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Legal formalism and the new Constitution: An analysis of the recent Zimbabwe Supreme Court decision in *Nyamande & Another v Zuva Petroleum*

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Summary

This is an analysis of the recent decision by the Supreme Court of Appeal in the case of Nyamande v Zuva Petroleum*. The article critiques the formalistic and conservative approach used by the Supreme Court in reaching its decision, as the Court failed to consider the important role now played by the Constitution of the Republic of Zimbabwe. This is because Zimbabwe passed a new Constitution in 2013. The article briefly discusses the facts of the case, the reasoning and ruling by the Supreme Court and, in some detail, the failure by the Court to consider a number of fundamental human rights and freedoms which are embodied in the Zimbabwean Constitution. The article also outlines some important rights and principles that the Supreme Court ought to have considered but failed to do. It additionally briefly considers the legislative framework governing labour relations in Zimbabwe, particularly the Labour Act of Zimbabwe, with the aim of interrogating the correctness of the decision in light of the constitutional and legislative framework governing labour relations in Zimbabwe. Although the legislature has subsequently rectified the matter, it is still important to reflect on the mistakes made by the Supreme Court in order to prevent it from erring in the same manner in the future. It is important to note that there has to be some level of change regarding the manner in which judges interpret the law, particularly in light of the new Constitution. If the Constitution is to be worth anything more than the*

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piece of paper it is written on, the judiciary ought to ensure that in all cases they adjudicate on the Constitution is considered. The Constitution should permeate all law, including statutory and common law.

Key words: *constitution; dismissal; labour; justice; fairness*

1 Introduction

Today it is a well-known fact that companies have a significant impact on communities and individuals. This impact sometimes may be negative and sometimes positive. Indeed, in some instances, companies exercise significant power over individuals, even having the ability to control their well-being.[1] For this and many other well-documented reasons,[2] there must be some checks and balances to ensure that workers access social justice and democracy in the workplace.[3] The recent decision by the Supreme Court of Zimbabwe in the case of *Nyamande & Another v Zuva Petroleum* (*Nyamande* case)[4] leaves a lot to be desired. Not only did the Supreme Court leave the majority of employees at the mercy of the employer, but it also destroyed the protection that workers enjoyed for decades under Zimbabwe's constitutional and labour framework.[5]

The article seeks to analyse the recent decision by the Supreme Court of Appeal in the *Nyamande* case. It critiques the formalistic and conservative approach used by the Supreme Court in reaching its decision, as the Court failed to consider the important role now played by the Constitution of the Republic of Zimbabwe. This is mainly because Zimbabwe passed a new Constitution in 2013.[6] As point of departure, the case note will briefly discuss the facts of the case and the reasoning and ruling by the Supreme Court. The second part of the article discusses, in some detail, the failure by the Supreme Court to consider a number of fundamental human rights and

1 M Gwanyanya 'The South African Companies Act and the realisation of corporate human rights responsibilities' (2015) 18 *Potchefstroom Electronic Law Journal* 3102.

2 For a discussion on the reasons why it has become necessary to regulate companies on human rights violations, see A Ramasastry 'Corporate complicity: From Nuremberg to Rangoon – An examination of forced labour cases and their impact on the liability of multinational corporations' (2002) *Berkeley Journal of International Law* 91; as J Ruggie 'Business and human rights: The evolving international agenda' (2007) *American Journal of International Law* 819; B Stephens 'Amorality of profit: Transnational corporations and human Rights' (2002) *Berkeley Journal of International Law* 45; B Stephens 'Corporate liability: Enforcing human rights through domestic litigation' (2000-2001) *Hastings International and Comparative Law Review* 401.

3 Zimbabwean Labour Act [Chapter 28:01] as amended by Act 17 of 2002 section 2 A.

4 *Nyamande & Another v Zuva Petroleum (Pvt) Ltd* SC 14/2015.

5 A Magaisa 'Dark day for the Zimbabwean worker as Supreme Court goes neo-liberal' 18 July 2015 http://alexmagaisa.com/dark-day-for-the-zimbabwean-worker-as-supreme-court-goes-neo-liberal/ (accessed 20 July 2015).

6 The Constitution of the Republic of Zimbabwe Amendment Act 2013.

freedoms now contained in the Constitution.[7] The article will outline all the possible rights and principles that the Supreme Court ought to have considered but failed to do. It will also briefly consider the legislative framework governing labour relations in Zimbabwe, particularly the Labour Act of Zimbabwe.[8] The aim is to interrogate the correctness of the decision in light of the constitutional and legislative framework governing labour relations in Zimbabwe. Most importantly, the article will interrogate the relationship between employer and employee and demonstrate that, contrary to what the Supreme Court said in its judgment, this relationship is neither equal nor fair. Inherent in this relationship is the unique, unequal bargaining positions of the two parties. This is why we generally have laws to protect this relationship.[9] To simply view this relationship as any other contractual relationship is, at the very least, unfair and results in injustice.

In the third and final part of the article I discuss the implications of this decision and provide a few recommendations as to how this situation in which workers in Zimbabwe find themselves can be rectified. I then conclude by arguing that the Supreme Court had failed to act in a manner consistent with the Constitution. In order to avoid a similar situation in the future, the judiciary needs to be constantly conscious of the fact that Zimbabwe now operates in a constitutional dispensation. If the Constitution is to be worth anything more than the piece of paper it is written on, the judiciary ought to ensure that in all cases they adjudicate on, the Constitution is considered. The Constitution should permeate all law, including statutory and common law.[10]

2 The case

2.1 Facts

The facts of the case are as follows. Don Nyamande and Kingstone Donga (the appellants) were employed by British Petroleum Shell (BP Shell) as supply and logistics manager and finance manager respectively. BP Shell sold its services as a going concern to Zuva Petroleum (the respondent).[11] An agreement of sale of business was concluded between BP Shell and Zuva Petroleum. A transfer of

7 As above.

8 Zimbabwean Labour Act [Chapter 28:01] as amended by Act 17 of 2002.

9 Magaisa (n 5 above).

10 See sec 2 of the Constitution which provides that it is the supreme law of Zimbabwe and conduct or law that is inconsistent with it is invalid.

11 'Going concern' here meant that Zuva Petroleum would simply step into the shoes of BP Shell, and no conditions of the employees would be altered.

undertaking was done in terms of section 16 of the Labour Act.[12] The appellants were transferred to the new undertaking without derogation from the terms and conditions of employment that they enjoyed while employed by BP Shell. Some time in November 2011, the respondent offered its employees, who included the appellants, a voluntary retrenchment package which was declined by some employees.[13] In December 2011, the respondent served each of its employees, including the appellants, with a compulsory notice of intention to retrench.[14]

The appellants and the respondent could not agree on the retrenchment terms. Having failed to agree on the terms of retrenchment, the parties referred the dispute to the Retrenchment Board of Zimbabwe.[15] In May 2012, the Ministry of Labour and Social Services directed the parties to carry out further retrenchment negotiations for another 21 days. In the middle of May 2012, and before the expiry of the 21 days, the respondent wrote letters to the appellants, terminating their contracts of employment on notice, as was provided for in the contracts of employment signed by both parties, with effect from 1 June 2012.[16]

The respondent paid the appellants in cash in lieu of notice and thus terminated the employment relationship. The appellants approached a labour officer, contending that their employment contracts had been unlawfully terminated. The labour officer failed to resolve the matter and referred it to compulsory arbitration. The arbitrator concluded 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 respondent appealed to the Labour Court. The Labour Court allowed the appeal. In its judgment, the Labour Court essentially held:[17]

> The submission that section 12B [of the Act] came to do away with the possibility of terminating a contract of employment on notice is a misunderstanding of the law as it stands. In any event, the provisions of section 12(4) of the Act are clear and allow no ambiguity as also the provisions of section 12B. None of the sections have the effect of doing away with the termination of a contract of employment on notice.

12 See sec 16 of the Act (n 6 above). It provides that whenever any undertaking in which any persons are employed 'is alienated or transferred in any way whatsoever, the employment of such persons shall, unless otherwise lawfully terminated, be deemed to be transferred to the transferee of the undertaking on terms and conditions which are not less favourable than those which applied immediately before the transfer, and the continuity of employment of such employees shall be deemed not to have been interrupted'.

13 *Nyamande* case para 2.

14 As above.

15 *Nyamande* case para 3.

16 As above.

17 *Petroleum v Nyamande & Another* (2014) 195 LC/H.

The Labour Court concluded that neither section 12B[18] nor section 12(4)[19] of the Act abolished the employer's right to terminate employment on notice. The appellants were not satisfied with the judgment of the Labour Court and appealed to the Supreme Court on the following grounds:[20]

(1) The Labour Court erred and seriously misdirected itself on a question of law by upholding the termination of the appellants' contracts of employment on notice and failing to find such termination to be unfair dismissal.

(2) The Labour Court erred and seriously misdirected itself on a question of law in failing to realise as it should have done that section 12(4) of the Act does not provide for the termination of a contract of employment on notice and that any such purported termination is contrary to section 12B of the Act.

(3) The Labour Court erred at law in allowing termination on notice as that amounts to allowing an employer to terminate employment for no justifiable and valid cause. The appellants sought the setting aside of the Labour Court's judgment and its substitution with that of the arbitrator.

As the Supreme Court correctly noted, the crux of the contention between the parties was the legal status of the employer's common law right to terminate an employment relationship on notice.[21] In their argument, the parties agreed that both the employer and the employee previously had a common law right to terminate an employment relationship on notice. The point of departure was that the appellants, while acknowledging that the employer's right once existed, argued that it had since been abolished or, at the very least,

18 Sec 12B(1) of the Labour Act states that '[e]very employee has the right not to be unfairly dismissed'. Subsection (3) sets out the instances whereby an employee is said to have been unfairly dismissed. An employee is deemed to have been unfairly dismissed if 'the employee terminated the contract of employment with or without notice because the employer deliberately made continued employment intolerable for the employee'; or 'if, on termination of an employment contract of fixed duration, the employee (i) had a legitimate expectation of being re-engaged; and (ii) another person was engaged instead of the employee'.

19 Sec 12(4) of the Labour Act provides as follows: 'Except where a longer period of notice has been provided for under a contract of employment or in any relevant enactment, and subject to subsections (5), (6) and (7), notice of termination of the contract of employment to be given by either party shall be (a) three months in the case of a contract without limit of time or a contract for a period of two years or more; (b) two months in the case of a contract for a period of one year or more but less than two years; (c) one month in the case of a contract for a period of six months or more but less than one year; (d) two weeks in the case of a contract for a period of three months or more but less than six months; (e) one day in the case of a contract for a period of less than three months or in the case of casual work or seasonal work.'

20 *Nyamande* case para 4.

21 *Nyamande* case para 6. I may add that it is my view that counsel for the appellants should have raised constitutional arguments in their papers, and not simply contended that the legal status of the common law right was abolished by the Labour Act.

that the right was now regulated by the Labour Act,[22] which requires an employer to show good cause before dismissing an employee.[23]

2.2 Decision of the Supreme Court

The Supreme Court upheld the decision of the Labour Court and held that the employer was within his contractual rights to terminate the employment contract on notice. It further held that nothing in the Labour Act abolished nor regulated the common law right of the employer[24] to terminate the contract upon giving notice to the employee. This, however, should not be the basis for precluding an employee who has been dismissed without good cause to challenge the lawfulness of his or her dismissal. In South Africa, for example, the notice of termination of employment does not affect the right of a dismissed employee to challenge the lawfulness or fairness of the dismissal in terms of the labour laws or any other law.[25]

2.3 Reasoning of the Supreme Court

After applying the golden rule of statutory interpretation, the Supreme Court held that it could not find any words in section 12B of the Act that either expressly or by necessary implication abolished the employer's common law right to terminate an employment relationship by way of notice. It also reasoned that it was a well-established principle of statutory interpretation that a statute cannot effect an alteration of the common law without explicitly saying so. Furthermore, the Supreme Court relied on the *dictum* of Lord Halsbury in *Bank of England v Vagliano Brothers*[26] that there is a presumption, in the interpretation of statutes, that parliament does not intend a change in the common law and, if it does, it has to express its intention with irresistible clarity.[27] The Court went further to state that if by necessary implication such alteration in the common law was intended to be effected, the language of the statute in question must be irresistibly clear. Construing the statute by adding words which are not found in the legislation or words of the statute itself is to sin against one of the most familiar rules of construction.[28]

Section 12B of the Labour Act deals with dismissals and the procedures to be followed in cases where an employment relationship is to be terminated by way of dismissal following misconduct

22 Again, counsel for the appellants in my view should have had an alternative argument that, in the event that the Labour Act does not regulate that right, then certainly the Constitution does. Perhaps this would have brought the attention of the Court to the constitutional provisions.

23 Sec 12B of the Labour Act.

24 The Supreme Court made the mistake of viewing the case as one involving a normal contract between parties.

25 Basic Conditions of Employment Act 11 of 2002.

26 (1891) AC 107 120.

27 *Bank of England* (n 26 above).

28 As above.

proceedings, while section 12(4) deals with the termination of a contract of employment on notice, and lays down the limitations as to the periods of notice. The Court reasoned that, on a proper reading, section 12B of the Labour Act deals with a method of termination of employment known as 'dismissal'. While dismissal is one method of terminating employment, it is not the only method of terminating an employment relationship. It is only one of several methods of terminating employment.[29]

Therefore, section 12B, according to the Supreme Court, does not deal with the general concept of termination of employment. It concerns itself only with the termination of employment by way of dismissal. The Court further stated that section 12(4) of the Act was the only provision that deals with the concept of termination of employment on notice in terms of a contract of employment. Section 12(4) of the Labour Act provides:

> Except where a longer period of notice has been provided for under a contract of employment or in any relevant enactment … notice of termination of the contract of employment to be given by either party shall be -
>
> (a) three months in the case of a contract without limit of time or a contract for a period of two years or more;
>
> (b) two months in the case of a contract for a period of one year or more but less than two years;
>
> (c) one month in the case of a contract for a period of six months or more but less than one year ...

Based on the above section, the Court concluded that 'the wording of section 12(4) is so clear that it leaves very little room, if any, for misinterpretation'.[30] It further held that section 12(4) 'governs the time periods that apply when employment is being terminated on notice' and that 'the notice periods do not apply when an employee is dismissed. In instances of dismissal no notice is required'.[31]

3 A critique of the Supreme Court's decision

As stated above, the Supreme Court held that after applying the golden rule of statutory interpretation, it could not find any word or words in section 12B of the Labour Act that either expressly or by necessary implication abolished the employer's common law right to terminate an employment relationship by way of notice. It also reasoned that it was a well-established principle of statutory interpretation that a statute cannot effect an alteration of the common law without explicitly saying so. The major problem with

29 *Nyamande* case (n 4 above).
30 *Nyamande* case (n 4 above) para 17.
31 As above.

this reasoning is that it fails to take into account the Constitution of Zimbabwe, which expressly states that the Constitution is 'the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency'.[32] Indeed, the Supreme Court should have gone beyond the arguments advanced by the parties to consider the applicability of the Constitution to the dispute.[33] It is submitted that if the Supreme Court wanted, as it stated, an expressly-stated alteration of the common law, then a simple glimpse at the founding provisions of the Constitution[34] would have provided it with such. If this did not satisfy the Court, perhaps another glimpse at the Constitution, particularly Chapter 4, which regulates the interpretation of the Constitution, would have provided it with such. In that sense, the Supreme Court should, at the very least, have considered to develop the common law as it is required to do so by the Constitution. Section 46 provides:[35]

> (1) When interpreting this Chapter, a court, tribunal, forum or body -
>
> (a) must give *full effect to the rights and freedoms* enshrined in this Chapter;
>
> (b) must promote the values and principles that underlie a democratic society based on openness, justice, human dignity, equality and freedom, and in particular, the values and principles set out in section 3;
>
> (c) must take into account *international law* and all treaties and conventions to which Zimbabwe is a party;
>
> (d) must have due regard to all the provisions of this Constitution, in particular the *principles and objectives* set out in Chapter 2; and
>
> (e) *may consider relevant foreign law*; in addition to considering *all other relevant factors* that are to be taken into account in the interpretation of a Constitution.
>
> (2) When interpreting an enactment, and when developing the common law, every court, tribunal, forum or body must promote and be guided by the spirit and objectives of this Chapter.

However, the Supreme Court did not see it fit to take these sections into account. With respect, this approach was extremely conservative and formalistic in its outlook, and this is reflected in its decision. If this was not the case, then, at the very least, the Supreme Court ought to have interrogated section 12, and this would have led it to the inevitable conclusion that it is inconsistent with the Constitution, particularly section 65(1), which provides that '[e]very person has the right to fair and safe labour practices'.[36] From a constitutional law perspective, this is where doctrines of cure come in, for instance,

32 Sec 2 Constitution of Zimbabwe (n 6 above).

33 M Sayi 'Constitutional validity in *Zuva* case judgment' http://www.chronicle.co.zw/constitutional-validity-in-zuva-case-judgment/ (accessed 23 July 2015).

34 Sec 3 Constitution of Zimbabwe.

35 My emphasis.

36 Sec 65(1), among other things, provides for the right to fair and safe labour practices.

reading in or severance, whichever would have been appropriate. The challenge seems to be the fact that the judges of the Supreme Court failed to come to terms with the transformative ethos of the new constitutional dispensation.

Added to this, the Supreme Court's reasoning and the use of Lord Halsbury's *dictum* in the *Bank of England* case[37] of the presumption against reading anything into a statute unless it is irresistibly clear, creates a number of problems in this particular case if it is to be accepted.

The problem with this reasoning is that if one is to accept it, then it renders the Labour Act useless in many instances, because what this means is that an employment contract is just an ordinary contract which should be governed by the common law rules of contract. The dictates of fairness, justice and equity would not apply as they are not explicitly mentioned in the Labour Act. Yet, one of the reasons why the Labour Act was enacted was to balance the relationship between employer and employee so that the relationship can be guided on the principles of fairness.[38]

It is significant to note that the Labour Act is premised on the basis that the employer and employee relationship is inherently unequal and that the employee must in certain instances be protected against the enormous amount of power that employers usually possess.[39] As the Act provides in its Preamble, its purpose is 'to declare and define the fundamental rights of employees; to give effect to international obligations of the Republic of Zimbabwe as a member of the ILO ...'[40]

One of these fundamental rights that employees have is not to be unfairly dismissed. Simply giving notice to an employee without any further checks and balances to protect the employee is grossly unfair, unjustifiable and, most importantly, unconstitutional. It is submitted that there must, at the very least, be some checks and balances to ensure that when the employer decides to terminate the relationship, it is done in a fair and just manner. Leaving employees at the mercy of employers may lead to serious injustices and may have dire consequences, some of which the Supreme Court may not have intended or even foreseen. As Magaisa notes,[41] it can never be a fair labour practice to dismiss an employee at will. This is especially so under the new constitutional dispensation. There must be some procedurally-accepted way of doing so, and reasons must be provided.[42]

Another fundamental error that the Supreme Court made was to interpret the termination of employment contracts by way of notice as

37 *Bank of England* (n 26 above).
38 Sec 2A Labour Act.
39 Magaisa (n 5 above).
40 Preamble Labour Act.
41 Magaisa (n 5 above).
42 As above.

being different from dismissals. As indicated above,[43] the Court stated that section 12(4) deals with the termination of a contract of employment on notice and sets out the limitations as to the periods of notice. It stated that a proper reading of section 12B of the Labour Act would reveal that it only deals with a method of termination of employment known as 'dismissal'. While dismissal is one method of terminating employment, it is not the only method of terminating an employment relationship. It is only one of several methods of terminating employment. The South African jurisprudence could in this instance have been of some guidance to the Supreme Court, particularly the Labour Relations Act, which provides that dismissal is applicable when an employer terminates a contract of employment with or without notice.[44] The Supreme Court here implies that the termination of employment by way of giving notice is not a dismissal but simply a termination of a contract or an agreement. The imperfections of this reasoning cannot be overemphasised. The termination of an employment contract by way of notice is a dismissal, and when an employer uses this form of contract termination, that also constitutes dismissal. [45] The Court seemed to suggest that giving notice to an employee that the contract will be terminated as per the contract is not dismissal and, therefore, will not fall under section 12(4) governing dismissals. This reasoning clearly is inaccurate, improper and misleading.

If this reasoning is to be accepted, section 12B, which regulates dismissals, may also have some problematic provisions. Section 12B lists situations which may be deemed to be unfair dismissals. One of those situations is 'if the *employee* terminated the contract of employment *with or without notice*[46] because the employer deliberately made continued employment intolerable for the employee'.[47] Clearly, therefore, if it is possible for an employee to terminate employment with notice and it may still be deemed to be unfair dismissal, then giving notice to terminate a contract indeed constitutes dismissal. Consequently, this would mean that section 12B applies to the termination of employment by way of notice and, thus, the common law position is indeed regulated by the Labour Act. It can no longer be enough simply to give notice in all circumstances. This section clearly shows that there may be instances where notice is indeed given and still this constitutes unfair dismissal.

The Labour Act also gives guidelines on retrenchment in section 12C. The section sets out the manner in which this should be done. However, the Supreme Court's decision also renders this section useless as surely no employer would opt to go through this long,

43 Sec 12B Labour Act.
44 Labour Relations Act 66 of 1995.
45 Magaisa (n 5 above).
46 My emphasis.
47 Sec 12B Labour Act.

expensive and exhaustive process if they can simply give notice. As Magaisa correctly argues, if the legislature did not intend these rules to be used, why, then, would they have gone to so much trouble of setting out rules against unfair dismissals and retrenchment procedures?[48] It is submitted that a correct reading and interpretation of these provisions in the Labour Act would have led the Supreme Court to conclude, at the very least, that the Labour Act regulates employer and employee relationships in instances where the parties decide to terminate the relationship by notice. Even if this is not done in the most explicit way, as the Supreme Court wanted, this alone should have been enough to look at the Labour Act in its entirety, its purposes as well as the sprit in which it was drafted. This would also have meant that issues of fairness, reasonableness and justice would come into play.

The Supreme Court's reasoning and ruling may lead to many unintended consequences, even if one were to excuse the reasoning of the Court based on the Labour Act, or assume that the Labour Act indeed does not regulate the termination of employment contracts, as was done by the Supreme Court. Can one come to the same conclusion if the constitutional dimension is brought into play? In my view, this would be a difficult argument. Below I outline some of the constitutional and human rights issues that the Supreme Court ignored completely. The aim here is to specifically highlight some sections which the Court could have considered before reaching its decision.

4 The Constitution

4.1 Supremacy of the Constitution

Section 1, arguably the most important provision of the Constitution of Zimbabwe, provides that it is 'the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency'. As stated above, the Supreme Court should have had due regard of the Constitution and its provisions. Section 2 further provides that 'the obligations imposed by the Constitution are binding on every person, natural or juristic, including the state and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them'. The Court's obligation to fulfil the Constitution is mandatory and, as the wording expressly provides, it must be done at every level. Surprisingly, the Supreme Court failed to fully appreciate the serious nature of this judgment and the potential implications it may have on the lives of ordinary citizens. The fact of the matter is that the judgment not only affects contracts of employment, but it also has serious implications for the livelihood of workers. As Magaisa put it,

48 Magaisa (n 5 above).

this concerns 'human lives and common standards of fairness, decency and social justice'.[49]

4.2 Founding values and principles

In its founding values and principles, the Constitution notes that the nation is founded on respect for, amongst other things, fundamental human rights and freedoms; recognition of the inherent dignity and worth of each human being as well as the recognition of the equality of all human beings.[50] It is submitted that an employee who is constantly at the mercy of his or her employer may never fully appraise himself or herself with any of these rights contained in the founding provisions. This, however, does not mean that all employers are 'evil' and will violate employees' rights. Rather, the mere fact that there is that potential should never go unchallenged in any constitutional democracy. If the Zimbabwean Constitution is to survive any scrutiny it may face, judgments such as these should never see the light of day.

4.3 Work and labour relations

Section 24 of the Constitution speaks directly to the matter of worker and labour relations. It provides:[51]

> The state and all institutions and agencies of government at every level must adopt *reasonable policies and measures*, within the limits of the resources available to them, to provide everyone with an opportunity to work in a freely chosen activity, in order to secure a decent living for themselves and their families.

This section clearly advocates some level of fairness by providing that reasonable policies must be put in place in order to give everyone an opportunity to work freely in order to secure a decent living. Surely the Supreme Court could have used this section to determine if it was reasonable to merely cancel an employment contract on notice and not to have any reasonable procedures to guard against abuse.[52]

Section 65, which deals with labour rights, also provides that each person has the right to fair and safe labour practices and standards. The section lists a number of rights that employees have and, as mentioned earlier, it is now difficult to envisage how employees will fully realise some of these rights. How does one fully enjoy the right to engage in collective bargaining,[53] for example, if the only thing an employer has to do in order to dismiss an employee is to give three months' notice? The same applies to many other rights, such as the

49 As above.
50 Sec 3 Constitution of Zimbabwe.
51 My emphasis.
52 Magaisa (n 5 above) correctly notes that an employer must act reasonably when deciding to terminate a contract on notice as the failure to do so might be an unconstitutional exercise.
53 Sec 65(5)(a) Constitution of Zimbabwe.

right to form and join unions, and the right to organise.[54] All the employer has to do in order to remove any threat that an employee may pose to him or her is to give notice of intention to terminate the contract which, in turn, begs the question of why the legislature would have included all these rights in the Constitution if a simple notice may render them useless.

Further, section 44 of the Constitution imposes on everyone a duty to respect fundamental human rights and freedoms and explicitly provides for the binding nature of the Constitution.[55] The interpretation section quoted above also demands the need to interpret the law in a manner that is just, equitable and fair.

4.4 Principles guiding the judiciary

Section 165 provides that the judiciary in exercising judicial authority must be guided by the principles that justice must be done to all, irrespective of status, and that the role of the courts is paramount in safeguarding human rights and freedoms and the rule of law. At the centre of this argument is the fact that the Supreme Court failed to safeguard the right to fair labour practices as contained in the Constitution. Section 44 of the Constitution provides for the duty to respect fundamental rights and freedoms of the state and every person, including juristic persons. Further, every institution of the state must respect, promote and fulfil the rights and freedoms set out in this chapter. Section 46(1) also provides that when interpreting this chapter, every court, tribunal and forum must give full effect to the rights and freedoms enshrined in the chapter. Therefore, the Supreme Court ought to have gone beyond the arguments raised by the parties and considered whether the Constitution found application in the dispute before it. Its failure to do so amounts to a failure to safeguard the rights and freedoms contained the Constitution, particularly the right to fair labour practices. The judgment has the potential of destabilising the workplace, which in turn leads to disintegration in the ability of the state to protect some of these human rights. Section 165(7) similarly provides that 'members of the judiciary must take reasonable steps to maintain and enhance their professional knowledge, skills and personal qualities, and in particular must keep themselves abreast of developments in domestic and international law'. It is worth mentioning, however, that the Court did analyse precedents of no-fault dismissals in previous cases, such as *Chirasasa v Fidelity Life Assurance*,[56] and found that there was good cause to terminate on notice for no-fault basis.

54 Sec 65(2) Constitution of Zimbabwe.
55 Sec 44 Constitution of Zimbabwe.
56 *Luke Chirasasa & Others v Fidelity Life Assurance of Zimbabwe & Another* [2003] ZWSC 72.

5 Possible remedies to this defect

It must be acknowledged that Zimbabwean labour laws operated in favour of the employee rather than the employer. Legislation placed a number of obligations on employers. Workers had significant protection, so much so that employers complained that it was expensive to terminate workers' contracts.[57] If one also considers the economic crisis that the country faced, and continues to face, this needed to be addressed. Even in the event that the Supreme Court's decision is reversed, this issue will still have to be addressed. The significant protection employees enjoyed alone cannot be sufficient justification for the decision that was given. Two fundamental principles should always be borne in mind when considering cases of this nature. First, the principle of separation of powers, now embodied in the Constitution of Zimbabwe,[58] clearly articulates that it is not the duty of courts to make legislation. This duty is left to the legislature. What the Supreme Court did was to effectively change the law which had been in existence for a number of years.[59] If indeed the courts felt that the labour laws were too stringent and operated harshly against employers, there was little they could do about it in terms of the Constitution. Therefore, if this was an attempt to tilt the law in favour of employers, it was an unconstitutional exercise which should be considered invalid. Second, if the Constitution is to be given the respect and value that it is worth, it should indeed be the supreme law of the country. No amount of economic hardship faced by those operating within its parameters should justify any deviation from it. The argument that the Supreme Court was correct in its decision because of the economic and social challenges that employers faced when wanting to downsize or dismiss employees, and the argument raised by some that, because of economic challenges as well as competition from imports, it was necessary to allow employers to shed off labour and avoid liquidation,[60] are flawed.

Whatever the reasons for the decision of the Supreme Court were, one can only hope that the above argument or reasoning has no basis whatsoever. However, that still does not solve the problem most employees currently face as a result of this judgment. There are other avenues which I believe may be pursued in order to assist employees.

57 See M Ruziwa 'Unpacking Supreme Court ruling on job termination' *The Herald* online 22 July 2015 http://www.herald.co.zw/unpacking-supreme-court-ruling-on-job-termination/ (accessed 25 July 2015).

58 Although not expressly, the Constitution of Zimbabwe recognised the principle of separation of powers by splitting the roles of government into three arms.

59 I argue that the Supreme Court changed the law that was in existence for years mainly because the Act sets out the procedures to be followed in the event of retrenchment. The decision of the Supreme Court would, however, mean that this would be futile because all that an employer would have to do is to give notice and the termination would be lawful.

60 Ruziwa (n 57 above).

First, the matter has been appealed to the Constitutional Court and one can only hope that the Constitutional Court will provide more greater and engage with the facts in more detail. Hopefully, the Constitutional Court will deal with the more fundamental issues of dignity and human rights at a deeper level. Since the matter has been taken on appeal, it brings some temporary relief to employees as this effectively means that the Supreme Court judgment is suspended.[61] It is not clear, however, whether employers understand this legal position, as dismissals are reportedly still carried out.[62]

However, section 11 of the Constitution provides that '[t]he state must take all practical measures to protect the fundamental rights and freedoms enshrined in Chapter 4 and to promote their full realisation and fulfilment'. It is submitted that the legislature can and should move swiftly to ensure that employees are protected by passing clear and unambiguous legislation that will bring finality to this matter.

A long-lasting solution is necessary to balance all the issues involved. There certainly is a need to foster a human rights-respecting culture in the workforce. The current situation in which employees find themselves fundamentally affects their dignity. The ability to earn a living is closely linked to the right to dignity. No employee should be at the mercy of an employer. As argued above, there must be some form of checks and balances. These may be negotiated or considered at various levels. Certain considerations have to be put in place, including, but not limited to, the reasonableness of the employer's decision to dismiss the employee; the length of time the employee has worked for the particular employer; and the fairness of the procedure.[63]

6 Conclusion

It is acknowledged that judges follow rules and precedents to ensure certainty and continuity. Indeed, the law should not be easily tilted merely because one feels that the result of applying set precedents will be unfair. In the same manner, it must also be acknowledged that Zimbabwe now operates under a constitutional dispensation. The common law foundations and provisions that are simply based on the notion of continuing on, for the sake of maintaining order, stability and precedent, need to be removed from our law, as the Constitution

61 C Mahove 'ConCourt challenge suspends Supreme Court ruling' *Newsday* online 25 July 2015 https://www.newsday.co.zw/2015/07/25/concourt-challenge-suspends-supreme-court-ruling/ (accessed 26 July 2015). Mahove correctly notes that an appeal to a higher court has the effect of suspending the decision appealed against.

62 It is beyond the scope of this article to discuss the legal understanding of the employers in this regard.

63 Magaisa (n 5 above).

so demands.[64] As Roederer, in the South African context, noted:[65]

> The result [of developing the common law in accordance with the Constitution] is not to undermine the foundations of law [or] to unsettle every rule, and to leave every existing right or entitlement in jeopardy. No doubt those which cannot be supported by the values of the new constitutional dispensation are in jeopardy of being condemned. They will need to be replaced with rules which are supported by those values. Those rules which can be, or are, supported by those values will find a foundation as secure as any set of rules can be … They will find a foundation built on comprehensive sets of human rights drawn from the best international and comprehensive practices.

Simply put, the common law rules, which are not supported by the new constitutional dispensation, no longer have a place in our law. If there is any hope for Zimbabwe to defeat the biggest challenge to transformative constitutionalism, the legal culture and philosophy also have to change. The legal system (including judges, lawyers, academics, and so on) also has to come to terms with the transformative ethos of the new constitutional dispensation.

It is important to note that the matter was taken on appeal to the Constitutional Court and the appeal was dismissed on the grounds that the appellants had failed to establish that the appeal was urgent. Nothing in the Constitutional Court's judgment supports the notion that there was no legal basis for the challenge. Rather, the case was dismissed on the basis that it lacked urgency. Coupled with this, the legislator amended the Labour Act by introducing the Labour Amendment Act 7 of 2015,[66] which was promulgated in August 2015. The amendment was aimed at protecting employees from arbitrary dismissals which resulted from the *Nyamande* case. Section 12(4)(a) of the Act was amended to describe the circumstances under which a contract of employment may be terminated. It provides that a contract of employment may only be terminated in accordance with a prior agreement between the employer and employee, an employment code or through retrenchment as described in the Act. The amendment also responds to employers' arguments about the retrenchment provisions under the Act being too costly, by allowing the Retrenchment Board to make exemptions for an employer in the case of financial incapacity.[67]

It would seem, therefore, that even if the case reaches the Constitutional Court on the normal roll, the result will be purely

64 CJ Roederer 'Post-matrix legal reasoning: Horizontality and the rule of values in the South African law' (2003) 19 *South African Journal on Human Rights* 57.

65 Roederer (n 64 above).

66 Labour Amendment Act 7 of 2015.

67 F Madzingira 'Employee rights in Zimbabwe: The contrasting approaches of the Constitutional Court and executive in response to *Nyamande and Another v Zuva Petroleum*' OxHRH Blog, 19 September 2015) http://ohrh.law.ox.ac.uk/employee-rights-in-zimbabwe-the-contrasting-approaches-of-the-constitutional-court-and-executive-in-response-to-nyamande-and-another-v-zuva-petroleum (accessed 23 May 2015.)

academic. One could indeed argue that it was in line with the principle of separation of powers to leave this matter to the legislature to make the necessary amendments to the Labour Act. It is submitted that this should not be the case, particularly in a constitutional democracy. At the very least, the Court ought to have declared the relative sections of the legislation invalid to the extent of its unconstitutionality, and then directed the legislator to rectify the defect by passing the necessary amendments to the legislation to the extent necessary.[68]

68 An example of such an order can be found in South African jurisprudence which declared certain provisions of the Marriage Act invalid to the extent that it did not recognise same-sex marriages in *Minister of Home Affairs & Another v Fourie & Another; Lesbian and Gay Equality Project & Others v Minister of Home Affairs & Others* 2006 (1) SA 524 (CC).