpose behind the retrospective application of the legislation was the protection of employees whose contracts were terminated on notice from uncompensated loss of employment at the initiative of the employers. The content of the purpose was the provision of the mechanism and formula for the payment of compensation to employees whose contracts were terminated on notice for loss of employment and the imposition on employers who terminated

the employees' contracts on notice of the obligation to pay the compensation calculated by reference to length of service. The purpose was to ensure that the employment that was lost by termination on notice at the initiative of the employer on or after 17 July 2015 was compensated.

There is no doubt that the welfare of employees upon termination of employment on notice is a matter of public interest deserving of legislative protection. The law cannot be interpreted against the employees unless the objective is shown to be unconstitutional or the means chosen for its achievement are disproportionate to it. At no time did *Mr Mpofo* suggest in the argument advanced to the Court that the purpose of the retrospective application of the legislation to the applicants was not legitimate.

The *raison d'être* of constitutional law is the human being. Section 56(1) of the Constitution enshrines three separate but related fundamental human rights. The rights are: the right to equality before the law; the right to equal protection of the law; and the right to benefit of the law.

The contents of the rights must be available and claimable under any measure which meets the standard of legality. Article 1 of the *Universal Declaration of Rights* declares that: "all human beings are born free and equal in dignity and rights". Equality is a fundamental human right and a principle of social justice. Every person is by virtue of being human entitled to equal access to the remedies, protection and benefits provided under the law. As all human beings are equal, they are entitled to equal treatment as such under the law. This idea of equality of human beings and equal treatment as such underlies all modern, democratic and humanitarian legal systems.

Whilst s 56(1) of the Constitution requires respect and protection of human equality as a foundational value, it does not mean that identically the same rules of law should be applicable to all persons in every instance, regardless of differences of factual circumstances and conditions. Section 56(1) of the Constitution does not protect a right to identical treatment. The right to equality is violated when the State makes an unjustified distinction between people or situations. Section 56(1) of the Constitution is not about formal equality, as formal equality is already part of the Constitution. The fundamental principle of the rule of law to the effect that all State power is bound by law and that everyone is bound by law means that there is equal application of law since the very nature of law demands universal application. Section 56(1) of the Constitution speaks to substantive equality.

Human beings may be equal yet act differently in different situations or circumstances. Need may arise for the enactment of a law, the specific object of which is the prohibition of the recurrence of harmful acts to protect public interest. A Legislature empowered to make laws on a wide range of subjects must of necessity have the power of making special laws to attain particular objectives. Such a law would have a specific objective and be aimed only at a section of people who would commit the prohibited conduct. For the reason of the specific objective and the nature of the prohibited acts, such a law would be based upon a creation of a class of people to which it applies. By exclusion, it would create a different class of people to which it does not apply.

The Legislature has undoubtedly a wide field of choice in determining and classifying the subject matter of its laws. It must be presumed that a Legislature understands and correctly

appreciates the needs of its own people. The power to classify or particularise objects of legislation must, in the nature of things, be left to the law-making authorities.

### **REASONABLE DIFFERENTIATION AND EQUAL PROTECTION OF THE LAW**

The right to equal protection of the law enshrined in s 56(1) of the Constitution does not prohibit the enactment of law based on reasonable differentiation of groups of people for different treatment in respect of the purpose of the legislation. Section 56(1) of the Constitution leaves it to the courts to decide when a classification of persons is prohibited under its provisions. The doctrine of classification evolved by the courts is not a paraphrase of s 56(1) of the Constitution. It is merely a judicial formula for determining whether the legislative or executive action in question is arbitrary and therefore a violation of the right of the claimant to equal protection of the law. See *E P Royappa v State of Tamil Nadu* 1974 SCR 248.

If unequal treatment of various groups of people addressed by the retrospective legislation is to be upheld under s 56(1) of the Constitution, there must be differences of such a type and weight that they can justify the difference of treatment. Unequal treatment and justification must be adequately related to each other.

The purpose of the right to equal protection of the law enshrined in s 56(1) of the Constitution is to ensure that those in similar circumstances and conditions who are the subjects of the legislation are treated equally, both in the privileges and in the liabilities imposed. There should be, as between them, equal protection of the law. The right does not require equal treatment of people who are in different circumstances. The difference must exist, characterised by objective

factors relevant to the achievement of the legislative purpose. The different treatment must correspond to the nature of the difference.

No legislation in any practical sense is possible without some kind of classification. The very nature and purpose of every legislation depend on the choice of some subject to the exclusion of the rest and some arena for its operation. This selective quality is inherent and implicit in every legislation. The constitutional guarantee of the right to equal protection of the law cannot be understood and construed in such a manner as to make legislation impossible for all practical purposes. To what class or classes of persons or things a statute should apply is, as a general rule, a legislative question. The Legislature is the best judge of the needs of the particular classes.

Given that the criterion for the imposition of the financial obligation was termination of an employee' contract on notice and that the object of the obligation retrospectively imposed was payment of compensation for loss of employment, there had to be a differentiation of treatment between employers and employees. The effect of the retrospective application of the statute had to be the classification of people in employment relationships into employers who terminated employees' contracts on notice on or after 17 July 2015 and the employees whose contracts were terminated on notice.

As long as the retrospective application of the change is rationally related to a legitimate legislative purpose, the constraints of equal protection of the law have been honoured even when the legislation imposes a new obligation based on past acts.



It readily becomes apparent that retrospectivity of the effect of an obligation alone does not make it a source of infringement of the fundamental right. The right to equal protection of the law enshrined in s 56(1) of the Constitution does not prohibit legislative differentiation of people resulting from retrospective imposition of a new obligation on members of one class for the benefit of members of the other class, provided the classification is in respect of a legitimate purpose and is based on reasonable and objective criteria. In other words, such a retrospective differentiation of treatment of persons who are the subjects of the legislation can be undertaken by the Legislature without infringing the right to equal protection of the law enshrined in s 56(1) of the Constitution.

Differentiation of treatment legitimately aimed at ameliorating the economic conditions of a disadvantaged group like employees whose contracts are terminated on notice without compensation for loss of employment cannot be held to be in contravention of s 56(1) of the Constitution simply because it is retrospectively imposed on the employers who terminated the employees' contracts on notice.

Article 26 of the *International Covenant on Civil and Political Rights* (“*ICCPR*”) recognises and protects the right to equal protection of the law by providing as follows:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Commenting on non-discrimination as it relates to the right to equal protection of the law, the United Nations Human Rights Committee on the *ICCPR* in General Comment 18 adopted on 10 November 1989 stated as follows:

“13. Finally, the Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.”

JUDGE TANAKA of the International Court of Justice, giving a dissenting opinion in the *South-West Africa Cases (Ethiopia v South Africa; Liberia v South Africa); Second Phase*, International Court of Justice (ICJ) 18 July 1966, said:

“To treat different matters equally in a mechanical way would be as unjust as to treat equal matters differently. We know that law serves the concrete requirements of individual human beings and societies. If individuals differ one from another and societies also, their needs will be different, and accordingly, the content of law may not be identical. Hence is derived the relativity of law to individual circumstances. ...

We can say accordingly that the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal. ...

The question is, in what case equal treatment or different treatment should exist. If we attach importance to the fact that no man is strictly equal to another and he may have some particularities, the principle of equal treatment could be easily evaded by referring to any factual and legal differences and the existence of this principle would be virtually denied. A different treatment comes into question only when and to the extent that it corresponds to the nature of the difference. To treat unequal matters differently according to their inequality is not only permitted but required. The issue is whether the difference exists. Accordingly, not every different treatment can be justified by the existence of differences, but only such as corresponds to the differences themselves, namely that which is called for by the idea of justice – ‘the principle to treat equal equally and unequal according to its inequality, constitutes an essential content of the idea of justice’ (Goetz Hueck, *Der Grundsatz der Gleichmassigen Behandlung in Privatrecht*, 1958, p. 106) [translation]. ...

Briefly, a different treatment is permitted when it can be justified by the criterion of justice. One may replace justice by the concept of reasonableness generally referred to by the Anglo-American school of law. Justice or reasonableness as a criterion for the different treatment logically excludes arbitrariness. The arbitrariness which is prohibited, means the purely objective fact and not the subjective condition of those concerned. Accordingly, the arbitrariness can be asserted without regard to motive or purpose.

... all human beings are equal before the law and have equal opportunities without regard to religion, race, language, sex, social groups, etc. As persons they have the dignity to be treated as such. This is the principle of equality which constitutes one of the fundamental human rights and freedoms which are universal to all mankind. On the other hand, human beings, being endowed with individuality, living in different surroundings and circumstances are not all alike, and they need in some aspects politically, legally and socially different treatment. Hence the above-

mentioned examples of different treatment are derived. Equal treatment is a principle but its mechanical application ignoring all concrete factors engenders injustice. Accordingly, it requires different treatment, taken into consideration, of concrete circumstances of individual cases. The different treatment is permissible and required by the considerations of justice; it does not mean a disregard of justice.

... Different treatment must not be given arbitrarily; it requires reasonableness, or must be in conformity with justice, ...”.

McCrudden C and Prechal S, in an article entitled “*The Concepts of Equality and Non-Discrimination in Europe: A practical approach*”, European Network of Legal Experts in the Field of Gender Equality, November 2009, refer to the Aristotelian conception of equality applied in Europe which has two dimensions: like cases should be treated alike, and different cases should be treated differently. An example of Cyprus is given where it is stated that the Supreme Constitutional Court of that country accepts that the:

“... right to equality is subject to reasonable differentiations between inherently different situations. On the other hand, arbitrary unreasonable differentiations not justified by the intrinsic nature of things, will contravene the equality principle.”

The authors go on to write that:

“In France, the Constitutional Council has held that the principle of equality does not preclude legislation from laying down different rules for categories of persons in different situations or legislation from laying down different rules where the difference of treatment is justified by general interest and where the difference of treatment is compatible with the purpose of the legislation. In Poland, too, the Constitutional Court has interpreted the constitutional principle of equality to mean that all subjects characterised by a certain feature or belonging to a certain category must be treated equally, without any differentiation, neither in a discriminatory manner, nor more favourably.”

The acceptance of different treatment of people in different positions as a means to achieve equality in India was made clear in the case of *V.M. Syed Mohammad and Company v The State of Andhra* 1954 AIR 314, [1954] SCR 1117 at p 1120. The right to equal protection of the law in India is provided for under Article 14 of its Constitution, which provides that the State shall not

deny to any person equality before the law or the equal protection of the laws within the territory of India. In *V.M. Syed Mohammad and Company supra* a complaint was made to the effect that an impugned Act singled out for taxation purchasers of certain specified commodities only but left out purchasers of all other commodities. In interpreting the right to equal protection of the law, the court stated as follows:

“It is well settled that the guarantee of equal protection of laws does not require that the same law should be made applicable to all persons. Article 14, it has been said, does not forbid classification for legislative purposes, provided that such classification is based on some differentia having a reasonable relation to the object and purpose of the law in question. As pointed out by the majority of the Bench which decided *Chiranjitlal Chowdhury's* case ([1950] S.C.R. 869), there is a strong presumption in favour of the validity of legislative classification and it is for those who challenge it as unconstitutional to allege and prove beyond all doubt that the legislation arbitrarily discriminates between different persons similarly circumstanced. There is no material on the record before us to suggest that the purchasers of other commodities are similarly situated as the purchasers of hides and skins.”

In the same jurisdiction, the court in the case of *Budhan Choudhry v The State of Bihar* [1955] 1 SCR 1040 accepted that the creation of classes for purposes of legislation is legal, which is the same as the treatment of different people in different positions. The court said:

“It is, therefore, not necessary to enter upon any lengthy discussion as to the meaning, scope and effect of the article in question. It is now well-established that while Article 14 forbids class legislation, it does not forbid reasonable classification for the purposes of legislation. In order, however, to pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group and (ii) that that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different bases; namely, geographical, or according to objects or occupations or the like. What is necessary is that there must be a nexus between the basis of classification and the object of the Act under consideration. ... It is also well established that the Legislature is not bound to extend a legislation to all cases which it might possibly reach. It may take into consideration practical exigencies, it may recognise degrees of harm, and confine the legislation where the need is greatest, and that a law which hits evil where it is most felt will not be overthrown because there are other instances to which it might have been applied; that the Legislature may proceed cautiously step by step; ...”.

In America, the right to equal protection of the law is found in the Fourteenth Amendment to the United States Constitution under section 1. Among other things, the section provides that no State in America shall deny to any person within its jurisdiction the equal protection of the laws.

As far back as 1897 the United States Supreme Court in the case of *Gulf, Colorado & Santa Fe Ry. Co. v Ellis* 165 U.S. 150 (1897) held that equal protection of the laws means subjection to equal laws applying alike to all in the same situation. In 1910 the same court in *Southern Railway Co. v Greene*, 216 U.S. 400 (1910) made the point that while reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed. Classification cannot be arbitrarily made without any substantial basis. Arbitrary selection cannot be justified by calling it classification.

Currie & de Waal: "*The Bill of Rights Handbook*" 6 ed Juta at p 218 explain that classification of people for purposes of legislation does not violate the right to equal protection when it is based on reasonable grounds. The learned authors state as follows:

"The equality right does not prevent the State from making classifications and from treating some people differently to others. This is because the principle of equality does not require everyone to be treated the same, but simply that people in the same position from a moral point of view should be treated the same. Laws may therefore classify people and treat them differently to other people for a variety of legitimate reasons. Indeed, laws almost inevitably differentiate between persons. It is impossible to regulate the affairs of the inhabitants in a country without differentiation and without classifications that treat people differently and that impact on people differently. Not every differentiation can therefore amount to unequal treatment. If it did, the courts could be called on to review almost the entire legislative programme." (my emphasis)

In *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) the Constitutional Court of South Africa explained that mere differentiation without a rational relationship to the legislative

purpose and not based on objective criteria would constitute a violation of the right to equal protection of the law. The court said at pp 1024G-1025B:

“In regard to mere differentiation the constitutional State is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest ‘naked preferences’ that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of a constitutional State. The purpose of this aspect of equality is, therefore, to ensure that the State is bound to function in a rational manner ....

Accordingly, before it can be said that mere differentiation infringes s 8 [IC] (now s 9(1) of the South African Constitution) it must be established that there is no rational relationship between the differentiation in question and the government purpose which is proffered to validate it. In the absence of such rational relationship the differentiation would infringe s 8.”

From the case law and commentaries from other jurisdictions, it can be concluded that for justice to be done, classes may be created retrospectively by a law which appears to favour one class over another. The classification must have a rational relation to the purpose sought to be achieved by the legislation. The classification must be based on reasonable grounds that are related to the matters marking the differences in the circumstances of the people classified. In other words, when a law retrospectively creates a classification, its purpose must clearly and logically be beneficial. Good reason must exist for the instrumentality of the retrospective classification. Once classification is done for the legitimate purpose of legislation and is based on reasonable and objective criteria, the law cannot be said to violate one’s right to equal protection of the law.

The transitional provision created two classes. The first class was that of employees whose contracts of employment were terminated on notice after the *Zuva Petroleum* judgment. They were to benefit from the payment of the minimum retrenchment packages under s 12 of the Act. The second class was that of the employers upon whom the obligation to pay the retrenchment packages to the employees whose contracts were terminated on notice was imposed.

The Legislature was free to classify employers who terminated employees' contracts on notice. It was free to choose to impose the financial obligation on them. The Legislature was also free to classify employees whose contracts were terminated on notice and grant them the benefit of compensation for loss of employment. The Legislature reacted to the direct adverse impact on the economic lives of employees whose contracts were terminated on notice at the initiative of employers who exercised their right to terminate the contracts of employment on notice.

The applicants, who belong to a class of persons obliged to pay minimum retrenchment packages, cannot allege unequal protection of the law against employees who are in a different class from theirs. The employees whose contracts were terminated on notice are not comparable to employers who terminated their contracts on notice for the purpose of the legislation retrospectively applied to the parties. The employer cannot in the circumstances claim equality with the employee whose employment he or she or it terminated on notice.

Although the applicants suffered a disadvantage by having the financial obligation imposed on them retrospectively, they did not share relevant characteristics with the employees whose contracts they terminated on notice for the purposes of the legislation. The applicants were not similarly situated as the employees whose contracts they terminated on notice for the purposes of the retrospective imposition of the financial obligation to pay the employees whose contracts were terminated the minimum retrenchment package. Equality means sameness in treatment of people who are similarly situated or placed. Only when people in a similar circumstance are treated

differently can it be alleged that the right to equal protection of the law has been violated. That was not the position in the present case.

The applicants were treated differently from the employees whose contracts they terminated on notice because of the consequences of their actions of terminating the employees' contracts on notice without paying them compensation for loss of employment. The right to terminate employees' contracts on notice exercised on or after 17 July 2015 was retained by the retrospective application of the legislation imposing the new financial obligation on the employers who terminated employees' contracts on notice. It became a statutory right, exercisable where it has been specifically provided for in the situations prescribed under s 12(4a) of the Act.

The retrospective application of the law ensured that both parties were treated fairly, in that whilst allowing the employer and employee to terminate the employment relationship on notice there was a balanced distribution of the benefits and burdens resulting from the termination of employment at the initiative of the employer. The Court has to view the effect of retrospective application of s 12 of the Act holistically, taking into account all the relevant circumstances that faced the Legislature at the time it enacted the legislation.

The applicants were treated in the same manner for the purposes of the retrospective application of the statute as all the employers who terminated employees' contracts on notice on the authority of the *Zuva Petroleum* judgment. In the *Chiranjitlal Chowdhury* case *supra* the Supreme Court of India held that if a law deals equally with all of a certain well-defined class it is not obnoxious. The law is not open to the charge of a denial of equal protection on the ground that



it has no application to other persons, for the class for whom the law has been made is different from other persons. By promulgating the transitional provision, all that the Legislature did was to adjust the distribution of the benefits and the burdens of termination of employment on notice.

The retrospective application of the law changed the past legal consequences of the conduct of terminating a contract of employment on notice without changing the past conduct itself. The financial obligation was retrospectively imposed on the employers who terminated their employees' contracts on notice solely for the purpose of providing a means for the achievement of the legitimate purpose of protecting employees whose contracts were terminated on notice from the economic hardships of loss of employment caused by the employers. Retrospective entitlement to the minimum retrenchment package was a right exclusively designed for the protection of employees whose contracts were terminated on notice on or after 17 July 2015.

The retrospective application of s 12C(2) of the Act was concerned with the detrimental consequences of the exercise of the right to terminate contracts of employment on notice by the employers. The less comparable the situations are, the more inequality is justified and allowed. It is for the Legislature not the Court to decide who is comparable and in what regard. The employers would naturally not suffer the damage of loss of employment. They would not need compensation for loss of employment for the simple reason that they are not employees.

The subject matter of the legislation required that employers and employees be treated differently. The retrospective distinction between employers and employees in the circumstances was relevant. The imposition of burdens on some and benefits on others is an integral aspect of the

process of governance. It will frequently be true that retrospective application of a new statute would vindicate its purpose more fully. *Landgraf v USI Film Products* 511 US 244 (1994) at 285-286.

All that the legislation did was to impose a retrospective obligation to conduct that was past, justifiably so, to achieve fairness and justice. The Legislature took the view that the circumstances of the cases of the terminations of contracts of employment on notice on or after 17 July 2015 revealed unfair results in the nature of the distribution of the benefits and burdens of the terminations between the employers and employees.

The impact of the legislation given retrospective effect on the employment relationship defined the line of interaction between private and public interest in termination of contracts of employment on notice at the initiative of the employer. The legitimate legislative purpose of protecting employees, whose contracts were terminated on notice from the harm of loss of employment for no fault of their own, ensured that the public interest in the fundamental values of fairness and justice which underlay the employment relationships ought to have been taken into account by employers in terminating employment on notice. Acting in accordance with the fundamental principles of fairness and justice, the employers would have realised that long service employees deserved more than a mere three months' notice pay. Long-serving employees would have become what they were in society because of their work. Being identified by the work they did would have become a matter of dignity for them deserving of due respect. Moreover, the longer their period of service, the more they would have contributed to the enhancement and wellbeing of their employer's business.

Trampling on the workers' economic interests in the termination of employment on notice beyond the mere token payments equivalent to three months' salaries or wages related to the notice period was bound to trigger socio-economic consequences with retrospective effect. There is no doubt that employers who terminated employees' contracts on notice in the circumstances caused that which created the compelling social need for the enactment of the legislation with retrospective effect. The employers did not need to be told that the law required that labour matters must be handled fairly and justly. The Legislature must have been aware of the fact that employers who terminated employees' contracts on notice following the *Zuva* Petroleum judgment did so because they believed it was cheap and easy to dispose of employees that way.

In fact, the *Zuva* judgment was misinterpreted to mean that an employer could terminate the employment contracts of any number of employees at will. There were other provisions in the Act which prohibited the wholesale termination of employment. For example, s 12C of the Act, before it was amended, provided that the termination of employment of five or more people amounted to retrenchment and that retrenchment legislation was to apply.

The need for retrospectivity of the legislation was particularly compelling in this case because the harmful consequences of the very conduct in respect to which it is claimed a vested right arose is one of those which motivated the Legislature to act. The cause of the amendment to s 12 of the Act was the social, political and economic impact of the termination of contracts of employment on notice at the initiative of employers without compensation to employees for loss of employment on or after 17 July 2015. The amendment was a direct result of those past events.

The Legislature had the substantive power to act retrospectively. The public interest in the effectiveness of the legislative scheme clearly permitted the elimination of pre-existing evils which pointed to the very need for the legislation. The continued existence of the social evils of termination of employment on notice at the initiative of the employer without compensation to the employee for loss of employment would impair the effectiveness of the statutory scheme. See *Benner v Canada (Secretary of State)* [1997] 1 SCR 358.

*Ms Munyoro* was on strong ground when she argued that the Legislature had to relate the retrospective application of the financial obligation to the mischief that gave rise to the need for enactment of the legislation. The unprecedented termination of large numbers of employees by employers on notice on the authority of a judgment they took to be a windfall had no substantial equity in it. The statute was not conceived and passed in a vacuum. It had a rational basis in the objective circumstances which would have caused any reasonable Legislature to enact such a law to remedy the situation.

The welfare and fairness in the treatment of the employees whose contracts were terminated on notice following the *Zuva Petroleum* judgment were matters of public concern. Fairness and justice could only be extended to the employees whose contracts were terminated on notice following the *Zuva Petroleum* judgment through the retrospective application of the legislation which imposed on any employer who terminated a contract of employment on notice an obligation to pay the employee whose contract was terminated on notice the minimum retrenchment package calculated by reference to the length of service.

The interest in the retrospective application of the principle of payment of what was due to each employee whose contract was terminated on notice in the form of compensation for loss of employment according to his or her length of service was the vindication of fairness and justice the employers ought to have observed in terminating employees' contracts on notice. Ultimately the question for determination is whether the retrospective imposition of the financial obligation on employers who terminated employees' contracts on notice without payment of compensation for loss of employment based on length of service was an unfair or irrational exercise of legislative power. Consideration of all the circumstances of the case shows that it was not.

A system that allows an employer to just wake up one bad day and decide for undisclosed reasons to terminate a contract of employment by giving notice of intention to do so without any regard to the need to compensate the employee for loss of employment is fundamentally unfair.

Without retrospective effect, the achievement of the legislative purpose would have been affected to a significant degree. Not giving retrospective effect to the legislation would have defeated the legislative purpose. Reasonable exercise of legislative powers of the State cannot be hampered by pre-enactment occurrences. The applicants failed to show that their rights enshrined in s 56(1) of the Constitution were violated by the retrospective application of s 12C(2) of the Act.

There was no violation of the equal protection of the right to terminate a contract of employment on notice enjoyed by the employer and employee as parties to the contract of employment. By its very nature, the financial obligation imposed on the employer to pay the

employee whose contract was terminated on notice compensation for loss of employment could not be imposed on the employee. The employers who terminated their employees' contracts on notice had to be treated differently from their employees for the purposes of the retrospective application of the legislation.

A reasonable classification, which by definition is a differentiation of treatment of persons based on objective criteria (none of the prohibited grounds of discrimination) and ensures for the legitimate purpose behind the statute that members of the class to which the legislation applies are treated the same, protects the right to equal protection of the law.

### **UNFAIR LABOUR PRACTICE**

The applicants also argued that the operation of the transitional provision infringed their right to fair labour practices protected by s 65(1) of the Constitution. It was their view that the *ex post facto* imposition of the financial obligation upon them to pay the employees whose contracts they had terminated on notice the minimum retrenchment package meant that the employees were being paid when they had not worked. In essence they argued that paying people who had not worked was not a fair labour practice.

Section 65(1) of the Constitution provides as follows:

#### **“65 Labour Rights**

Every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage.”

Section 65(1) of the Constitution guarantees in a wholesome fashion the right to fair labour practices. The right to fair labour practices is conferred on “every person”. It is a labour right claimable by a person in an employment relationship. The word “person” is defined in s 332 of the Constitution to mean an individual or a body of persons, whether incorporated or unincorporated.

In the founding affidavit the applicants state:

“... Sight cannot be lost of the fact that this kind of conduct constitutes an unfair labour practice as defined in section 65 of the Constitution of Zimbabwe. The whole process lacks elements of basic fairness.” (my emphasis)

Section 2, as read with Part III, of the Act gives effect to s 65(1) of the Constitution. Section 2 of the Act defines “unfair labour practice” as an unfair labour practice specified in Part III, or declared to be so in terms of any other provision of the Act. The Act codifies what the Legislature considered to be actions or omissions which if committed by the employer, a trade union, a workers’ committee and in certain circumstances other persons against an employee would amount to unfair labour practices.

In *Boniface Magurure and 63 Ors v Cargo Carriers International Hauliers (Pvt) Ltd t/a Sabot CCZ-15-16* the Court held that the Act only defines those labour practices which if proved would amount to unfair labour practices in violation of the constitutional right to fair labour practices. These are acts committed as a matter of practice by an employer or employee contrary to what is required by the law to be done. For a person to allege an unfair labour practice as a violation of the right enshrined in s 65(1) of the Constitution, the conduct complained of must constitute one of the acts or omissions listed by the Act as unfair labour practices.

The general requirements that must be satisfied before conduct, positive or otherwise, can be held to fall within the definition of unfair labour practice are that -

- (i) The “act or omission” must constitute a “*labour practice*”. An “act” or “omission” may refer to either a single act or a single inaction which may or may not have lasting consequences and having occurred during the subsistence of the employment relationship, that is, in the period between the conclusion of the contract of employment and its termination. The word “practice” suggests that the employer must have actually done something or declined to do something.
- (ii) The unfair labour practice can arise only if the employer does something or refrains from doing something (“act or omission”). In Zimbabwe the employer must have actually done something listed in Part III of the Act, which act or omission the employee claims the employer should have done or should have refrained from doing.
- (iii) The unfair labour practice must be between an employer and an employee. In Zimbabwe, however, the unfair labour practice may be between the employee and a trade union, a workers’ committee or any other person for sexual conduct amounting to an unfair labour practice.
- (iv) The unfair labour practice must involve one of the practices specified, for our purposes listed in Part III of the Act or declared to be so in terms of any other provision of the Act; and
- (v) The act or omission complained of must be unfair.



See John Grogan: “*Employment Rights*” 1 ed Juta pp 93-97.

John Grogan *supra* states at p 98 that:

“Considerations of fairness normally arise in situations where one person has power to dispense or deny favours to others. The fair labour practice is concerned with the kind of favours employers are able to bestow on employees – positions, benefits and sanctions for ill-discipline. Relief for unfair labour practices is designed to ensure that employers do not abuse their power to bestow or withhold favours and benefits, or impose discipline in an unfair manner. In this sense, the right to fair labour practices is a check on employer unilateralism.”

In the founding affidavit the applicants said:

“32. The effect of the amendment is to have implications on (the) applicants’ right to the protection of the law as set out in section 56(1) of the Constitution. This is because the law opens up (the) applicants to a monetary claim in the absence of a sound legal or commercial basis. It also constitutes an unfair labour practice in violation of section 65(1) of the Constitution in that it requires an employer to pay from monies that are not in existence. ...”. (my emphasis)”

What is complained of by the applicants as unfair labour practice is the retrospective imposition by the Legislature on employers who terminated their employees’ contracts on notice of the obligation to pay them a minimum retrenchment package. The employees would be receiving payment of minimum retrenchment packages as a matter of right in terms of s 12C of the Act. That cannot be called an unfair labour practice. The fact that an employer has no money with which to discharge the obligation to the employee whose contract was terminated on notice does not make the obligation invalid.

Section 12C(2) of the Act is consistent with international best practices. The International Labour Organisation (“ILO”) Convention 158 (“the Convention”) contains principles which have

been accepted at international level on how employees whose contracts of employment have been terminated on notice at the initiative of employers must be treated under national law.

Article 12(1) of the Convention provides:

“12(1) A worker whose employment has been terminated shall be entitled, in accordance with national law and practice, to –

- (a) a severance allowance or other separation benefits, the amount of which shall be based, *inter alia*, on length of service and the level of wages and paid directly by the employer ...”.

Section 12C(2) of the Act gives effect to the purpose of Article 12(1) of the Convention of ensuring that workers whose employment has been terminated on notice at the initiative of the employer are afforded some form of income protection to mitigate the adverse effects of termination of employment.

It is a recognised principle of labour relations reflective of social justice that when employment is terminated for reasons other than misconduct, compensation for long service rendered is paid. Payment of a severance package based on length of service to an employee whose contract was terminated for a reason other than misconduct has always been viewed as a means of ensuring that the employee has a soft and safe landing after losing employment.

The adoption of principles of Article 12(1)(a) of the Convention is an important factor which serves to show that the decision to retrospectively apply the financial obligation on employers who had terminated employees’ contracts on notice on or after 17 July 2015 to pay

them the minimum retrenchment package based on length of service was not based on arbitrariness. It was based on internationally acceptable legal standards.

The provisions of Article 12(1)(a) of the Convention are relevant in testing the constitutionality of the retrospective application of s 12 of the Act to the applicants. An examination of the provisions of s 12C(2) of the Act shows that they closely reflect the requirements of Article 12(1)(a) of the Convention. The Convention contains universally accepted norms. It constitutes a touchstone against which the notion of fairness may be gauged. This is not to suggest that the notion of fairness is exclusive of employers' legitimate commercial interests. It indicates that a central purpose of modern employment law is to guarantee the protection of workers even at the time of termination of employment on notice at the initiative of the employer.

The applicants were aware at the time they terminated employees' contracts on notice that the law required an employer who terminated employees' contracts for reasons of retrenchment to pay them severance packages calculated on the basis of length of service. The retrospective financial obligation imposed on the applicants and the other employers similarly situated was measured in terms of a formula substantially similar to that relating to the calculation of severance packages. The imposition of the financial obligation on employers who terminated employees' contracts on notice to pay the minimum retrenchment package based on the length of service was not disproportionate to the applicants' experience.

The applicants want to ignore the fact that the principle behind Article 12(1)(a) of the Convention, the law governing retrenchments of employees with which they are familiar, and the

retrospective application of the financial obligation on them under the transitional provision, is that the length of service designates value independent of remunerated services.

Section 65(1) of the Constitution is not applicable. It is not the conduct of the employer or the employee which is under attack. It is the law itself, the validity of which is under attack because it retrospectively imposed the financial obligation on employers who terminated their employees' contracts on notice to pay them minimum retrenchment packages calculated by reference to length of service.

The Legislature, as an arm of Government responsible for making laws, is clearly not envisaged by the Act as part of those who can commit an unfair labour practice. Unfair labour practice is conduct which is prohibited by law. It can only be committed by the employer in respect of the employee and his or her interests or by the employee in respect of the employer and his or her or its interests.

Payment of a severance package based on length of service to an employee whose contract was terminated for reasons other than misconduct cannot constitute an unfair labour practice within the meaning of s 65(1) of the Constitution. The applicants' allegation is clearly without legal basis. There was no violation of the right to fair labour practices.

### **COMPULSORY DEPRIVATION OF PROPERTY**

The applicants alleged that the transitional provision infringes their right to property enshrined in s 71(2) and protected under s 71(3) of the Constitution. Sections 71(2) and 71(3) provide as follows:

**“71 Property Rights**

(1) ...

(2) Subject to section 72, every person has the right, in any part of Zimbabwe, to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others.

(3) Subject to this section and to section 72, no person may be compulsorily deprived of their property except where the following conditions are satisfied -

- (a) the deprivation is in terms of a law of general application;
- (b) the deprivation is necessary for any of the following reasons -
  - (i) in the interests of defence, public safety, public order, public morality, public health or town and country planning; or
  - (ii) in order to develop or use that or any other property for a purpose beneficial to the community;”.

The applicants’ case was that, by operation of the transitional provision, they were made to incur a financial obligation which they were not required to fulfil at the time they terminated the employment relationships with former employees on notice. They argued that, as a result of the retrospective imposition of the obligation to pay the employees whose contracts were terminated the minimum retrenchment package, they were being compulsorily deprived of private property in the form of money in violation of s 71(3) of the Constitution.

The retrospective imposition of the financial obligation on employers who terminated employees’ contracts on notice on or after 17 July 2015 to pay the minimum retrenchment package based on length of service has already been held to be constitutional. The question is whether the action constitutes compulsory deprivation of property within the meaning of s 71(3) of the Constitution.

There is a distinction between compulsory deprivation and compulsory acquisition of private property by the State. Deprivation does not necessarily amount to acquisition or taking away of property by the State. It may be confined to the imposition of restrictions on the use, enjoyment or exploitation of the private property.

In that case, deprivation must be by a law of general application and be for the purpose of one of the public interests listed in s 73(1)(b) of the Constitution. Where the compulsory deprivation involves the acquisition or taking away or dispossession of private property, there is expropriation.

It cannot be disputed that acquisition means and implies the acquiring of the entire title of the expropriated owner, whatever the nature or extent of that title might be. The whole bundle of rights which were vested in the original holder would pass on acquisition to the acquirer, leaving nothing in the former. Expropriation requires the payment of a fair and adequate compensation. In that case, all the requirements of validity of the law prescribed under s 71(3) of the Constitution must be met.

Whichever way one looks at the facts of this case, s 71(3) of the Constitution is not applicable, whether in the broad sense of compulsory deprivation or the narrow meaning of expropriation. There was no retrospective compulsory deprivation of vested rights in property. The retrospective imposition of the financial obligation on employers who terminated their employees' contracts on notice to pay them the minimum retrenchment package as compensation for loss of employment cannot be passed as compulsory deprivation of employers of private property in the

form of money by the State. There is obviously no taking of money from the employers by the State.

The objective of the retrospective imposition of the financial obligation on employers who terminated employees' contracts on notice to pay a minimum retrenchment package was not the taking of the employers' money. There was a pre-determined liability by the employer to the employee whose contract was terminated for damages caused by the loss of employment as a result of termination on notice. Compulsory deprivation of property prohibited under s 71(3) of the Constitution would not be premised on a pre-determined liability for a debt owed by one person to another. It is clear from the provisions of s 71(3) of the Constitution that the right to property is protected against compulsory deprivation by the State.

The mechanism by which the retrospective application of the financial obligation on the applicants on account of their having terminated employees' contracts on notice during the relevant period is unlike an act of deprivation of the applicants of specific and identified property. It would be incongruous to call the effect of the retrospective application of the obligation to pay compensation to employees whose contracts were terminated on notice deprivation of property within the meaning of s 71(3) of the Constitution.

The transitional provision gives retrospective effect to legislation that simply imposes an obligation on an employer, the content of which is payment of the minimum retrenchment package to the employee whose contract was terminated on notice as compensation for the loss of employment. The retrospective application of the obligation did not target a specific property

interest, nor did it depend upon any particular property for the operation of the statutory mechanism. The Government took nothing for its own use. It imposed an obligation on employers which was within its legislative powers to impose. The money was to be paid to employees whose contracts were terminated on notice.

The retrospective application of s 12C(2) of the Act placed the responsibility of bearing the burden of loss of employment by the employee whose contract was terminated on notice fairly on those who would have caused the loss. It is not a burden that should in fairness and justice have been borne by the public as a whole. The employers who terminated employees' contracts on notice would have benefitted from the fruits of their labour.

The financial obligation imposed on the employers is owed to the employees whose contracts were terminated on notice. No specific amount of money is represented by the obligation. The law provides a formula which the parties must use to arrive at the specific amount of money to be paid.

An employer who terminated an employee's contract on notice is placed under an obligation retrospectively to assess the value of the entitlement of the employee to compensation for loss of employment based on length of service. The payment to the employee by the employer is made after calculation of what is due and payable as damages for loss of employment at the initiative of the employer. The money the employer would have had to pay to the employee whose contract of employment was terminated on notice is a measure of the damages for loss of employment caused by the employer.



It would be absurd to say that Government should pay the employer compensation for the money paid to the employee for loss of employment, which payment it would be bound to pay if there was expropriation. The employer may even not pay the money if he or she or it successfully pleads financial incapacity and consequent inability to pay the minimum retrenchment package to the employment council established for the undertaking or, if there is no employment council for the undertaking concerned, the Retrenchment Board, and gets an exemption from the obligation to pay the full minimum retrenchment package or any part of it.

Payment by money was simply the means which the Legislature employed to fulfil its purpose. Nothing in s 71 of the Constitution prohibits the Legislature from employing monetary means in this way. Selection of the most effective means for the achievement of a legislative purpose is a prerogative of the Legislature. Section 71 of the Constitution was altogether irrelevant for the purposes of the applicants' case.

### **DISPOSITION**

In the result, the application is dismissed with costs.

**ZIYAMBI JCC:**                      **I agree**

**GWAUNZA JCC:**                      **I agree**

**GARWE JCC: I agree**

**HLATSHWAYO JCC: I agree**

**PATEL JCC I agree**

**GUVAVA JCC I agree**

**MAVANGIRA JCC I agree**

**UCHENA JCC I agree**

*Gill, Godlonton & Gerrans, applicants' legal practitioners*

*Civil Division, Attorney-General's Office, respondents' legal practitioners*