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editormsulr@staff.msu.ac.zw www.msu.ac.zw

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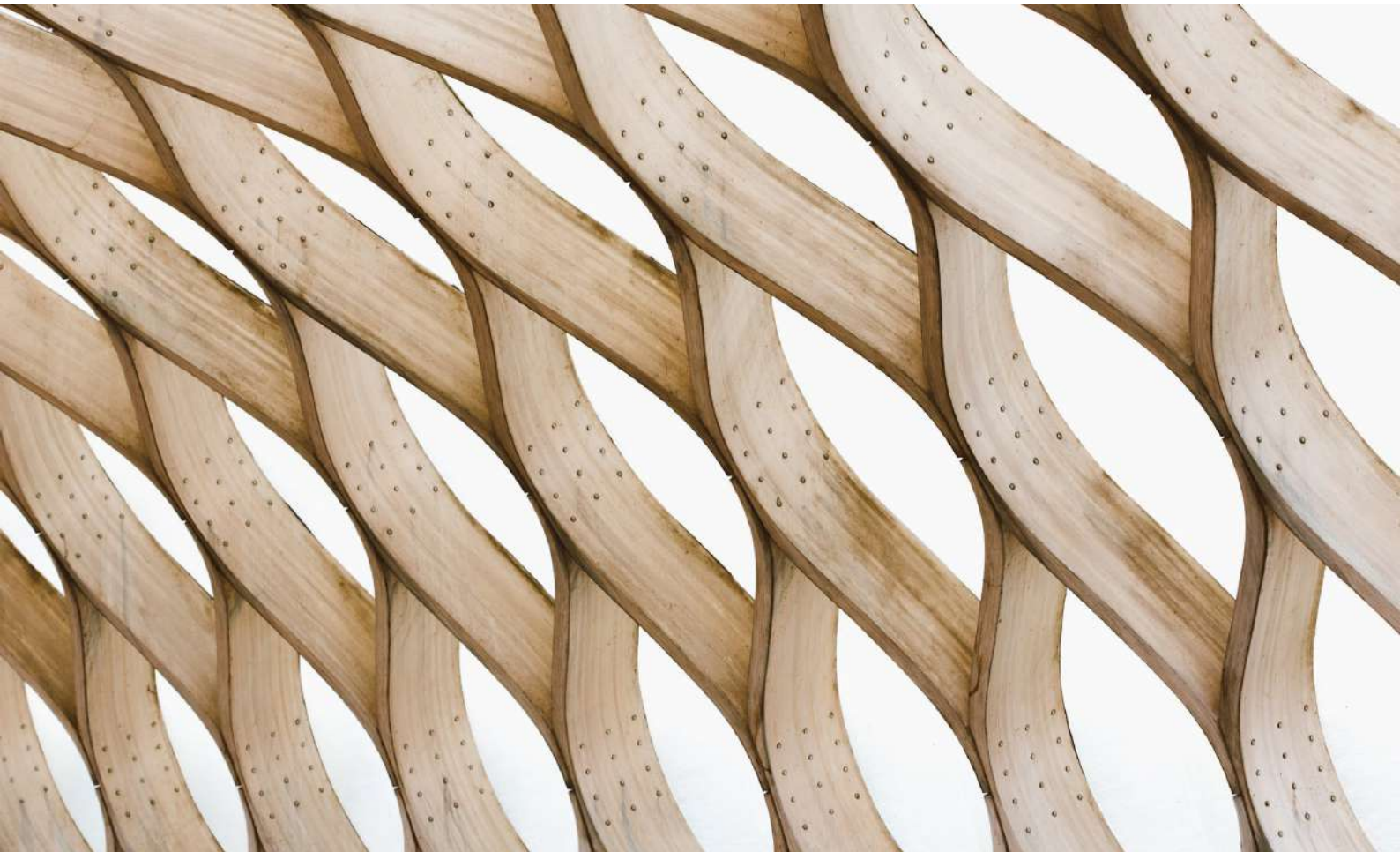
website : www.msu.ac.zw



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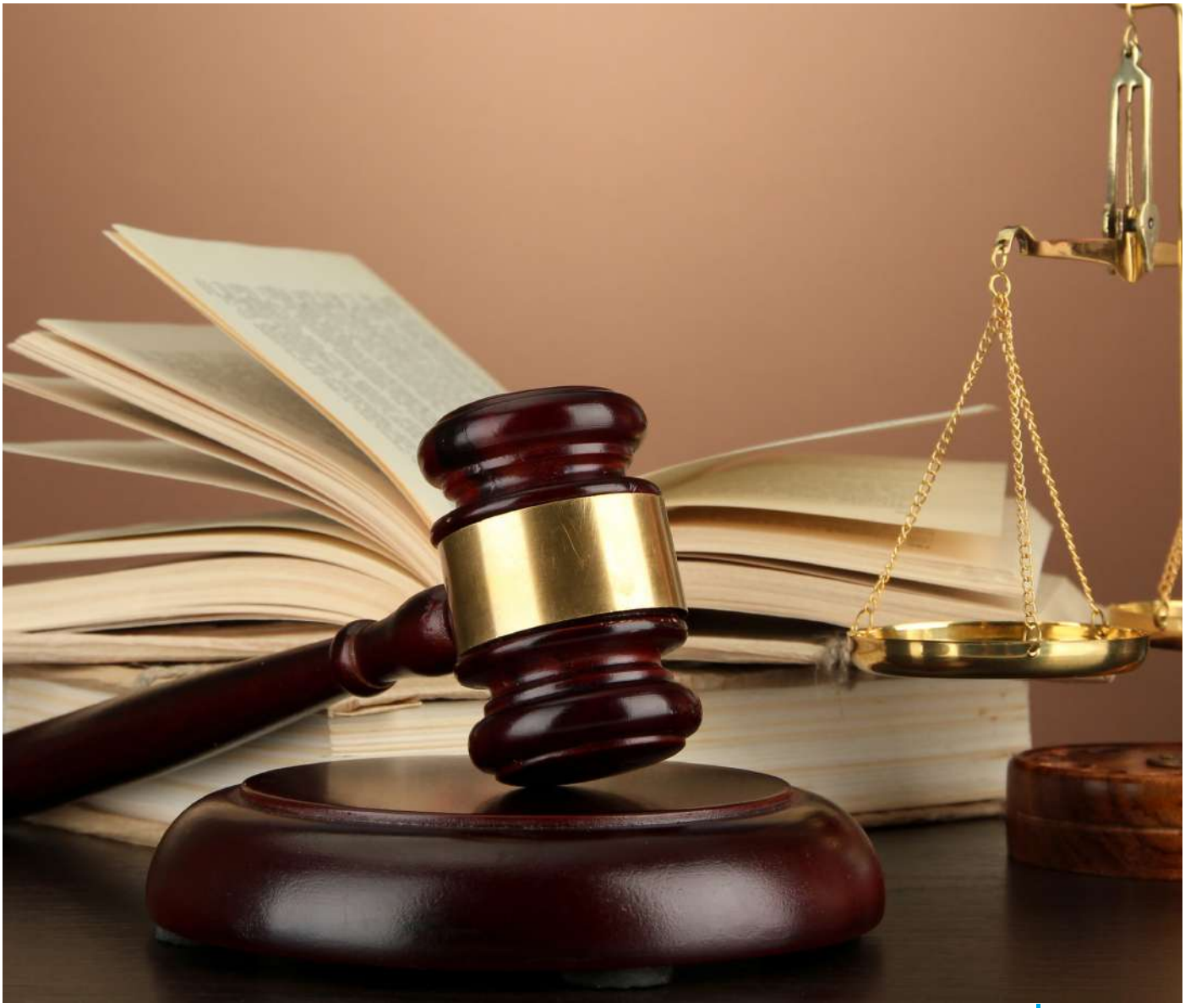

The Rights of Probationary Employees under the Zimbabwean Labour Act

*Tapiwa G Kasuso**

1. Introduction

The common law recognises the right of an employer to require a newly hired employee to serve probation before regular employment is confirmed.[1] During this period, the employer retains the right to terminate the probation contract by giving the requisite notice.[2] Critically, the employer has a right to terminate the contract for any reason, or indeed for no reason at all provided that notice of termination has been given.[3] Alternatively, the employer may allow the probation period to run its full course and on its expiration let go the employee. In this sense, a probationary contract is like any other contract of fixed duration.[4] The common law position has since been modified by the Labour Act (LA)[5] which recognises probation as a legitimate mechanism for employers to assess competency and suitability of an employee before confirmation of regular employment. Section 10 of the Labour (Amendment) Act 17 of 2002 introduced section 12(5) of the LA which regulates probation and provides as follows;

> (5) A contract of employment may provide in writing for a single, non-renewable probationary period of not more than –
>
> (a) one day in the case of casual work or seasonal work; or
>
> (b) three months in any other case;
>
> during which notice of termination of the contract to be given by either party may be one week in the case of casual work or seasonal work or two weeks in any other case.

In addition, section 65(1) of the Constitution guarantees every person's right to fair and safe labour practices and standards. This constitutional right is given effect to by labour legislation such as the LA. Therefore, the interpretation of section 12(5) of the LA is invariably grounded in the Constitution.

This article interrogates the current legislative framework regulating the employment of probationers and termination of their contracts. It begins with an overview of the constitutional framework and its implications on interpretation of section 12(5) of the LA. Thereafter, the rationale underlying probationary contracts is discussed. This is followed by an analysis of the impact of section 12(5) of the LA on duration, extension and renewal of probation periods. The last part analyses the termination of probationary contracts. This analysis is divided into two parts, the first part deals with termination during currency of the probation period and the second part covers termination on expiration of the probation period.

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*Tapiwa G Kasuso LLB Hons (University of Zimbabwe), LLM (University of South Africa), LLD Candidate (University of South Africa); Lecturer, Faculty of Commerce and Law, Zimbabwe Open University, Harare, Zimbabwe.

1 See *Ndamase v Fyfe – King NO* 1939 EDL 262-3; *Muzondo v University of Zimbabwe* 1981 (4) SA 755

2 M Brassey *et al The New Labour Law* (1987) 3; J Riekert *Basic Employment Law* (1987) 63.

3 J Grogan "Dismissal of Probationary Employees: A Postscript" (1990) 11 *Industrial Law Journal* 266 at 272; T Cohen .Worth the paper they are written on? A look at the new probation provisions' (2002) 1 *Law, Democracy and Development* 57.

4 See L Madhuku *Labour Law in Zimbabwe* (2015) 96.

5 (Chapter 28:01) (the LA).

2. The Constitutional Framework

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.[6] Apart from the commonly accepted fundamental rights contained in a codified Constitution, labour rights have also been entrenched therein.[7] Section 65(1) of the Constitution specifically provides for every person's right to 'fair and safe labour practices and standards.' Traditionally, a Declaration of Rights in a Constitution was intended to protect citizens against state power by entrenching rights which could not be violated by means of law - making or through State conduct.[8] Thus, the Lancaster House Constitution contained a Declaration of Rights which had an indirect application of the vertical relationship between the State and citizens. It had no direct application to horizontal relationships such as the employment relationship. The 2013 Constitution applies vertically and horizontally, thus binding every person, natural or juristic, in addition to the State. Therefore, the application of section 65 impacts on the exercise of an employer's private power vis-à-vis its employees, as well as the exercise by the State of its power as employer.[9]

Without doubt, there is great potential for the protection of employees' rights under this constitutional framework due to its scope of coverage and its horizontal application. Firstly, the Zimbabwean workplace is a site of serious oppression of workers with little freedom due to over reliance on the common law by the courts. Consequently, constitutionalisation of labour rights balances the patent inequality inherent in the common law contract of employment. Secondly, the constitutional right to fair labour practices covers all conceivable labour practices including those not covered by the LA. The definition of unfair labour practices in the LA is only limited to actions or omissions specifically described as such in Part III of the LA. If a practice is not specified as unfair in the LA then it cannot be raised as an unfair labour practice under the LA.[10] The constitutional right to fair labour practices is broader than the concept of unfair labour practices in the LA. It covers any practice in all spheres of employment including recruitment, probation, termination and dismissal. Thus, any conduct by an employer in respect of probation which is not an unfair labour practice under the LA may be interpreted as such on the basis of section 65(1) of the Constitution. On this basis, it is argued that the entrenchment of labour rights effectively impacts on labour law in two main ways: [11]

> The first impact is that s65 can be used to test the validity of legislation (or legislative provisions), such as the Labour Act, which purports to give effect to it. Furthermore, provisions on constitutional

6 Section 2 (1) of the Constitution.

7 The Declaration of Rights is located in Chapter 4, Part 2 of the Constitution and enshrines civil and political rights, socio-economic rights, cultural rights and solidarity rights.

8 BPS Van Eck '*Constitutionalisation of South African Labour Law: An Experiment in the Making'* in C Fenwick & T Novitz *Human Rights of Work: Perspectives on Law and Regulation* (2010) 259-291.

9 J Tsabora & TG Kasuso 'Reflections on the Constitutionalising of Individual Labour Law and Labour Rights in Zimbabwe' (2017) 38 *Industrial Law Journal* 43.

10 L Madhuku *Labour Law in Zimbabwe* (2015) 78.

11 J Tsabora & TG Kasuso 'Reflections on the Constitutionalising of Individual Labour Law and Labour Rights in Zimbabwe' (2017) 38 *Industrial Law Journal* 43. For an overview of the impact of section 65 of the Constitutiononlabour law also see M Gwisai 'Enshrined labour rights under s65 (1) of the 2013 Constitution of Zimbabwe: the right to fair and safe labour practices and standards and the right to a fair and reasonable wage' (2015) 3 *University of Zimbabwe Student Journal* 1.

rights can be used to develop the common law as well as customary law in terms of s46 of the Constitution. Clearly, the purpose of the provision of constitutional rights is critical to the development of a constitutional state that is based on the rule of law and the supremacy of the Constitution.

Therefore, the general guarantee of the right to fair labour practices has far reaching consequences on the interpretation of the rights of parties to employment relationships and rights guaranteed in labour legislation.[12] The employment of probationary employees under section 12(5) of the LA is no exception to this influence. Accordingly, section 12(5) of the LA will be interpreted and analysed to the extent it is in compliance with the Constitution. However, section 65(1) of the Constitution is not a magic wand for solely protecting employees on probation. It operates like a double edged sword in that the right to fair labour practices is also available to employers.

3. Purpose of probation

The LA does not define the term probation.[13] It follows that reliance must be placed on the definitions developed by the common law or other legal instruments. In Zimbabwe, the common law remains applicable unless ousted by clear, unequivocal and express provisions of statute or by necessary implication.[14] In *Madawo v Interfresh Limited,*[15] it was held that probation by its very nature presupposes that the probationer is on trial and it is 'the action or process of testing or putting to the proof, the testing or trial of a person's conduct, character or moral qualification; a proceeding designed to ascertain these for some position or office.' Therefore, probation is a trial period during which an employee's ability is tested and assessed so as to determine his or her suitability for employment on a substantive basis.[16] In essence, a probation contract is the equivalent of a putative contract or a contract within a contract. It includes the probationary contract itself and the second contract of regular employment, which is conditional upon successful completion of the probation contract.[17] It is akin to courtship which precedes marriage.

The purpose of probation is twofold. On the one hand, its objective is not only to assess whether the employee has the technical skill and ability to do the work, but it also ascertains whether the employee is a suitable person in a much wider sense.[18] This includes assessing the employee's compatibility with fellow employees, clients and management, including his or her demeanour, diligence, character and personality.[19] On the other hand, it is beneficial to the new employee. It fulfils an important

12 J Grogan *Workplace Law* (2009) 6.

13 It must be noted that the Public Service Regulations 1 of 2000 define probation as the period of employment before a member is confirmed in his appointment. However, these regulations are only applicable to state employees or members of the civil service. In terms of these Regulations probation periods for state employees range from six months to one year and may be extended for a maximum period of six months to one year.

14 See *Hama v NRZ* 1996 (1) ZLR 664 (S); *United Bottlers v Kaduya* 2006 (2) ZLR 150 (S).

15 2000 (1) 660 (H) at 882.

16 See also the following cases; *St Giles Medical Rehabilitation Centre v Patsanza* SC 59/18; *Muzondo v University of Zimbabwe* 1981 (4) SA 755 (Z); *Kazembe v Adult Literacy Organisation* SC 173/94; *Minister of Labour & Others v PEN Transport (Pvt) Ltd* 1989 (1) ZLR 293 (S); *Kwete v Africa Community Publishing and Development Trust &Others* HH 216/98; *Madawo v Interfresh Ltd* 2000 (1) ZLR 660 (H). The Code of Good Practice: Dismissal annexed as item 8 of Schedule 8 of the Labour Relations Act 66 of 1995 of South Africa provides that the purpose of probation is to give the employer an opportunity to evaluate the employee's performance before confirming appointment.

17 L Madhuku *Labour Law in Zimbabwe* (2015) 44.

18 AC Bassone*t al Essential Labour Law* (2005) 35; P Benjamine*t al* 'The cost of "doing business" and labour regulation: The case of South Africa' (2010) 149 *International Labour Review* 80-8.

19 Z Baloyi&A Crafford 'Problems surrounding probation in South African Public Service' (2006) 4 (1) *SA Journal of*

socialisation function, through which employees are integrated into the organisation and familiarise with the work situation. Though probation is not regarded as a period for acquisition of necessary qualifications, it allows employees to adapt to the new work environment and gain practical exposure before confirmation of employment.[20] In light of the foregoing, key to any probation is balancing the employer's interest in the ability to remedy an inappropriate placement through termination with relative ease and the employee's interest in work security and legitimate expectation of employment on a regular basis.[21] The need for flexicurity is what underlies section 12(5) of the LA. This is also recognised in section 65(1) of the Constitution which advocates for a labour law dispensation that promotes fairness by paying due regard to interests of both employers and employees.

4. Duration of Probation

Section 12(5) of the LA brought with it hope for change and clarity on several aspects of probation, including duration of probation. This was unregulated under the common law. Firstly, probation is not compulsory. Section 12(5) of the LA uses the word 'may.' This relates to the employer's discretion to engage an employee either on probation or immediately into a substantive position. In the event that a contract of employment is silent on probation, an employer cannot turn around and place an employee on probation once the contract of employment is running. This position finds support in international labour standards and the LA. Article 2(b) of the ILO[22] Termination of Employment Convention 158 of 1982 provides that a period of probation or qualifying period must be determined in advance and be of reasonable duration.[23] This position is bastioned in section 12(2) (c) of the LA which provides that 'an employer shall upon engagement of an employee inform the employee in writing the terms of probation, if any'. Not only does section 12(2) (c) of the LA fortify the proposition that probation is discretionary, but it also makes it clear that an employee's probationary status must be set out in advance in the contract of employment. In the circumstances, an employee can only serve probation if there is a prior agreement to that effect.[24] A probation period cannot and will not be implied into a contract. It is submitted that this interpretation is in line with the right to fair labour practices in section 65(1) of the Constitution and it is for this reason section 12 (5) of the LA makes it mandatory for probation to be reduced to writing.

The duration of probation depends with the nature of employment. The LA recognises various

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Human Resource Management 12-16.

20 R Masango & V Hilliard 'Probation: A contentious South African Public Service Practice' (1999) 34 *Journal of Public Administration* 94-103.

21 H Cheadle 'Regulated flexibility: Revisiting the LRA and the BCEA' (2006) 27 *Industrial Law Journal* 663; A Brunder 'From Jacmain to Leeming: The Problem of Probationary Employees in the Public Sector' (1983) 21 (1) *Osgoode Hall Law Journal* 1-16.

22 International Labour Organisation.

23 A Van Niekerk in 'Regulating Flexibility and Small Business: Revisiting the LRA and BCEA - A Response to Halton Cheadle's Concept Paper' UCT Development Policy Research Unit Working Paper 07/119 (2007) 16, distinguishes a probationary period from a qualifying period in that a qualifying period is a period during which employees do not enjoy any protections of labour legislation such as protection against unfair dismissal with the exception of fundamental rights, whilst with probationary periods, employees enjoy labour law protections. This is an artificial and unnecessary distinction which exposes vulnerable employees.

24 A similar provision is also found in the Code of Good Practice: Dismissal annexed as item 8 of Schedule 8 of the South African Labour Relations Act 66 of 1995.

forms of employment which *inter alia*, include casual contracts,[25] seasonal contracts,[26] permanent employment,[27] fixed task contracts and fixed duration contracts. In respect of casual work and seasonal contracts which are usually short term contracts, the length of probation is one day.[28] As for any other contract, the LA prescribes a probation period of three months.[29] However, there is nothing in the LA that precludes parties from contracting to a lesser period. It therefore follows that any clause providing for a longer probation period than that prescribed in the LA is against the law and a nullity. That statutory provisions override the common law goes without saying.[30]

5. Extension of a Probationary Period

Once a probationary period is given by an employer, it can only be a 'single, non-renewable' period. Section 12(5) of the LA enhances protection of probationers by curtailing employers' power to extend or renew the probation period. It effectively outlaws renewal or extension of probation once it matures.[31] This is a departure from the common law which gives employers unfettered power to extend or renew probation thereby depriving employees regular employment. In *Chitere v Securitas (Pvt) Ltd*[32] the Labour Court succinctly summarised the position as follows:

> The argument by the Respondent that the Appellant was on extended probation for a period which we know to be well in excess of one year is defeated by the provision which restricts the probation to a "single non-renewable probation period of not more than three months. This provision means that the Appellant's probation matured when he completed three months.

While section 12(5) of the LA is clear that probation cannot be renewed or extended, courts have not always interpreted this section easily and in the process have whittled down protections afforded probationary employees by labour legislation. In *Shonhiwa v Bata Shoe Company (Pvt) Ltd*,[33] the Appellant had his three months' probation extended by consent for a period of thirty four days. This extension was despite the fact that the contract itself and section 12(5) of the LA prohibited extension of probation. After expiration of the extended probation period Appellant's employment on a substantive basis was not confirmed. Dissatisfied with the termination, Appellant lodged an unfair dismissal complaint. He contended that the extension of his probation contract was unlawful and

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25 A casual contract is defined in section 2 of the LA as a contract in terms of which an employee is engaged by an employer for not more than a total of six weeks in any four consecutive months. For the difference between a casual contract and a fixed term contract in the Zimbabwean context see *Simbi (Steelmakers) (Pvt) Ltd v Shamu & Others* SC 71/15.

26 Section 2 of the LA defines seasonal work as work that is, owing to the nature of the industry, performed only at certain times of the year.

27 Section 12(3) of the LA identifies a permanent contract as one that does not specify its duration or date of termination.

28 Section 12(5) (a) of the LA.

29 Section 12(5) (b) of the LA. It has been argued by others that the duration of probation must not be prescribed by statute but must be determined with reference to the nature of the job and the time it takes to determine the suitability for continued employment. The more complex the job, the more likely it will be that the probationary clause will be for a longer period. See T Cohen 'Worth the paper they are written on? A look at the new probation provisions' (2002) 1 *Law, Democracy and Development* 61.

30 The position of the law was put beyond doubt in the following cases *St Giles Rehabilitation Centre v Patsanza* SC 59/18; *Allied Timbers Holdings v Chikumbu* LC/MC/05/13, *Chitere v Securitas (Pvt) Ltd* LC/H/162/06; *Zimbabwe Revenue Authority v Pfumo* LC/H/89/09.

31 *St Giles Medical Rehabilitation Centre v Patsanza* SC 59/18.

32 LC/H/162/06.

33 LC/MD/08/03/14.

on expiration of the initial probation he had become a permanent employee. The court accepted that section 12(5) of the LA prohibited renewal or extension of probation contracts. Despite this prohibition, the court went on to reason that it was the intention of the parties that Appellant was still on probation. He had consented to the extension and thus could not turn around and seek to take advantage of a possible error of law which was common to both parties. The conduct of the parties was not consistent with a tacit renewal or deeming of the Appellant a permanent employee. A similar approach was adopted in *Zimbabwe Revenue Authority v Pfumo*. Appellant terminated Respondent's probation contract after the latter had failed two assessment tests and the probation period had been extended beyond the prescribed period. Though the court acknowledged that the LA prohibits abuse of employees by extending probation, the extension was at the instance of the employee who begged for a second chance. Therefore, it was not unlawful. The court then concluded that section 12(5) of the LA only prohibits renewal of probation by employers and not employees and the renewal was condoned. With due respect, this reasoning is doubtful. It is capitalistic and in direct violence to the spirit of section 12(5) of the LA which is clear that there is no room for renewal of probation and does not create any exceptions.

The Supreme Court has since pronounced itself on this matter in *St Giles Rehabilitation Centre v Patsanza supra*. An employee's period of probation had been extended by one month despite the employee's protestations. The extension was an attempt by the employer to give the employee time to remedy the inconsistencies which had been noted during performance appraisal of the employee. On termination of the contract on two weeks' notice, the employee argued that the extension was unlawful. The Supreme Court accepted that the employer had erred by extending the probation period. Section 12(5) of the Labour Act is clear that there is no room for renewal or extension of the probationary contract.

6 Termination of probationary contracts

The protections afforded by labour legislation apply only to those persons who fall within the ambit of an 'employee' as defined in the LA.[34] One such fundamental protection is every employee's right not to be unfairly dismissed provided in section 12B (1) of the LA. Although the LA provides for different categories of employees including probationers, the definition of employee does not differentiate these diverse categories. It applies to all employees. While probationary employees may be defined as employees for purposes of labour legislation, there is a general perception that they do not have the same degree of security and protections as other regular employees especially on termination. The genesis of this treatment of probationers lies in Article 2(b) of ILO Termination of Employment Convention 158 of 1982. It allows member States to exclude probationary employees from all or some of the provisions of the Convention. It can therefore be questioned, what protections are afforded probationers by the LA and the Constitution on termination? Is the right against unfair

34 Section 2 of the LA defines an employee as follows: "any person who performs work or services for another person for remuneration or reward on such terms and conditions or agreed upon by the parties or as provided for in this Act, and includes a person performing work or services for another person-

(a)in circumstances where, even if the person performing the work or services supplies his own tools or works under flexible conditions of service, the hirer provides the substantial investment in or assumes the substantial risk of the undertaking; or

(b)in any other circumstances that more closely resemble the relationship between an employee and employer than that between an independent contractor and hirer of services."

dismissal available to probationers?

6.1 Termination during Probation

In Zimbabwe the statutory concept of dismissal is different from the common law concept of termination of the contract of employment. A termination occurs when the employer or employee brings the employment relationship to an end by giving the agreed notice. As long as notice has been given, the employee does not have any legal remedy because the common law recognises that a contract of employment can be terminated by either party on notice.[35] This common law position is codified in section 12(4) of the LA as amended by section 12(4a) of the Labour (Amendment) Act 5 of 2015 which prescribes notice periods applicable in the event of termination on notice. Dismissal is much broader than the common law concept of termination of employment.[36] It takes place where the termination of employment is at the behest of the employer irrespective of how precisely the termination takes place in contractual terms.[36] The LA does not define the term dismissal. In section 12B (1) the LA guarantees every employee's right not to be unfairly dismissed. Thereafter, it enumerates and signposts instances in which termination of a contract of employment amounts to an unfair dismissal.[37] Relevant to this discussion is section 12B (2) of the LA which applies when a contract of employment is terminated for disciplinary reasons or misconduct. In this regard, the dismissal must be done in terms of a code of conduct and must be both substantively and procedurally fair. Put differently, there must be a valid and fair reason relating to conduct and the employee must be afforded the right to be heard. These principles are not applicable where an employer terminates a contract of employment on notice.[38] Therefore, termination of a contract on notice is not one of the circumstances of unfair dismissal prescribed under section 12B (2) and (3) of the LA. Neither is it an unfair labour practice.

Section 12(5) of the LA gives the employer the right to terminate a probationers' contract on notice without having to proceed under an employment code, if the purpose of probation has been frustrated. Smith J, in *Time Bank of Zimbabwe v Moyo,*[39] summarised the position as follows:

> Moyo claimed that the termination of his employment was motivated by bad faith. As he was still serving his probationary period, Time Bank was entitled to terminate his services at any time within the probationary period merely by giving Moyo the requisite notice. Its motives are irrelevant.[40]

This is a restatement of the common law position.[41] Section 12(5) of the LA gives both the employer and employee a reciprocal right to terminate a probationary contract on notice. Where the probationary period is cut short, then the issue of notice arises. The legislature did not use the term 'dismissal' in the demise of the employment relationship during probation. It can be lawfully terminated for

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35 J Grogan*Dismissal, Discrimination and Unfair Labour Practices* (2007) 180.
36 See *Nyamande & Another v Zuva Petroleum (Pvt) Ltd* SC 43/15.
37 The three instances include; dismissal for misconduct in terms of a registered code of conduct or the model code, constructive dismissal and failure to renew a fixed term contract in circumstances were an employee had a legitimate expectation of re-engagement and someone else was employed.
38 For the difference between a termination and dismissal see *Chirasasa & Ors v Nhamo NO & Another* 2003 (2) ZLR 206 (S); *Colcom Foods v Kabasa* SC 12/04; *Samuriwo v Zimbabwe United Passenger Company* 1999 (1) ZLR 385 (H); *Nyamande & Anor v Zuva Petroleum (Pvt) Ltd* SC 43/15; *Diamond Mining Corporation v Tafa & Others* SC 70/15.
39 HH 26/02.
40 See also *St Giles Medical Rehabilitation Centre v Patsanza* SC 59/18; *Muzondo v University of Zimbabwe* 1981 (4) SA 755 (Z); *Kazembe v The Adult Literacy Organisation* SC 173/94; *Madawo v Interfresh Ltd* 2000 (1) ZLR 660 (H).
41 It is not an unfair labour practice as defined in the LA nor is it an unfair dismissal.

cause or conduct during its currency and that does not amount to an unfair dismissal. In addition, section 12B of the LA provides an exhaustive list of circumstances which constitute unfair dismissal. Termination of a probationary contract is not one of the instances of unfair dismissal prescribed by the legislature.

In *Hammer and Tongues (Pvt) Ltd v Giya,*[42] the Supreme Court accepted that the right against unfair dismissal is not applicable to probationary employees. In this case a security guard was placed on probation for three months. During probation he committed an act of misconduct and was charged with theft. He was subsequently dismissed from employment and he challenged his dismissal on the grounds that he did not commit the offence and that there was no hearing in terms of the code of conduct. The Supreme Court held that the employer was entitled to summarily dismiss a probationary employee if the purpose of probation had been frustrated. To argue otherwise would defeat the whole purpose of placing an employee on probation.[43] Madhuku[44] supports this position and states as follows:

> Secondly, section 12B does not apply to the termination of employment of probationary employees, apprentices or trainees, as these are governed by the common law. This is because it is neither sensible nor logical to apply the concept of unfair dismissal to persons who are still being assessed to determine whether or not they become employees. In other words, the term "employee" in section 12B must be interpreted as excluding probationary employees, apprentices and trainees. These remain "employees" for other purposes of the Act but not for section 12B.

This position strips probationers of the right not to be unfairly dismissed and is debatable.[45] The distinction between termination and dismissal is cosmetic and fictitious. For this reason, section 65(1) of the Constitution can be invoked to extend protection against unfair dismissal to probationers. Firstly, the broad term 'every person' used in describing the beneficiaries of the right to fair labour practices in section 65(1) of the Constitution suggests an expansive interpretation of the statutory definition of employee to include probationers. It lays the foundation for the possibility of finding that the exclusion of probationers from labour legislation and specifically the right not to be unfairly dismissed is unconstitutional. Secondly, the definition of an employee in section 2 of the LA covers all employees including probationers. The right not to be unfairly dismissed in section 12B (1) of the LA is available to every employee. There is nothing in section 12B (1) of the LA that excludes probationers from protection of the right not to be unfairly dismissed. A literal interpretation of section 12B (1) of the LA clearly shows that there is no intention whatsoever on the legislature to differentiate probationers from other employees. The golden rule of statutory interpretation requires adherence to the plain words of a statute unless this would lead to an absurdity or to a result contrary to the intention of the legislature. The plain words of section 12B (1) of the LA do not lead to any absurdity nor to a result contrary to the intention of the legislature. The term employee in section 12B (1) covers all employees and there is no basis of interfering with the *ipsissima verba* of the provision. There is no absurdity in section 12B (1) justifying the reading of words to the effect that section 12B

42 SC 42/04.

43 Cheda JA on page 3-4 of the cyclostyled judgment stated as follows:
If he was still on probation, surely the employer was entitled to say- I wanted a security guard. I took you for trial on probation in order to decide whether I can offer you permanent employment. I am not happy with your performance and you have to go.

44 L Madhuku *Labour Law in Zimbabwe* (2015) 99.

45 M Gwisai *Labour and Employment Law in Zimbabwe: Relations under Neo-ColonialCapitalism* (2006) 182; P Lloyd *Labour Legislation in Zimbabwe* (2006) 39.

excludes probationers.[46] If this was the intention of the legislature, then the legislature would have explicitly stated so. For instance, section 35 of the Employment Act 1980 of Swaziland provides that no employer shall terminate the services of an employee unfairly, but this does not apply to an employee who has not completed his or her probation. In Australia, section 382 (a) of the Fair Work Act, 2009 provides that an employee cannot pursue an unfair dismissal claim until he or she has served the minimum employment period which covers qualifying and probation periods.[47] In the United Kingdom, section 108(1) of the Employment Rights Act 1996 read with the Unfair Dismissal (Variation of Qualifying Period) Order 1999, provides a statutory qualifying period of one year for eligibility for protection against unfair dismissal or entitlement to a written statement of reasons for dismissal.

In Zimbabwe there is no express exclusion of probationers from the protection against unfair dismissal. What the LA does is to give the employer an option to terminate the probationary contract on the basis of section 12(5) without mentioning the word dismissal at all or invoking section 12B. Therefore, there is no difference in the manner in which a probationer who has committed an act of misconduct is dismissed and that of any other employee. However, from a substantive point of view an employer can dismiss a probationer on less compelling reasons than would be the case if the dismissal is for a tenured employee. In other words, the hurdle for substantive fairness in dismissal of a probationer is less onerous than that of a regular employee.[47] This position is not new at all. In *Minister of Labour & Others v PEN Transport (Pvt) Ltd*[48] the Supreme Court accepted that where allegations of misconduct have been raised against a probationer, he or she should be dismissed in terms of the applicable regulations or in terms of a code of conduct.[49] Thus, there is no jurisprudential basis for discriminating probationers from other employees. They should be protected against substantively unjustified and procedurally unfair dismissals.

6.2 Termination on Expiration of Probationary Period

Probation is for a fixed duration and at the end of this period the employer retains the right to confirm the appointment of the employee on a regular basis or terminate the contract.[50] It cannot be renewed. In the event that the employer elects to terminate the probation contract, there is no requirement that the employer must follow the procedures laid down in a code of conduct. In other words, such termination is not a dismissal but a residual common law right of the employer to terminate a contract without following any procedures or giving any reasons.[51] In *Shonhiwa v Bata Shoe Company*[52] the Labour Court held that probation creates a contract of fixed duration and stated as follows:

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46 *Van Heerden & Others NNO v Queens Hotel (Pty) Ltd & Others* 1973 (2) SA 14 (RAD).
For a detailed discussion of the Australian position see A Chapman 'Protections in Relation to Dismissal: From the Workplace Relations Act to the Fair Work Act' (2009) 32 (3) *UNSW Law Journal* 746-771.

47 See A Van Niekerk *et al Law@work* (2012) 187; E Cameron*et al The New Labour Relations Act* (1989) 114; R Le Roux&A Landman 'Probation – the rights of parties to probationary contracts of employment' (1992) *Contemporary Labour Law* 43.

48 1989 (1) ZLR 293 (S).

49 See also *Muzondo v University of Zimbabwe* 1981 (4) SA 755 (Z); *Mbedzi v Deputy Registrar of the High Court & Another* SC 57/97; *Gumbo v Air Zimbabwe (Pvt) Ltd* 2000 (2) ZLR 126 (H); *Kwangwari v CBZ* HH 79/03.

50 P Lloyd *Labour Legislation in Zimbabwe* (2006) 39.

51 *Mbedzi v Deputy Registrar of the High Court & Another* SC 57/97; *Gumbo v Air Zimbabwe (Pvt) Ltd* 2000 (2) ZLR 126 (H); *Madawo v Interfresh Ltd* 2000 (1) ZLR 660 (H).

52LC/MD/08/03/14. See also the following cases: *Damo Resources (Pvt) Ltd v Mandisodza* LC/H/ 798/14; *Time Bank Zimbabwe Ltd v Moyo* HH 26/02.

> A probation is a type of a fixed contract. The period itself comes to an end as fixed. Consequently, there is no need to give notice of termination. There is no need to give a report on the probation period either. The employer simply informs on whether the contract would be confirmed or not.

While the period for probation is fixed, it is not correct that a probation contract is a fixed term contract in the strict sense. Firstly, a probationary engagement can be terminated during its currency once the purpose of the probation has been frustrated.[53] However, a fixed term contract cannot be terminated during its currency unless the contract provides for such termination. Secondly, at the expiration of the probation contract an employer has the right to confirm regular employment or terminate the contract. As for a fixed term contract, it terminates at the expiration of the term for which it was entered into. The termination follows automatically and is not a dismissal.[54] In terms of section 12B (3) (b) of the LA, its termination can only be a dismissal if on termination of the fixed term contract, the employee had a legitimate expectation of being re-engaged and another person was engaged instead of the employee.[55] As shall be demonstrated herein below, the LA's treatment of failure or refusal to renew a fixed term contract may amount to an unfair dismissal whilst the situation is different with probationary employees.

Section 12(5) of the LA gives the employer the right to terminate a probationary contract once it matures but this does not give the employer an unfettered right to refuse to confirm substantive employment. There are certain substantive and procedural safeguards created by the constitutional right to fair labour practices in section 65(1) of the Constitution and the general purpose of section 12(5) of the LA as a whole. It is trite that the purpose of probation is to assess whether the employee has the technical skill and ability to do the job. Therefore, during the probation period the employer must appraise the employee's performance in a manner that is not arbitrary, discriminatory or *mala fide*. Reasonable evaluation, instruction, training, guidance and counselling must be given to allow the employee to render satisfactory service.[56] The probationer must be advised of his or her shortcomings and given a fair opportunity to improve and meet the required standard. It is only after such assessments that an employer may terminate the probation contract on its expiration.[57]

Although section 12(5) of the LA provides that probation is for a single non-renewable period, there is an unhappy divergence of opinion as to the status of a probationer who remains in employment beyond maturity date of the probation in the absence of confirmation of regular employment. The only clear cases are where a contract of employment provides that in the absence of confirmation an employee will automatically become permanent. Under such circumstances, an employee who remains in employment beyond maturity date of probation will automatically become a regular employee. In all other cases, a failure to confirm appointment or the mere expiry of probation does

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53 This line of reasoning was also adopted by the High Court in *Madawo v Interfresh Ltd* 2000 (1) ZLR 600 (H); *SIRDC v Chakuparira* 2001 (2) ZLR 421 (H); *Kwete v African Community Publishing and Development Trust & Others* HH 216/98.

54 M Olivier 'Legal Constraints on the Termination of Fixed term contracts of Employment: An Enquiry into Recent Developments' (1996) 17 *Industrial Law Journal* 1001.

55 For case law discussing this specie of unfair dismissal see *UZ-UCSF Collaborative Research Programme in Women's Health v Shamuyarira* 2010 (1) ZLR 127 (S); *Magodora & Others v Care International Zimbabwe* SC 24/14; *Kenyan Airways v Musarurwa* SC 67/14.

56 *Kwangwari v CBZ* 2003 (1) ZLR 551 (H). For useful guidelines on employee assessment during probation also see the Code of Good Practice: Dismissal annexed as item 8 of Schedule 8 of the South African Labour Relations Act 66 of 1995.

57 *SIRDC v Chakuparira* 2001 (2) ZLR 421 (S); *Madawo v Interfresh Ltd* 2000 (1) ZLR 660 (H).

not mean that the probationer automatically acquires the status of a regular employee.[58]

Gwisai[59] argues that allowing a probationer to continue working after expiry of the probationary period without confirming his employment is enough to ground a legitimate expectation of the employee being confirmed in the relevant position. The legitimate expectation is based on an express prior promise or the existence of a regular practice. The common law requirements for legitimate expectation are as follows:

> The representation underlying the expectation must be clear, unambiguous and devoid of qualification; the expectation must be reasonable; the representation must have been induced by the decision maker and the representation must be one which it was competent and lawful for the decision maker to make without which reliance cannot be legitimate.[60]

Section 12B (3) (b) (i) and (ii) of the LA codifies the common law doctrine of legitimate expectation and provides that an expectation can only arise on expiration of a fixed term contract. The employee must have a legitimate expectation of being re-engaged and another person has been engaged instead of the employee. This casts some doubt on Gwisai's argument. A probation contract is not a fixed term contract in the strict sense despite its duration being fixed. In any event, the expectation relates to renewal of the contract on the same terms and conditions. Section 12(5) of the LA outlaws renewal of probation. Furthermore, section 12B (3) (b) of the LA does not create an inherent expectation of permanent employment.

Another school of thought is that of tacit relocation or renewal which can be inferred where employment continues for a substantial period beyond the date of expiry. There is a presumption that the renewal is on the same terms and conditions as the preceding contract.[61] In respect of a probation contract, the appropriate renewal period would be a further probation period. This argument carries within itself the seeds of its own destruction as it goes against the spirit and purpose of section 12(5) of the LA which outlaws renewal of probationary periods. It can also be questioned: what would happen if the employee remains in employment for a period which is in excess of the initial probationary period? In addition, tacit relocation is a concept associated with fixed term contracts.[62] Though the period of a probation contract is fixed, probation is not a fixed term contract which can be deemed to have been renewed tacitly.

The third school of thought is that of acquiescence or implied confirmation of the contract. This is a presumption that when the probationer remains in employment beyond the maturity date of the probation period, the probationer's employment on a regular basis is deemed to have been confirmed[63] either as a fixed term contract or indefinite contract, depending on the circumstances. This position is sound and finds support in section 12(5) read with section 12(1) and (3) of the

58 *Mamobolo v Rustenburg Regional Council* 2001 (1) SA 135 (SCA).
59 M Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work Under Neo-Colonial Capitalism* (2006) 183.
60 See *Matake & Others v Ministry of Local Government & Others* HB 93/07; M Gwisai*Labour and Employment Law in Zimbabwe: Relations of Work under Neo-Colonial Capitalism* (2006) 177-182.
61 See *Lilford v Black* 1943 SR; *Gould v Lewis* 1913 SR; *R v Bhana* 1941 SR 186; *ARDA v Murwisi* LC/H/90/04; *Gumbo v Air Zimbabwe* 2000 (2) ZLR 126 (H); *Chibanda v Hewlett* 1991 (2) ZLR 211 (H).
62 JPA Swanepoel*Introduction to Labour Law* (1992) 33; A Rycroft &B Jordaan*A Guide to South African Labour Law* (1992) 55.
63 This approach was adopted in the following Labour Court decisions *Chitere v Securitas (Pvt) Ltd* LC/H/162/06; *Allied Timbers v Chikumbu* LC/MC/05/13; *Zimbabwe Revenue Authority v Pfumo* LC/H/89/09.

LA. Firstly, the LA fixes the period of probation and this period cannot be extended or renewed. Therefore, a probationer who is allowed to continue in employment after expiration of probation and without an express confirmation cannot be deemed to continue in that post as a probationer. Such an implication is negated by section 12(5) of the LA which forbids renewal of probation. Secondly, section 12(1) of the LA provides that every person who is employed by or working for any other person and receiving or entitled to receive any remuneration in respect of such employment or work shall be deemed to be under a contract of employment with that other person, whether such contract is reduced to writing or not. Section 12 (3) of the LA puts the position beyond doubt by providing that 'a contract that does not specify its duration or date of termination, other than a contract for casual work or seasonal work or for the performance of some specific service, shall be deemed to be a contract without limit of time.' Thus, by operation of law a probationer who remains in employment in the absence of confirmation is deemed to have become a regular employee.[64]

Be that as it may, courts must guard against rewriting the terms of a contract that has been freely and voluntarily entered into by parties by altering fundamental terms such as its agreed duration. Acquiescence or implied confirmation of the contract must be exercised with circumspection and restraint unless the conduct of the parties is consistent with implied confirmation.[65] For instance, in Gumbo *v Air Zimbabwe (Pvt) Ltd, supra,* Applicant's contract was terminated some twenty - six days after expiry of its stated duration. The court did not hesitate to rule that there was no room for importing an implied term that the inaction of the employer for twenty - six days amounted to confirmation of the appointment.[66] Therefore, the consequences of delay in termination depend on the extent of the delay. The longer the delay, the greater the likelihood a finding of acquiescence or implied confirmation will be made, whilst minor delays will be ignored by the courts.[67] This finds support in the libertarian perspective of labour relations which gives primacy to the employer's interest in flexibility. If an employer is unable to dismiss a probationer who proves unsuitable with relative ease, then the purpose of probation is undermined. Probation cannot be frustrated by minor delays in terminating the contract. Notwithstanding, it must be noted that this case was determined when section 12(5) of the LA had not come into operation. This section provides for a 'single, non-renewable' period of probation. On this basis the Supreme Court in *St Giles Medical Rehabilitation Centre v Patsanza, supra,* held that an employee who had his probation period extended by one month had become a permanent employee.

7 Conclusion

This discussion sought to highlight that the legislature has made notable efforts in addressing the uncertainty regarding the protections of probationers. The Zimbabwean law recognises that less protection during probation may be abused by unscrupulous employers, who may constantly dismiss workers during the probation period because it is relatively easy to do to so. Section 12(5) of the LA read with section 12B of the LA and 65(1) of the Constitution have the potential of providing

64 See *St Giles Medical Rehabilitation Centre v Patsanza* SC 59/18; *Rainbow Tourism Group v Nkomo* SC 47/15.
65 See *Pan American World Airways Inc v SA Fire and Accident Insurance Co. Ltd* 1965 (3) SA 150 (A); *South African Railways and Harbours v National Bank of South Africa Ltd* 1924 AD 704; *Mamabolo v Rustenburg Regional Council* 2001 (1) SA 135 (SCA). See also RH Christie*The Law of Contract in South Africa* (2006) 66.
67 SC 173-94.
66 See also *Shonhiwa v Bata Shoe Company (Pvt) Ltd* LC/MD/08/03/14.
67 M Gwisai *Labour and Employment Law in Zimbabwe: Relations of Work under Neo-Colonial Capitalism* (2006) 183.

probationers with protection and several fundamental labour rights. These rights can conversely be referred to as duties of employers engaging probationers.

Despite this, Zimbabwean labour law is as much about the courts as it is about the law. Importantly, these courts have in certain instances interpreted the law in ways which offer protection to employees on probation. However, the same courts have in some instances treated probationary employees as second class employees without rights. They have on several occasions condoned the renewal and extension of probation beyond the prescribed periods and denied probationers the right not to be unfairly dismissed. This has created a perception that courts are unwilling to overturn legislation and rewrite the common law in order to vindicate employees' rights. It is therefore hoped that the legislature will once again intervene and provide clarity on the applicability of the right not to be unfairly dismissed to probationers and their status in the event of remaining in employment after expiration of probation. In the interim, the judiciary is urged to utilise the constitutional right to fair labour practices and invalidate provisions in the LA and the common law which are arbitrary and unfair to probationers. In doing so, they should be alive to the need to balance the employers' interest in flexibility and the employees' interest in security.

An assessment of public participation in the realization of environmental rights in Zimbabwe: Prospects and challenges

Veronica Zano* and Gift Manyatera**

1. Introduction

In the last forty years, international environmental law has evolved rapidly. This evolution has resulted in environmental rights becoming more apparent and their assessment and management more complex.[1] A realisation has been noted of how the environment is increasingly integrated with economic development and human rights and thus emphasizing its importance to mankind. Some scholars advocate for a separate human right to a clean, decent or healthy environment,[2] whilst others argue that the environmental rights encompass existing international human rights law such as the right to life, the right to health and the right to water.[3] At the national level, there are several Constitutions that have entrenched the right to environment.

A number of rights exist for the public with regards to the environmental protection, which public authorities at local and national level should contribute towards by allowing them to become effective. The Aarhus Convention provides for the public to participate from an early stage in environmental decision-making and for the need for them to be aware of the procedures for participation in environmental decision-making, have free access to them, and know how to use them.[4] Public participation is acclaimed as an environmental principle pivotal to addressing environmental problems and bringing about sustainable development.[5] It is incumbent upon countries to enact national environmental laws that integrate public participation in ensuring the protection and promotion of environmental rights. Accordingly, constitutional environmental rights are now guaranteed by most countries as an emerging global trend.[6]

Zimbabwe adopted a new Constitution in 2013, which is generally regarded as entrenching progressive human rights provisions, particularly in relation to the environment. Constitutional prescriptions alone are not enough in fostering the realization of rights. It is critical therefore that an assessment of the Zimbabwean environmental protection mechanisms be done with a view to gauging the prospects for the realisation of environmental rights through public participation.

This paper begins with an assessment of the entrenched Zimbabwean constitutional provisions regarding public participation in environmental decision-making for the realization of environmental rights, juxtaposed with international and regional instruments. This is followed by an analysis of the legislative framework relating to the right to environment. The paper further incorporates a case

* LLM Candidate, Faculty of Law, Midlands State University.

** Faculty of Law, Midlands State University.

1 E Weiss *The Evolution of International Environmental Law*(2011) 7.

2 D Shelton 'Human Rights, Environmental Rights and the Right to Environment'(1991) Vol.28 *Stanford Journal of International Law* 359.

3 P Alston 'Conjuring up New Human Rights: A Proposal for Quality Control' (1984) Vol.78 *American Journal of International Law* 608.

4 Preamble, Aarhus Convention adopted in 1998.

5 J May 'Constitutional Directions in Procedural Environmental Rights' Vol 28 (2013*) Journal of Environmental Law and Litigation* 28.

6 J. May &E. Daly Global Constitutional Rights (2013), 603.

study analysis on public participation in the environmental impact assessment (EIA) environmental decision-making process focusing on the Marange Diamond Mining Operations. The case study is meant to examine the practical adequacy of the constitutional and legislative framework on public participation in relation to projects that have potentially significant impact on the environment.

2. Public participation as a constitutional virtue in the realisation of environmental rights

The supremacy of the Constitution and all its provisions renders invalid any law or practice or conduct that is inconsistent with it.[7] This essentially means that all laws and policies in Zimbabwe governing the environment should not be contrary to the provisions of the Constitution. If any such law is found to conflict with it, it is deemed unconstitutional and therefore invalid. Section 2 (2) further states that the obligations imposed by the Constitution are binding on every individual, institution and government agency.

The Constitution provides national development as one of the national objectives.[8] It provides that the state and all institutions and agencies of government at every level must endeavor to facilitate rapid and equitable development. The international environmental law instruments stress the need to address the potential conflict between economic development and environmental protection.[9] To guard against this conflict, the Constitution provides that measures towards ensuring national development must involve the people in the formulation and implementation of development plans and programmes that affect them. The Constitution thus recognises and provides for public participation as a precondition in any development plans undertaken in the country.

The constitutional protection of environmental rights is noted as a key strategy towards sustainable development and environmental protection in developing countries.[10] Section 4 of the Constitution provides for the Declaration of Rights and provides the duty of the state, government institutions, natural and juristic persons to respect the fundamental rights and freedoms.[11] Section 73 of the Constitution entrenches environmental rights by stipulating that

> "every person has the right to an environment that is not harmful to their health or well-being, and to have the environment protected for the benefit of present and future generations through reasonable legislative and other measures that prevent pollution and ecological degradation,[12] promote of conservation[13] and secure ecologically sustainable development and use of natural resources while promoting economic and social development."[14]

The explicit entrenchment of environmental rights in the Constitution's Declaration of Rights is a positive development by the country towards environmental protection, considering that the Lancaster House Constitution did not provide for environmental rights.

The benefits of entrenching environmental rights in the Constitution include the enactment of stronger environmental laws and raising the profile and importance of environmental protection.[15]

7 Section 2 (1), Constitution of Zimbabwe.
8 Section 13, Constitution of Zimbabwe.
9 E Weiss *The Evolution of International Environmental Law* (2011) 7.
10 T Murombo 'Environmental Rights in Zimbabwe' Vol 11 (2011) *African Human Rights Journal* 121.
11 Section 44, Constitution of Zimbabwe.
12 Section 73 (1) (b) (i), Constitution of Zimbabwe.
13 Section 73 (1) (b) (ii, Constitution of Zimbabwe.
14 Section 73 (1) (b) (iii), Constitution of Zimbabwe.
15 Unpublished Inter-Ministerial Task-Force on Alignment Legislation Technical Committee 'Discussion Paper on the

The importance of environmental rights entrenchment in the Constitution was noted in the *Manyame Park Residents v Chitungwiza Municipality,* a case filed at a time when environmental rights were not entrenched in the Constitution.[16] In this case, the High Court accepted the local authority's submission of lack of resources to remedy the sewage problem in Chitungwiza. Constitutional environmental rights can provide a safe net to plug gaps in statutory environmental laws. Whilst section 73 of the Constitution entrenches substantive environmental rights, it does not entrench public participation as a procedural right that is tied to the substantive right to environment. The non-entrenchment of public participation in environmental matters is retrogressive to achieving effective protection and realisation of constitutional environmental rights.[17] The constitutional provisions relating to environmental rights do not provide public participation as an essential principle in environmental protection in Zimbabwe, which is a key element of modern day environmental law.

Nevertheless, the Constitution's Declaration of Rights provides for the right of access to information in section 62. It provides that "every Zimbabwean citizen, including juristic persons and the Zimbabwean media, has the right to access any information held by the State or any institution or agency of government at every level, if such information is requested in the interests of public accountability. Section 62 (2) extends the right to access information to individuals for purposes of exercising of environmental rights. This is consistent with international environmental law instruments such as the Rio Declaration and the Aarhus Convention which acknowledge the right of access to information as a prerequisite for effective and meaningful public participation in environmental decision-making processes. Thus, access to environmental information in the custody of relevant state institutions or individuals contributes towards ensuring an informed public which can effectively participate in environmental protection initiatives.

The Constitution also states that legislation must be enacted to give effect to the right of access to information but may restrict access to information in the interests of defence, public security or professional confidentiality.[18] The restrictions must be reasonable and fair in a democratic society based on openness, equality and freedom. This benchmarking is meant to place strict reasons for which the public may be refused access to important information in this era of environmental democracy. In the case of *Zimbabwe Lawyers for Human Rights (ZLHR)s and The Legal Resources Foundation (LRF) v The President of the Republic of Zimbabwe and the Attorney-General,* the Supreme Court noted that in as much as the rights created in the Constitution are protected, they are not absolute.[19] This means that this right can be limited to the extent that such limitations do not infringe upon public interest or freedoms of other citizens.

Furthermore, section 68 of the Constitution provides the right to administrative justice by stating that "every person has the right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate, impartial and both substantively and procedurally fair." It further states that any person whose right, freedom, interest or legitimate expectation has been adversely affected by administrative conduct has the right to be given promptly and in writing, the reasons for the conduct.

Review and Gap Analysis of the Environmental Management Act (2016) 11.
16 Manyame Park Residents v Chitungwiza Municipality HH11552-03.
17 J May, 28.
18 Section 62(4), Constitution of Zimbabwe.
19 *Zimbabwe Lawyers for Human Rights and The Legal Resources Foundation versus The President of the Republic of Zimbabwe and the Attorney-General* SC 12/03, 7.

International environmental law instruments such as the Rio Declaration on Environment and Development, 1992 note the importance for states to provide effective judicial and administrative remedies and procedures available to a natural or juristic person aggrieved or likely to be aggrieved by environmental harm, which is the right of access to justice. Constitutional entrenchment of the right of access to administrative justice is thus a facet of enhancing public participation, which the public can use to challenge decisions or procedures by government institutions that amount to a violation of the entrenched environmental rights.

Thus, the Constitution provides an enabling constitutional framework on access to justice as a mechanism for public participation in challenging actions that amount to violations of environmental rights and based on the relaxed rules of locus standi provided for by the Constitution. Whilst access to administrative and judicial justice is provided for by the Constitution, there remains no specialized court in the country to deal with cases of violations of environmental rights. There has been an emerging trend globally, with countries such as Kenya establishing environmental courts and tribunals at national level as a mechanism to implement and strengthen the right of public participation in the protection and promotion of environmental rights.

The Constitution states that Parliament must facilitate public involvement in its legislative and other processes of its Committees. Parliamentary Committees are designated government portfolios to examine the administration and policy of government departments and other matters under the jurisdiction of Parliament.[20] The Constitution states that processes of Parliament and its Committees as provided in the Standing Orders must encourage the involvement of the public.[21] In discharging its lawmaking duties, Parliament must ensure that interested parties are consulted about Bills being considered by Parliament, unless such consultation is inappropriate or impracticable.[22] These constitutional provisions recognise public participation as integral in the formulation of environmental laws of Zimbabwe aimed at promoting the environmental rights entrenched in the Constitution. Since 2013, the country has been on a drive to align the country's laws to the Constitution. Thus, national public consultations have been conducted on several Bills ,including those having environmental protection aspects, to solicit public opinion.[23] Civil Society Organisations (CSOs) such as the Zimbabwe Environmental Law Association (ZELA) and Southern Africa Parliamentary Support Trust (SAPST) have partnered with Parliament in the law-making processes and public hearings in a bid to increase public participation through sensitization meetings.[24]

The Constitution further establishes independent commissions aimed at supporting and entrenching human rights and democracy in Zimbabwe as well as ensuring that injustices are remedied.[25] Specific analysis will be made of the Zimbabwe Human Rights Commission (ZHRC) as the primary commission with the mandate of promoting the protection and attainment of human rights and freedoms in the country.[26] One of the duties of the ZHRC is to promote awareness of and respect

20 http://www.parlzim.gov.zw/about-parliament/committee-system/types-of-committees accessed on 18 September 2017.
21 Section 139 (3), Constitution.
22 Section 141 (b), Constitution of Zimbabwe.
23 https://www.newsday.co.zw/2016/09/mines-minerals-amendment-bill-anomaly-corrected/ accessed on 18 September 2017.
24 www.newsday.co.zw (n 28 above).
25 Section 233, Constitution of Zimbabwe.
26 Section 232(b), Constitution of Zimbabwe.

for human rights and freedoms at all levels of society. Public education on human rights such as environmental rights has been rendered effective where rights holders have the capacity to exercise rights and enjoy the benefits of the rights bestowed on them.[27]

Such capacity can assume the form of citizens being knowledgeable of rights and how to exercise them. Rights education motivates citizens to familiarize themselves with rights, which in turn enables them to effectively participate in efforts to fulfil environmental rights.[28] This is particularly important given that environmental rights are a new and emerging field in Zimbabwe's human rights system and are relevant for the plight of the ordinary poor who largely depend on the environment. Thus, the ZHRC through their facilities on human rights awareness and education, facilitate an enabling environment to inform the public to participate in advancing environmental rights.

The other function of the ZHRC's is to protect the public against abuse of power and maladministration by state and public institutions. Complaints or reports filed by the public with the ZHRC are important mechanisms providing scope for the public to participate in the protection and realisation of environmental rights through access to non-judicial remedies.[29]

3. Analysis of the environmental legislative framework

The EMA is the primary legislation regulating environmental management and protection in Zimbabwe.[30] The Act promotes the sustainable management of natural resources and protection of the environment. Section 4 of the EMA provides the right to a clean environment that is not harmful to health. In addition, the section provides the right to protect the environment for the benefit of present and future generations and to participate in the implementation of the promulgation of reasonable legislative, policy and other measures that prevent pollution and sustainable development.[31] The decisions that require the public to participate in and air out their views or objections are those that relate to pollution control, environmental degradation and the sustainable use of natural resources.[32]

Section 4 (2) of the EMA sets out the general principles of environmental management which should apply to actions which significantly affect the environment by all persons and government agencies. In such actions, the Act states that environmental management must place the people and their needs at the forefront. Commendably, the EMA states in its guiding principles that "the participation of all interested and affected parties in environmental governance must be promoted and all people must be given an opportunity to develop their understanding, skills and capacity necessary for achieving equitable and effective participation."[33] The EMA adequately captures the principle of public participation in environmental decision making for effective environmental protection as outlined in the international and regional instruments. The general principle on effective public participation is further promoted under the EMA through environmental education, awareness and sharing of skills, knowledge and experience on sustainable environmental management.[34] Thus an informed public

27 T Madebwe 'Rights-Based Environmental Protection in Zimbabwe' Vol 15(2015) *African Human Rights Law Journal* 112.
28 T Madebwe, 112.
29 Section 243 (1) (e), Constitution of Zimbabwe.
30 Environmental Management Act [Chapter 20:27].
31 Section 4 (b) Environmental Management Act.
32 Section 4 (b) (ii), Environmental Management Act.
33 Section 4 (2) (c), Environmental Management Act.
34 Section 4 (2) (d) Environmental Management Act.

is seen as prerequisite towards equitable and effective public participation to achieve environmental protection. A duty is placed on the Minister responsible for environmental management to coordinate promotion of public awareness and education in environmental management.[35] These environmental rights and principles therefore, guide the interpretation, administration and implementation of the law.

Section 87 of the EMA makes provision for the development of a National Environmental Plan whose purpose is to promote and facilitate the co-ordination of strategies, plans and activities relating to the protection of the environment. In its preparation, the Minister is required to carry out consultations with persons he considers necessary.[36] This consultation provision is vague and does not provide for public participation in this process as it confers discretionary powers on the Minister with regards to persons he considers important in the development process. Since the objectives of the plans are largely on protection of the environment, each person within society in accordance with the general principle on public participation, has an interest and active role in this planning process. Section 89 provides for invitations of public comments on completion of the Environmental Plan. A procedure is detailed on this process whereby notice shall be made in the Gazette and in newspapers with wide circulation, of the places at which the plan will be publicly exhibited for public inspection and the period within which objections of representations will be made. The public are thus afforded an opportunity at this stage to participate by providing their objections and representations at this decision- making stage.

Early involvement is essential before any decisions are made to adopt a specific environmental standard or option.[37] It can be further argued that the public participation ensured at this stage of the development of the plan does very little to contribute towards decision–making. In this regard, EMA provides that once objections or representations have been received, the Minister shall consider all submissions made and may either confirm the National Plan or carry out such further consultations necessary. The provisions on inviting public comments are thus not for environmental decision-making in the Plan as they are few mandatory opportunities to participate in this process.

The EMA lists certain projects which cannot commence unless an EIA has been done and a certificate issued by the Director-General of the Environmental Management Agency.[38] Such projects include construction of dams, irrigations, housing development, industry, mining and quarrying and many others. EIA is defined in the Act as an evaluation of a project to determine its impact on the environment and human health and to set out the required environmental monitoring and management procedures and plans. It is commendable that the law recognises EIA as an effective tool used to support the implementation of sustainable development and its integrative aspects highlighted in Principle 17 of the Rio Declaration. The Environmental Management (EIA and Ecosystems Protection) Regulations provide detailed mechanisms to promote the EIA process outlined in the EMA.[39] The Regulations stipulate that before any environmental impact assessment report is submitted to the Director-General, the developer must carry out wide consultations with

35 Ibid. Section 5(1) (e).
36 Ibid. Section 87 (2) (a).
37 Zimbabwe Environmental Law Association, 11.
38 Section 97 read with First Schedule, Environmental Management Act.
39 Environmental Management Act and Environmental Management (EIA and Ecosystems Protection) Regulations 7 of 2007.

stakeholders. In terms of section 10 (5) of the Act, the Director-General should verify whether full stakeholder participation has been carried out during the EIA report review period.

The wide stakeholder consultations provisions provided for fall short of the essential elements of public participation provided for in international environmental law instruments. There are no clear and detailed guidelines for the wide consultation process such as notice requirements alerting stakeholders of the EIA process. An example can be drawn from the notice for public comments regarding the development of environmental plans. The regulations do not explain or provide guidelines on what constitutes consultations with stakeholders and the period within which the consultations must be carried out. It therefore largely remains the discretion of the EIA consultants to consult the stakeholders whom they deem relevant in the project and not a requirement for public consultation of other relevant and interested stakeholders per se. The vagueness in the EIA Regulations with respect to wide consultation has been abused whereby EIA consultants have used their own discretion in the assessment process.[40]

Therefore, the Regulations fall short of the principle of public participation in environmental management and protection outlined in the EMA and the Rio Declaration. It has been argued that the utility of environmental legislation largely depends on the extent to which legislation provides for public participation in the process of environmental impact assessment.[41] Often, the legal provisions requiring considerations to be made by stakeholders during the EIA process for essential and meaningful decision-making and not a mere validation exercise, are absent.

Lack of information accounts for most of the problems in environmental management.[42] As highlighted in the Rio Declaration, meaningful public participation can only be attained through an informed public. An informed public is one which is able to access information relevant for their participation in environmental decision-making and protection. This nexus is also acknowledged in section 4(2) of the EMA whereby the right to environmental information is tied together with the right to participation in the enactment of law, policy and other measures.

Although the right of access to environmental information is provided for in the EMA, the governing law on access to all information in Zimbabwe is the Access to Information and Protection of Privacy Act (AIPPA).[43] Zimbabwe was one of the first African countries to enact a law on access to information whose objective is to provide members of the public with a right of access to records and information held by public bodies.[44] AIPPA states that a person requiring access to any record that is in the custody or control of a public body shall make a request in writing to the public body, giving adequate and precise details to enable the public body to locate the information required.[45]

Protected information that is not accessible to the public under AIPPA does not apply to information relating to the state of the environment.[46] This highlights the importance of such information for

40 In most instances, the traditional leadership are theonly stakeholders consulted.
41 T Murombo, 31.
42 B Lewis 'What You Don't Know Can Hurt You: The Importance of Information in the Battle Against Environmental Class and Racial Discrimination" Vol 29 (2005) Environmental Law and Policy Review 327.
43 Access to Information and Protection of Privacy Act Chapter 10:27.
44 Preamble of the Access to Information and Protection of Privacy Act.
45 Section 6, Access to Information and Protection of Privacy Act.
46 Section 15(e), Access to Information and Protection of Privacy Act.

purposes of ensuring effective and meaningful public participation in environmental protection and decision-making processes. The law provides applicants seeking access to information to pay prescribed fees. This provision under AIPPA is against the modern dictates of the entrenched right of access to information in the absence of effective provisions mandating access to relevant information. The law relating to access to environmental information is reactionary despite the entrenchment of the right in the Constitution and its importance in the realisation of environmental rights. Access to environmental information for meaningful public participation thus requires government to proactively gather and disseminate this information.[47]

Public participation is also very important at the law implementation and enforcement stage.[48] With regards to EIAs and their importance in mitigating against possible negative impacts on the environment from developmental projects, it is vital that the public, especially communities directly affected, also participate at these stages. EIA implementation is important for safeguarding the environmental rights of local communities based on the significant impacts such projects have on the environment. Monitoring the implementation of the EIA commitments of mining projects is problematic given the major restrictions on these documents.[49] The fee levels for inspecting EIA reports have been set at $250 in terms of the Environmental and Natural Resources Management *(Environmental Impact Assessment and Ecosystem Protection)* Amendment. This fee is far beyond the reach of the ordinary person in the country and thus restricts them from accessing information which is important for exercising and protecting their environmental rights. The result is an excluded public which does not play an active role in monitoring the activities that can violate the realisation of their constitutional environmental rights. As such, this is one of the reasons development projects listed under the EIA provisions continue to undermine environmental protection at the expense of economic development, a deviation from the principle of sustainable development advanced in the Rio Declaration.

The Environmental Management Agency is required to carry out bi-annual audits to ensure that all projects under EIA licences are being implemented in compliance with its provisions.[50] The participation of the public is important at this stage given the need to exercise concerted efforts towards monitoring implementation of the EIAs, yet the public is excluded from participation during this implementation and enforcement stage. Public participation especially by the affected communities is vital during the environmental audit processes given their proximity to the development project and its anticipated impact. Their participation can assist in law enforcement to be effective by detailing the environmental sustainability of the project. It is evident that the opportunities for public participation within the environmental legal framework are not effective and are unlike the dictates of the principle of public participation provided for by the principal Act.

4. Public participation in the EIA process: Case Study of the Marange diamond mining operations

47 J. Foti, 7.
48 Zimbabwe Environmental Law Association, 11.
49 S. Mtisi *Assessment of Mining Environmental Impact Assessment (EIA) Report in Zimbabwe* (2015) 12.
50 Section 13(e), Environmental Management Act and Environmental Management (EIA and Ecosystems Protection) Regulations 7 of 2007).

The constitutional and legislative provisions discussed above illustrate the level to which Zimbabwe has incorporated the important role public participation plays in the realisation of environmental rights. It is therefore important to assess whether the national environmental legal framework has effectively enhanced or inhibited meaningful public participation in environmental protection and fostered sustainable development. Significantly, the evolution of environmental rights and the importance of public participation has largely been influenced by the need to balance protection of the environment and pursuit of economic development. The case study focuses on a mining development project given that mining is listed as a project requiring an EIA considering its effects on the environment.[51]

The material facts are that Diamonds were discovered in Marange around June 2006 by African Consolidated Resources (ACR) which had exploration rights over the area. Due to the economic hardships faced by the country, an influx of over 30,000 illegal diamond panners invaded the area to undertake operations.[52] However, formal mining in the Marange diamond fields started in 2009 through joint ventures between the Zimbabwe Mining Development Corporation (ZMDC) and seven companies namely Mbada Diamonds, Diamond Mining Corporation, Marange Resources, Anjin, Gye Nyame, and Nan Jiang Africa.[53]

The diamond mining operations in Marange were deemed a highly prioritised national economic project given the political and economic fragility of the country. Mbada Diamonds and Anjin started mining operations without undertaking EIAs and being granted EIA certificates by the Environmental Management Agency.[54] The EIAs were however, done by the companies during the mining operations. For example, the EIA report of Mbada Diamonds indicated that it was done in August 2011.[55] Many of the mining companies operating in the area also developed their EIA reports without public consultations, especially with the affected communities.[56] Evidence of this is the EIA provisions on relocation and resettlement plans which lacked comprehensive provisions on free, prior and informed consent on relocations and compensation.[57] In turn, community groups in Marange made efforts to access the EIA reports of the companies to understand their contents but were not successful.[58]

The EIA reports of the companies adequately captured the potential environmental and biodiversity impacts of the diamond mining activities and mitigation measures.[59] In 2011, communities living downstream of the Save and Odzi rivers in Manicaland started making complaintsof pollution. According to the communities, Anjin Investments, Marange Resources and Diamond Mining Corporation (DMC) were polluting Save and Odzi rivers by discharging sewage and chemical effluents into the two rivers. ZELA was approached by the communities seeking legal assistance on the matter, and in turn the organisation commissioned a biological scientific study to ascertain the

51 Section 97.
52 T Zvarivadza *Making the most out of Zimbabwe's Marange diamonds: leaving a lasting positive legacy for distressed communities* (2015)2.
53 M Sibanda & G Makore Tracking the Trends: An Assessment of Diamond Mining Sector Tax Contributions to Treasury with Particular Reference to Marange Diamond Fields(2013) 4.
54 S Mtisi et al *Extractives Industries policy and legal handbook: Analysis of the Key Issues in Zimbabwe's Mining Sector* (2011) 28.
55 Mtisi, 10.
56 Mtisi, 13.
57 Ibid.
58 Mtisi, 14.
59 Ibid.

water quality of the two rivers. The study found evidence of untreated sewerage waste, chemical and heavy metals attributed to diamond mining in the two rivers.[60] The water quality in the two rivers was highlighted as a serious environmental problem which needed to be addressed urgently.[61] In the report on the environmental monitoring of mining operations by the Environmental Management Agency, the Auditor-General indicated motivation to carry out the investigation based on press reports on pollution from mining activities.[62] The report made reference to a newspaper article which reported that Marange diamond mining companies were discharging hazardous waste in Odzi river resulting in an estimated 100 cattle deaths and contamination of water sources.[63]

In 2012, community members affected by the water pollution together with ZELA sought a remedy in the courts over the environmental matter.[64] The litigation case was filed against the diamond mining companies responsible for pollution of the Save and Odzi rivers. The application was based on the expert scientific evidence from biologists that had conducted the water assessment commissioned by ZELA. The applicants sought a court order interdicting the companies from polluting the rivers as this was a violation of their right to clean drinking water. The court order was finally granted in 2015 through a consent order from the companies despite the case having started in 2012.

In 2016, the mining licenses of the diamond mining companies operating in Marange were terminated. A state-owned company called the Zimbabwe Consolidated Mining Company (ZCDC) was given sole mining rights of the diamond fields. This was done despite section 103 of the EMA stating that an EIA Certificate which is issued by the Environmental Management Agency is not transferable. ZCDC followed the same trend of the predecessor companies by mining without an EIA certificate. Marange Development Trust (MDT) which is a community based group from the area raised concerns it had over the conduct of ZCDC which was mining a few metres from some households exposing them to various hazards.[65] The other concern of the community group was the lack of public participation by the community in the development of the company's EIA report. ZELA provided legal advice to the community group and a letter was sent to the company requesting it to provide the community group its EIA report. After futile efforts to get the requested EIA document, MDT filed an application in the High Court against ZCDC and the Environmental Management Agency (EMA).[66]

The group sought an order from the Court to interdict the company from carrying out mining operations until it had complied with the law. The High Court of Zimbabwe on the 1st of August 2017 granted the order directing Zimbabwe Diamond Consolidated Mining Company (ZCDC) to immediately halt its diamond mining operations in Marange pending approval of an Environmental Impact Assessment (EIA) certificate by the Environmental Management Agency (EMA).[67] Surprisingly, a week after the landmark court ruling, ZCDC informed the public that they had resumed operations after the

60 Zimbabwe Environmental Law Association *Scientific Assessment of the Quality of Water in Save and Odzi Rivers* (2012) 30.
61 Zimbabwe Environmental Law Association (n 188 above) 35.
62 Report of the Auditor-General Report Environmental Monitoring of Mining Operations (2015) 4.
63 Zimbabwe Independent Newspaper of March 31, 2011.
64 Zimbabwe Environmental Law Association & Others v Anjin Investments (Private) Limited and Marange Resources (Private) Limited and Diamond Mining Company (Private) Limited (HC 9451/12).
65 Unpublished ZELA '*Report on the Field Visit to Marange Diamond Fields and to Relocated Families in Arda Transau, by the Portfolio Committee on Mines and Energy'* (2017) 5.
66 Marange Development Trust v Zimbabwe Consolidated Diamond Company (Private) Limited and Environmental Management Agency (HC 902/17).
67 The Financial Gazette, 3 August 2017.

company complied with the EIA Regulations.[68]

The case study illustrates several shortcomings in the legislative framework on public participation regarding EIAs in Zimbabwe. There is clear evidence of weak public participation provisions in the EIA formulation and decision-making. Further, there is lack of effective implementation and enforcement of the EIA laws entrenched in the EMA and the Regulations. The fact that the mining activities of Anjin and Mbada Diamonds were done without complying with the law depicts the contrast between the law and its implementation especially relating to development projects deemed as national interests. In addition, the fact that the companies' EIAs were done without public participation by the affected Marange community indicates failure by the Environmental Management Agency to implement the law. Participation by affected communities in the EIA process is very important in that they are made to understand the different measures the developer of the mining project will undertake to address the impact identified.[69]

The case study also highlights the shortcomings of environmental laws in Zimbabwe regarding public participation in all stages of the EIA process. Evidence also shows having EIA reports of listed projects does not automatically translate into environmental protection and fulfilment of environmental rights by local communities.[70] Restrictions on the communities in accessing the EIA reports of the companies limit the public to meaningfully participate in the protection of the environment against development projects that have potentially negative impact on it. The continued water pollution by the diamond companies illustrates weak law enforcement by the Environmental Management Agency in conducting bi-annual audits of EIA licences.[71]

The Auditor-General raised concerns over the inadequate carrying out of bi-annual audits to check compliance by miners with EIA regulations.[72] Evidence was provided on the non-deterrent penalty system of the Agency where some offenders such as Anjin Investments and Marange Resources had been penalized and paid fines three times for discharging effluent into Odzi river without taking any measures to prevent pollution.[73] The challenges in environmental law implementation and enforcement by the Agency highlight the importance of public participation in all decision-making stages. EMA faces limited human and financial resources to carry out extensive monitoring activities to compliance by mining companies of their EIA obligations.[74] These challenges warrant the need for community participation in monitoring implementation of EIAs for purposes of providing useful information which the Agency can use in the bi-annual audits of mining operations aimed at protecting the environment.

The duration of the water pollution litigation case is evidence of the difficulties surrounding access to justice in environmental matters. The affected communities endured three excruciating years living in a contaminated environment harmful to their health and wellbeing whilst the case dragged on in the courts for four years. This case study provides a clear illustration of the gaps within the country's

68 The Zimbabwe Independent; 18 August 2017.
69 Zimbabwe Environmental Law Association, 28.
70 Mtisi, 14.
71 Section 13(1)Environmental Management Act and Environmental Management (EIA and Ecosystems Protection) Regulations 7 of 2007).
72 Report of the Auditor General report, 26.
73 Report of the Auditor General report,10.
74 Mtisi (n 177 above) 14.

environmental laws governing public participation within the EIA process. In addition, the case study illustrates evidence of EIA implementation and enforcement by the environmental regulatory authority contributing towards violations of communities' environmental rights.

5. Conclusion

It is evident that the Constitution of Zimbabwe as the supreme law of the country adequately provides for the public's participation in the realisation of constitutional environmental rights. The public participation provisions in the Constitution recognise that effective participation ought to occur in environmental law-making, implementation, monitoring and enforcement to promote and fulfil the constitutional environmental rights. As the primary environmental law, the EMA provides public participation as a right and key principle in environmental management processes aimed at protecting the environment. However, it has been illustrated that the provisions of the Act and its regulations particularly on EIAs fall short in effectively ensuring the public's participation especially at the most important planning stage. This applies to formulation of environmental plans and participation in the EIA process regarding projects that present significant harm on the environment. Public participation in environmental laws must meet certain standards for it to be effective. In addition, it must be meaningful and informed at stages where it can still be decisive in the environmental decision-making processes.[75] It is evident that the environmental legal framework in Zimbabwe greatly militates against effective and meaningful public participation in environmental matters.[76] To address the needs of vulnerable communities and the poor, environmental legislation must facilitate effective public participation and inclusivity in environmental decision making at all stages.

The provisions on public participation in the environmental decision-making process within the Zimbabwe environmental legal framework lack legally enforceable provisions requiring public officials to consider the contributions made during the public participation. This defies the purpose of public participation provided in Principle 10 of the Rio Declaration. Often, public participation in the environmental legislation is done when policy or project decisions have already been made. Given the collective role and interest that the environment plays in communities generally, it is imperative that decisions concerning peoples' livelihoods be transparent. Furthermore, whilst the Constitution and the EMA promotes access to environmental information, the high fees charged to access EIA reports constitutes a major hurdle to meaningful public participation in decisions that have an impact on the environment.

75 Zimbabwe Environmental Law Association.
76 Zimbabwe Environmental Law Association.

Traditional cultural practices and gender-based violence: Zimbabwe's legal response[1*]

Sindiso N. Nkomo,[*] Obdiah Mawodza,[**] and Michelle R. Maziwisa[***]

1. Introduction

Gender-based violence against women refers to violence that targets women and girls because of their sex and their socially constructed gender roles.[2] The UN Committee on the Elimination of Discrimination Against Women defines gender-based violence as 'a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.[3] Gender-based violence includes acts of sexual, physical, psychological and economic violence against women,[4] and property grabbing.[5]

In Zimbabwe, which is the focus of this discussion, a study by Gender Links on gender-based violence revealed that 68 per cent of female respondents from six Southern African countries had experienced some form of gender-based violence.[6] In 2016, the Zimbabwe National Statistics Agency and ICF International revealed that 14, 32 and 35 per cent of women interviewed had experienced sexual, physical, and emotional violence respectively, since the age of fifteen years.[7] It is worth highlighting that sexual, physical, psychological or economic violence have direct linkages with traditional cultural practices such as *lobolo,*[8] *barika* or *isithembo,*[9] *ukuthwala*,[10] male primogeniture,[11] *kugara nhaka/ukungena*[12] and *kuripa ngozi.*[13] For example, these customary practices directly or indirectly predispose women to physical, mental or sexual harm or suffering, the threat of such acts, coercion, and other deprivations of liberty.[14]

1* This article is an extract from the first author's LLM mini-thesis titled '*A critical analysis of Zimbabwe's legal response to traditional cultural practices and gender-based violence'* (2015 UWC) Unpublished. The authors would like to sincerely thank Professor Lea Mwambene (Associate Professor in Private Law, University of the Western Cape) for her excellent research and supervisory assistance from the initial stages of drafting the paper.

2 IRIN 'Definitions of sexual and gender-based violence' 1 September. http://www.irinnews.org/feature/2004/09/01/definitions-sexual-and-gender-based-violence (Accessed 11 August 2018).

3 The UN Committee on the Elimination of Discrimination Against Women CEDAW General Recommendation No. 19 (1992) para 1.

4 OL Fawole 'Economic violence to women and girls: is it receiving the necessary attention?' (2008) Vol 9 *Trauma, Violence, & Abuse* 167.

5 M Dube 'The ordeal of "property stripping" from widows in a peri-urban community: The case of a selected ward in Binga District, Zimbabwe' (2017) 53 (3) Issue 4 *Social Work/Maatskaplike Werk* 341.

6 Gender Links 'Gender based violence is dis-empowering women' 29 November http://genderlinks.org.za/news/gender-based-violence-dis-empowering-women/ (Accessed 11 August 2018); participants came from Lesotho, Zambia, Zimbabwe, Botswana, South Africa and Mauritius.

7 Zimbabwe National Statistics Agency and ICF International 'Zimbabwe Demographic and Health Survey 2015' (2016) 313.

8 TW Bennett & NS Peart *A Sourcebook of African Customary Law for SouthernAfrica* (1991) 194.

9 U Hirschfelder & Y Rahmaan *From Monogamy to Polygyny: A Way Through* (2003) 78.

10 L Mwambene & J Sloth-Nielsen 'Benign accommodation? *Ukuthwala*, "forced marriage" and the South African Children's Act' (2011) Vol 11 *African Human Rights Law Journal* 6.

11 E Knoetze 'Westernization or promotion of African women's rights?' (2006) Vol 20 *Speculum Juris* 106.

12 Unpublished: SN Nkomo '*A critical analysis of Zimbabwe's legal response to traditional cultural practices and gender- based violence'* Unpublished LLM thesis, University of the Western Cape, (2014) 60.

13 E Benyera 'Presenting ngozi as an important consideration in pursuing transitional justice for victims: The case of Moses Chokuda' (2015) Vol 13 *Gender and Behaviour* 6760.

14 Centre for the Study of Violence and Reconciliation *Gender-Based Violence (GBV) in South Africa: A Brief Review* (2016) 8.

The Convention on the Elimination of all forms of Discrimination against Women (CEDAW) General Recommendation No. 21 points out that gender-based violence against women is a fundamental violation of human rights which robs women of the enjoyment of their fundamental freedoms.[15] In addition, Heise also observed that gender-based violence against women increases the risk of health problems, such as chronic pain and depression.[16] For these reasons, we argue that gender-based violence against women is not only a human rights crisis, but also a health and social crisis for women and girls.

Zimbabwe is party to several international and regional standards that proscribe human rights violations and acts of violence against women. In complying with these standards, the Government of Zimbabwe has enacted several statutes and regulations to address and protect women from gender-based violence linked to traditional cultural practices.[17]

This article critically analyses the above-mentioned national legislative framework in addressing the cultural practices that lead to gender-based violence against women. The paper is divided into three parts. The first part provides an introduction and general overview. The second part provides an analysis of the constitutional and statutory framework. The third part draws conclusions and recommendations. The aim of the article is to assess the compliance of the domestic legal framework with regional and international standards in protecting women from gender-based violence- linked to traditional cultural practices in Zimbabwe.

2. Analysis of the constitutional and legislative framework

2.1 The Constitution of Zimbabwe

The Constitution has several provisions that are useful in addressing gender-based violence and traditional cultural practices that are harmful to women. However, research has revealed that despite these provisions, several cultural practices exist and these practices lead to gender-based violence which disproportionately affects women. As stated above, traditional cultural practices such as *lobolo, ukuthwala*, male primogeniture, *ukungena* and *kuripa ngozi,* discriminate against women based on gender. There is also a balancing of conflicting rights which emanates from Zimbabwe's duallegal system which provides for customary and civil law to co-exist. For example, consistent with international standards, section 63 guarantees the right to culture, and this right must co-exist with other rights, such as the right to equality in section 56.[18] Section 63 (b) expressly recognises the practice of one's culture, provided that person's exercise of his or her cultural rights is consistent with other provisions of the Declaration of Rights.

From the above discussion, one can observe that although the Constitution recognises the right to culture, it does not provide a basis to violate other human rights. In support of this view, scholars

15 The UN Committee on the Elimination of Discrimination Against Women (CEDAW) General Recommendation No. 21 (1994) para 3.

16 L Heise, M Ellsberg & M Gottmoeller 'A global overview of gender-based violence' (2002) Vol 78 *International Journal of Gynecology & Obstetrics* 5.

17 See the Constitution of Zimbabwe Amendment No. 20 of 2013, the Domestic Violence Act [Chapter 5:16], the Customary Marriages Act [Chapter 5:07], the Marriage Act [Chapter 5:11], the Administration of Estates Amendment Act [Chapter 6:07] and the Deceased Persons Family Maintenance Act [Chapter 6:03].

18 See Articles 15(1)(a), 17 and 29 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), African Charter on Human and Peoples' Rights (African Charter) and Convention on the Rights of the Child (CRC), respectively.

such as Cook argue that culture must cede to international human rights standards.[19] This, according to Sloth-Nielsen, promotes cultures which protect the advancement of human rights and in turn, curtails the violation of rights.[20] The right to culture is not unlimited. It must be balanced against other rights such as the right to equal treatment between men and women, boys and girls in line with section 56 of the Constitution.

The significance of section 63 is that the provision addresses customary practices such as *kuzvarira,kuripa ngozi* and *ukungena* that lead to gender-based violence against women in Zimbabwe.[21] The provision does so by breaking the cycle of perpetual disadvantage associated with women, since most of the customary practices that affect women predispose them to emotional, sexual, physical and mental abuse.[22]Thus, the limitation under section 63 pertains to customary practices, such as *kuzvarira,* which perpetuate gender-based violence, that negatively affect women and girls but are justified in the name of cultural practices.[23] Since section 63 calls for equal treatment, the right to equality and non-discrimination becomes relevant in addressing gender-based violence against women.

Section 56 of the Constitution prohibits discrimination based on gender, custom and culture; and recognises the equality of both sexes. The importance of section 56, read together with section 80(1), is that it guarantees equal treatment of persons irrespective of gender.[24] More importantly, section 80(3) reinforces section 56(1) by purposefully declaring that 'all laws, customs, traditions and cultural practices that infringe the rights of women conferred by this Constitution are void to the extent of the infringement'.[25] We argue that section 80(3) asserts the element of 'equal protection and benefit' in section 56(1), which finds its basis on the concept of formal equality.[26] With this interpretation, both provisions comply with international law standards which protect women against gender-based violence because they outlaw discrimination based on sex and gender.

Customary law 'dictates that property be devolved according to the customs and usages of the ethnic group to which it applies'.[27] As a result, many of the ethnic groups in Zimbabwe devolve property to the eldest male son, or closest male relative to the exclusion of female family members. For this reason, we argue that property grabbing is a cultural practice that is intrinsically linked with male primogeniture, which both perpetuate gender-based violence against women in Zimbabwe. In support of this claim, Izumi argued that property grabbing is often accompanied by acts of violence,

19 M Shivdas & S Coleman *Without prejudice: CEDAW and the determination of women's rights in a legal and cultural context* (2010) 29.
20 J Sloth-Nielsen & BD Mezmur 'Surveying the research landscape to promote children's legal rights in an African context' (2007) Vol 7 *African Human Rights Law Journal* 349.
21 SN Nkomo (n 13 above) 41-60.
22 AJ Mavedzenge & DJ Coltart *A Constitutional Law Guide Towards Understanding Zimbabwe's Fundamental Socio-Economic and Cultural Human Rights* (2014) 30.
23 Mavedzenge & Coltart (n 22 above) 30.
24 H Chitimira 'An analysis of socio-economic and cultural rights protection under the Zimbabwe Constitution of 2013' (2017) Vol 61 *Journal of African Law* 178.
25 Section 80(3) of the Constitution.
26 S Cusack & L Pusey 'CEDAW and the rights to non-discrimination and equality' (2013) Vol 14 *Melbourne Journal of International Law* 10.
27 Misheck Dube 'The ordeal of "property stripping" from widows in a peri-urban community: the case of a selected ward in Binga District, Zimbabwe' Social work (Stellenbosch. Online) vol.53 n.3 Stellenbosch 2017
Also available on http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0037-80542017000300005 (accessed 17 February 2019).

including physical and mental abuse, targeting mostly women.[28] For this reason, section 80(3) provides a legal safety net, which protects widows against male primogeniture, which, for example, deprives them of inheriting property after their husbands die.

Moreover, section 78(1) read with section 26 is relevant in addressing the practice of child marriage, which disproportionately affects girls more than boys in Zimbabwe.. This provision guarantees every person who has attained the age of eighteen years the right to found a family.[29] Section 78(2) further expresses that parties to a marriage should give their consent.[30] These two provisions are relevant in prohibiting parents from marrying off their minor daughters against their will.[31] They also unequivocally exclude girls from concluding a marriage since girls are young children incapable of giving consent because of their age.[32] It is argued that section 78 broadly protects the physical, mental and spiritual health, as well as wellbeing of girls as most child brides are immature and often taken advantage of by older men.

Finally, the principle of the 'best interests of the child' found in section 81(2) of the Constitution is also relevant in addressing gender-based violence, which primarily affects girls.[33] This provision addresses various cultural practices, such as *kuripa ngozi,* child marriage and *lobolo* that give priority to the interests of parents at the expense of girl children.[34] According to section 82(1), parental interests that override the best interests of girls do not conform to both national and international law.[35] More importantly, such parental interests perpetuate the discrimination of girls based on sex, and ultimately, gender-based violence.[36] The 'best interests' principle, therefore, protects girls against gender-based violence by targeting cultural traditions, such as child marriage and *ukungena,* which prioritise the interests of parents at the expense of children.[37]

2.2 Customary Marriages Act

The Customary Marriages Act is the principal piece of legislation which regulates customary marriages in Zimbabwe. This Act is a direct response to Zimbabwe's obligation to address gender-based violence against women, caused by marriage. For instance, consistent with international law, section 11 prohibits the pledging of girls and women in marriage.[38] Section 11(1) provides that '*any*

28 K Izumi 'Gender-based violence and property grabbing in Africa: a denial of women's liberty and security' (2007) Vol 15 *Gender & Development* 12.

29 *Mudzuru & Another v Ministry of Justice, Legal & Parliamentary Affairs (N.O.) & Others* 2015 ZWCC 45.

30 J Sloth-Nielsen & K Hove '*Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs & 2 Others*: A review' (2016) Vol 16 *African Human Rights Law Journal* 565.

31 *Mudzuru* (n 30 above) 55.

32 M Makonese '*Women's rights and gender equality in the new Zimbabwean Constitution: The role of civil society in implementation and compliance*' in CM Fombad (Ed) *The implementation of modern African Constitutions: Challenges and Prospects* (2016) 172.

33 Section 81(2) of the Constitution. In the objective sense, the term "best interests of the child" pertains to the principles that are used to determine what will be best for a child in a particular circumstance. In general terms, the best interests of the child assessment is used to determine which services and orders will best serve the child.

34 Unpublished: O Mawodza '*An assessment of the legal framework for the protection of girls against child marriages in Malawi'* Unpublished LLM thesis, University of the Western Cape, (2015) 26-29.

35 P Alston 'The best interests principle: Towards a reconciliation of culture and human rights' (1994) Vol 8 *International Journal of Law and the Family* 11.

36 O Ekundayo 'Does the African Charter on the Rights and Welfare of the Child only underline and repeat the Convention on the Rights of the Child's Provisions? Examining the similarities and the differences between the ACRWC and the CRC' (2015) Vol 5 *International Journal of Humanities and Social Science* 143.

37 Unpublished: N Dias '*Best interests of the child principle in the context of parent separation or divorce: As Conceptualised by the Community'* Unpublished PhD thesis, Edith Cowan University, (2014) 36.

38 Section 11 Customary Marriages Act is in keeping with Articles 6(a) and 21 of the African Charter on Human and

agreement in which a person, whether for consideration or otherwise, pledges or promises a girl or woman in marriage to a man shall be of no effect'.

This provision is unequivocal in addressing traditional cultural practices such as *lobola* and *kuzvarira which* forces girls into marriage.[39] This is in keeping with section 78(2) of the Constitution, which requires the free and full consent of both parties when concluding a marriage.[40] As such, section 11(1) protects women and girls against gender-based violence, since forced and early marriages subject them to substantial risks of physical, emotional, and sexual abuse.[41]

However, sections 5 and 12 of the Act conflict with section 11(1). For example, section 5 allows parents and/or legal guardians to give consent on behalf of the 'woman' to enter into marriage.[42] Section 12 complements section 5 in that it requires the certificate of consent before a woman can solemnise her marriage.[43] This implies that sections 5 and 12 forbid a woman to conclude a valid customary marriage if she does not obtain consent from her parents or guardians. Thus, both provisions view women and girls as perpetual minors, who must operate under the guardianship of their male counterparts. This contradicts section 78(2) of the Constitution and Article 16(1)(b) of CEDAW, which respectively prescribe that men and women equally give their free and full consent to enter into marriage.[44]

Despite the above contradictions, section 11(2) fortifies section 11(1). Section 11(2) prescribes that a person who contravenes section 11(1) commits an offence and shall be liable for a fine or one-year imprisonment.[45] This provision is in keeping with international law, which calls upon 'States parties to explicitly prohibit by law and adequately sanction or criminalize harmful practices'.[46] This sends a strong message that customary practices, such as *kuzvarira* and child marriage, which perpetuate gender-based violence against women, are no longer justifiable.

In addition, section 3(5) of the Customary Marriages Act is also useful in addressing gender-based violence against women. It provides:

> 'A marriage contracted according to customary law which is not a valid marriage in terms of this section shall, for the purposes of customary law and custom relating to the status, guardianship, custody and rights of succession of the children of such marriage, be regarded as a valid

Peoples' Rights on the Rights of Women in Africa and the African Charter on the Rights and Welfare of the Child, which respectively prohibit the betrothal of girls.

39 SN Nkomo (n 13 above) 41-60.

40 B Mushohwe 'A positive step towards ending child marriages: A review of the *Loveness Mudzuru & Another v The Minister of Justice, Legal and Parliamentary Affairs N.O & Others case'* (2017) Vol 3 *Midlands State University Law Review* 20.

41 TS Sayi & A Sibanda 'Correlates of Child Marriage in Zimbabwe' (2018) Vol 39 *Journal of Family Issues* 2367.

42 See section 5 of the Customary Marriages Act.

43 J Kurebwa & N Kurebwa 'Child Marriages in Shamva District of Zimbabwe' (2018) Vol 18 *Global Journal of Human-Social Science Research* 33.

44 R Gaffney-Rhys 'A comparison of child marriage and polygamy from a human rights perspective: are the arguments equally cogent?' (2012) Vol 34 *Journal of Social Welfare and Family Law* 59.

45 See section 11(1) of the Customary Marriages Act.

46 The UN Committee on the Elimination of Discrimination Against Women CEDAW General Recommendation No. 31 and UN Committee on the Rights of the Child (CRC Committee), General Comment No. 18 on harmful practices (2014) paras 13 and 51.

marriage'.

Section 3(5) is in keeping with international law, which deals with issues of child custody; protection of women's rights to property and guaranteeing the right to equality between spouses.[47] The significance of section 3(5) is that it empowers women to acquire equal rights with men, concerning custody and inheritance.[48]This protects women against exclusion from inheriting property of their husbands or having full custody of their children.[49] This position finds support from Izumi, who argues that 'property grabbing [is] a new form of gendered violence against women'.[50]

Section 3(5) further places women in unregistered customary marriages in an equal position with those in registered marriages with regard to access to property upon the death of their husbands or after divorce.[51] This, without a doubt, addresses systematic discrimination associated with property grabbing, leaving widows and children of the deceased without what was rightfully theirs, in the name of cultural practices.[52]

Another major drawback of the Customary Marriages Act is that six years after the Constitution entered into force, it has not been brought into full alignment with the Constitution. The Act does not specify the minimum age for marriage.[53] This delay in legal reform is mirrored in living customary law, and encourages parents or guardians to marry off their minor children, under the justifications of customary practices, such as, *ukuthwala* and *ukungena.* The dissonance between the Constitution and the Customary Marriage Act stands in the way of all attempts to address sexual, physical and mental violence, which negatively affects women and girls who enter into forced or early marriages.[54]

2.3 Matrimonial Causes Act and the Deceased Persons Family Maintenance Act

The Matrimonial Causes Act and the Deceased Persons Family Maintenance Act support harmful cultural practices by differentiating between women married under civil law, registered customary marriages, and unregistered customary marriages, and by allowing and re-enforcing male primogeniture, which leads to property grabbing. Property rights upon divorce or death are determined by the type of marriage entered into by the parties.[55] Consequently, the proprietary consequences of marriages concluded under the Marriage Act and Customary Marriages Act, as regulated by the Matrimonial Causes Act, are determined by those Acts respectively upon divorce or death.[56] The

47 See Articles 2, 6(j) and 16(1)(g) of the Convention on the Elimination of all forms of Discrimination against Women, African Charter on the Rights and Welfare of the Child and Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa, respectively.
48 See the case of *Chiminya v Estate (Late Dennis Mhirimo Chiminya) & Others* 2015 ZWHHC 272 where the court affirmed that women, regardless of their marital status have a right to equal protection of the law and also have a right to own property.
49 K Izumi *The Land and Property Rights of Women and Orphans in the Context of HIV and AIDS: Case Studies from Zimbabwe* (2006) 10.
50 K Izumi (n 28 above) 15.
51 B Mutedzi *Am I insane, black or just a woman?* (2011) 9.
52 M Dube 'The ordeal of "property stripping" from widows in a peri-urban community: the case of a selected ward in Binga District, Zimbabwe' (2017) Vol 53 *Social Work* 349.
53 J Sloth-Nielsen '*Child Marriage in Zimbabwe: The Constitutional Court Rules No*' in Atkin B (Ed) *International Survey of Family Law* (2016) 545.
54 *Mudzuru* (n 30 above) 4.
55 Cardozo *Journal of law & gender, Volume 13* (2006) 46.
56 See generally, Strategy Conference for "The Legal Network for Women's Property and Inheritance Rights" 2009.

Matrimonial Causes Act provides guidelines for the equitable distribution of matrimonial property upon divorce.[57] Section 7(4) of the Matrimonial Causes Act provides factors which a court shall consider when making an order as to maintenance. Careful and objective consideration of these factors may promote equality between women and men as required under Article 16 of CEDAW which requires that men and women have the same rights during the subsistence of their marriage or upon its dissolution.

However, in spite of section 26 of the Constitution which provides that

> 'The State must take appropriate measures to ensure that (c) there is equality of rights and obligations of spouses during marriage and at its dissolution; and (d) in the event of dissolution of a marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses,' women married in registered customary marriages and those in unregistered customary marriages are treated differently in relation to inheritance as well as the proprietary consequences of marriage upon its dissolution.

Women in registered customary marriages are at an advantage of inheriting the deceased's property upon dissolution of the marriage. However, women in unregistered customary marriages can suffer consequences of inequality in distribution of property. For example, in polygamous customary marriages, especially where a husband marries another wife and gives them part of the property that he had acquired with his senior wife.[58] While there is compliance on one hand, the Act falls short of Article 2 of CEDAW and Article 2(1) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) which proscribe discrimination on any grounds.

Section 68 Administration of Deceased Estates Act provides for the recognition of both registered and unregistered customary widows to be deemed as 'spouse' for purposes of inheritance. This provision is in line with section 26(c) of the Constitution and constitutes a positive step towards the protection of women's rights as customary marriages constitute a larger portion of unions in Zimbabwe.[59] However, in most cases, where the male spouse dies intestate, this distribution is usually done by the relatives of the deceased and such property grabbing tends to leave the widow and surviving children with nothing. This obviously subjects more women in unregistered customary unions to greater risks of gender-based violence insofar as distribution of property is concerned. Furthermore, the Deceased Persons Family Maintenance Act provides that the dependent of an estate can apply for an award from that estate.[60] Simply put, the Act clothes the surviving spouse

57 *Musonza v Musonza* 2010 ZWHHC 35. See S7 of the Matrimonial Causes Act.

58 Dube (n 53)349. Dube (n 53).

59 In Zimbabwe, statistics show that an estimated 80 per cent of marriages are customary marriages in which a woman's right to inherit property upon the death of her husband can be severely compromised. Approximately 18 per cent of women are in polygamous marriages, which further limits the wife's property rights.

60 According to s 2(1) of the Deceased Persons Family Maintenance Act, dependant means-

(a) a surviving spouse;
(b) a divorced spouse who at the time of the deceased's death was entitled to the payment of maintenance by the deceased in terms of an order of court;
(c) a minor child;
(d) a major child who is, by reason of some mental or physical disability, incapable of maintaining himself and who was being maintained by the deceased at the time of his death;
(e) parent who was being maintained by the deceased at the time of his death;
(f) any other person who-
    (i) was being maintained by the deceased at the time of his death; or
    (ii) was entitled to the payment of maintenance by the deceased at the time of his death.

and children with the right to occupy the matrimonial home. The application for the award must be done within 'three months of the date of the grant of the letters of administration to the executor of the deceased estate concerned'.[61] Section 3 addresses the social ills under traditional cultural practices that leave women without the rights to inherit property from their deceased husband's estate due to the male primogeniture principle and perpetual minority status.[62] Evidently, section 3 complies with international law, which advocates for equality between spouses.[63] Further, section 3 addresses systematic discrimination associated with property grabbing, leaving widows and children of the deceased without what was rightfully theirs, in the name of male primogeniture.[64]

Closely linked with this provision is section 10, which recognises property grabbing as an offence, and prohibits any interference or deprivation of property rights of the dependents. More importantly, such an offence attracts a punishment through a fine or imprisonment.[65] This is an important tool in the protection of women and children against persons who purport to act in terms of culture whereas they are in fact 'property-grabbers'. A very strong message is given that any person who steals inherited property from the spouse or child in the name of culture, must return the property and even pay compensation.[66] This sanction is important as it applies irrespective of any law, including customary law. In addition, this provision can be commended for implementing the international law norm of giving priority to gender equality where a conflict exists between equality and culture.

2.4 Administration of Estates Amendment Act

This Act [67] applies to estates that are governed by customary law where a person died intestate. Gwarinda observes that the Administration of Estates Amendment Act was introduced to make

61 Section 3(2)(b)(i) of the Deceased Persons Family Maintenance Act.

62 Section 3 of the Deceased Persons Family Maintenance Act.

63 Castan and Joseph (n 69) 691.

64 McPherson 'Property Grabbing and Africa's Orphaned Generation: A Legal Analysis of the Implications of the HIV/AIDS Pandemic for Inheritance by Orphaned Children in Uganda, Kenya, Zambia and Malawi' https://www.law.utoronto.ca/documents/ihrp/HIV_mcpherson.doc (Accessed 28 July 2016.

65 Section 10 of the Deceased Persons Family Maintenance Act , provides:

(1) Notwithstanding any law, including customary law, to the contrary, when any person dies, any surviving spouse or child of such person shall, subject to section eleven, have the following rights-

(a) the right to occupy any immovable property which the deceased had the right to occupy and which such surviving spouse or child was ordinarily occupying immediately before the death of the deceased;

(b) the right to use any household goods and effects, implements, tools, vehicles or other things which immediately before the death of the deceased the surviving spouse or child was using in relation to such immovable property;

(c) the right to use and employ any animals which immediately before the death of the deceased were depastured or kept on such immovable property;

(d) to an extent that is reasonable for the support of such surviving spouse or child, the right to any crops which immediately before the death of the deceased were growing or being produced on such immovable property.

(2) Any person who does an act with the intention of depriving any other person of any right, or interferes with any other person's right, that has accrued to that other person in terms of subsection (1) shall be guilty of an offence and liable to a fine not exceeding two thousand dollars or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment.

(3) A court convicting a person of an offence in terms of subsection (1) may order the convicted person or any other person to restore any property or pay any money which he has unlawfully acquired to the person entitled thereto in terms of subsection (1) or to any other person specified by the court, and any such order shall have the same effect and may be executed in the same manner as if the order had been made in a civil action instituted in the court.

66 Centre on Housing Rights and Evictions "Bringing equality home: Promoting and protecting the inheritance rights of women (A survey of law and practice in sub-Saharan Africa)" 2004 166.

67 Administration of Estates Amendment Act No 6 of 1997.

inheritance laws more favourable to both polygamous and monogamous widows.[68] The Act addresses harmful cultural practices linked to gender-based violence in the following terms. First, the surviving spouse and children are the primary beneficiaries of the deceased's estate.[69] This basically means that the rules of male primogeniture are abandoned and property is shared between the widow and the children.[70] The effect of such gender equity is that women and girls can now inherit from the estates of their deceased husbands and fathers.[71] Therefore, the Act conforms to Article 2 of CEDAW and the Banjul Charter, respectively, which proscribe discrimination on the grounds of sex, birth, gender and culture.[72]

It should be recalled that in Zimbabwe, the discriminatory nature of the male primogeniture rule was the issue in the *Magaya v Magaya*[73] decision. In this case the Supreme Court of Zimbabwe upheld the customary rule that a woman cannot be appointed as a customary heir. The case concerned the challenge to the application of African customary law of male primogeniture under succession. The deceased had married two wives in terms of customary law. One female child was born of the first marriage and three male children of the second. The eldest female child claimed heirship to the deceased's estate in conflict with the customary rule of male primogeniture. In this case, the court acknowledged that the exclusion of women as heirs under customary law could amount to *prima facie* discrimination on the basis of sex but the court proceeded to give a controversial judgment in which the second-born male child, being a son from the second marriage, was recognised as the heir.

Despite a strong constitutional and legal framework, the decision of the Supreme Court of Appeal proceeded to elevate discriminatory cultural practices over the rights of women to property inheritance. However, in a factually similar case in South Africa, *Bhe v Magistrate Khayelitsha,*[74] the Constitutional Court ruled that the principle of male primogeniture in the customary law of succession offended the right to equality protected under section 9 of the South African Constitution and was consequently declared invalid.[75] The reasoning by the two courts sends the message that the customary rule of male primogeniture is discriminatory towards women and can lead to gender-based violence despite the different decisions reached by the two courts.

2.5 Domestic Violence Act

Before the establishment of the Act, there was no law in Zimbabwe that dealt specifically with domestic violence, particularly violence against women.[76] Section 3 defines domestic violence as 'any unlawful

68 Gwarinda *A Critical Analysis of the Impact of the Common Law on African Indigenous Law of Inheritance: A case study of post-colonial legislation in Zimbabwe* (2009 thesis SA) 74.

69 Strategy Conference *The Legal Network for Women's Property and Inheritance Rights* (2009) 16.

70 Mutopo and Chiweshe 'Large-scale land deals, global capital and the politics of livelihoods: Experiences of women small-holder farmers in Chisumbanje, Zimbabwe'(2014)*International Journal of African Renaissance Studies-Multi-Inter-and Transdisciplinarity* 84-99.

71 For a similar discussion, see *Bhe and Others v Khayelitsha Magistrate and Others* 2005 (1) SA 580 (CC).

72 Mwambene 'Marriage under African customary law in the face of the Bill of Rights and international human rights standards in Malawi' 2010 *AHRLJ* 82.

73 *Veneria Magaya v Nakayi Shonhiwa Magaya* (SC 210/98).

74 *Bhe v The Magistrate of Khayelitsha* 2005 1 SA 580 (CC).

75 *Bhe v The Magistrate of Khayelitsha* 2005 1 SA 580 (CC).

76 Makahamadze *et al* 'Examining the Perceptions of Zimbabwean Women about the Domestic Violence Act'(2011)

act, omission or behaviour which results in death or the direct infliction of physical, sexual or mental injury to any complainant by a respondent'.[77] The Act recognises, *inter alia*, cultural practices such as forced virginity tests, female genital mutilation, and forced wife inheritance as domestic violence. Section 3 is therefore well-suited with articles 5, 12 and 16 of the Maputo Protocol, Southern African Development Community (SADC) Gender Protocol and CEDAW, respectively that condemn and call for the elimination of all cultural practices that affect the personal integrity of women and girls. Apart from section 3, section 4 is also relevant. It provides:

> '(1) Subject to subsection (2), any person who commits an act of domestic violence within the meaning of section 3 shall be guilty of an offence and liable to a fine not exceeding level fourteen or imprisonment for a period not exceeding ten years or to both such fine and such imprisonment.'

Provisions such as section 4(1) require States to denounce customs and social practices that perpetuate gender inequality.[78] By imposing a punishment, section 4 (1) is a deterrent to gender-based violence which leads to violations of women's rights. In addition, section 5 mandates police officers to investigate claims of domestic violence and to help the complainants in lodging criminal complaints.[79] Section 5, therefore, can also be used to bring the offenders of gender-based violence to justice. Despite this, the implementation of the Act has been quite problematic. The problems in part, lie in hands of the police.[80] It has been argued that as a result of police corruption, women cannot successfully lodge their complaints, and the police officers are therefore perpetrators of gender-based violence.[81] In addition, it has been observed that customary law, which continues to be strong in the private sphere, is problematic in the implementation of the Act.[82]

3. Conclusion

The analysis of Zimbabwe's legislation has highlighted the merits and demerits in the protection of women and girls against gender-based violence. More importantly, it is observed that the legal response has some discriminatory attributes that can predispose women to gender-based violence

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Journal of Interpersonal Violence 10.

77 Section 3 of the Domestic Violence Act.

78 Higgins and Fenrich *The Future of African Customary Law* (2011) 424.

79 Section 5 of the Domestic Violence Act, provides: (1) There shall be a section at every police station which shall, where practically possible, be staffed by at least one police officer with relevant expertise in domestic violence, victim friendly or other family-related matters.

(2) A police officer to whom a complaint of domestic violence is made or who investigates any such complaint shall—

(a) obtain for the complainant, or advise the complainant how to obtain, shelter or medical treatment, or assist the complainant in any other suitable way;

(b) advise the complainant of the right to apply for relief under this Act and the right to lodge a criminal complaint: Provided that, where a complainant so desires, the statement of the nature of the domestic violence suffered by the complainant shall be taken by a police officer of the same sex as that of the complainant.

(3) A complainant who is not satisfied with the services of a police officer to whom he or she has reported a case of domestic violence shall have the right to register a complaint in accordance with any procedure prescribed for that purpose under section 19.

80 Makahamadze (n 77) 10.

81 Makahamadze (n 77) 10.

82 Chuma and Chazovachii 'Domestic Violence Act: Opportunities and Challenges for Women in Rural Areas: The Case of Ward 3, Mwenezi District, Zimbabwe'(2012)*International Journal of Politics and Good Governance* 10.

in the name of culture.[83] The analysis has also shown how existing legislation falls short of the constitutional and international legal standards on the protection of women and girls from gender based violence linked to traditional cultural practices. For example, marriage laws are not consistent because women married under customary law are not afforded the same protection as women married under civil law. Furthermore, court decisions such as *Magaya v Magaya*, in which discriminatory living law and cultural practices were elevated above internationally recognised rights to equality between men and women, raise serious concerns with regards to Zimbabwe's commitment to CEDAW and the Maputo Protocol. In order to address these shortcomings, the enactment of the Marriage Bill is an important step as it seeks to unify the various types of marriages under a single legislative framework. This will prevent inconsistencies in the adjudication of inheritance disputes.[84] The Bill will have to be tested once it comes into operation to determine its compliance with constitutional as well as regional and international law standards.

More importantly, law reform cannot act in isolation. Whereas the Domestic Violence Act creates an obligation on the State to protect and promote the rights of women, the practice and procedures pertaining to the issuance of protection orders and warrants of arrest must be handled in a manner which does not amount to secondary victimisation of complainants, and justice must be seen to be done in the judicial system. This must be accompanied by other non-legal measures. Such non-legal measures include, mandating the Zimbabwe Human Rights Commission to continually hold campaigns and workshops that educate everyone, including women and girls on their rights, and the available laws to utilise in or

83 Pieces of legislation such as the Marriages Act Chapter 5:11 and the Customary Marriages Act Chapter 5:07 are examples of legislation that harbours discrimination against women which needs to be realigned with the new Constitution of Zimbabwe Amendment No. 20 of 2013.

84 However, some scholars like Rautenbach have argued that unification can present a technical problem, and that one has to find 'an alternative new law which reconciles and unifies the old'. See Rautenbach 'South African Common and Customary Law of Intestate Succession: A Question of Harmonisation, Integration or Abolition'(2008)*Electronic Journal of Comparative Law* 6.

Complacency in the State's progressive realisation of the right to water: Hopcik Investment (Pvt) Limited v Minister of Environment, Water and Climate and City of Harare

Chantelle G. Moyo.[1]

1. Introduction

Water is central to the survival of all living organisms. Without sufficient clean water, life as we know it would cease to exist. Animals, plants and human beings would fail to thrive in environments within which they live. In Zimbabwe, the challenge of limited resources has become synonymous with poor service delivery in several sectors, including the water sector. As such, the right to water has been given ultimate protection within the Constitution of Zimbabwe,[2] the Water Act,[3] and the Urban Councils Act.[4] This article will unpack the decision in the *Hopcik Investment (Pvt) Limited v Minister of Environment, Water and Climate and City of Harare* case (thereafter referred to as "*Hopcik"*).[5] This case highlighted the importance of the progressive realisation of the right to water, regardless of the country's economic problems.

The court had the first opportunity to interpret the content of the right to water as enshrined in our Constitution. The High Court reached the decision that limited resources could be a valid basis upon which to justify the State's inability to provide safe, clean and potable water to its citizens. However, such reasoning would not be readily accepted in circumstances where the State blatantly negates its responsibility towards the progressive realisation of the right to water. Furthermore, the court noted that although local authorities bear the responsibility of ensuring that the citizens of Zimbabwe have safe, clean and potable water supply in their respective areas of jurisdiction, consideration will be given to whether these local authorities are adequately resourced and assisted by relevant parent ministries in order to deliver on such mandate.

2 Facts of the case

The issue in the *Hopcik* case was whether the State was doing all that was necessary, in terms of existing legislation, to ensure the equitable distribution of water to the inhabitants of the City of Harare.[6] The applicant, Hopcik, brought an application seeking an order compelling the respondents to ensure the supply of clean, safe and potable water to its premises.[7] The Constitution places a duty on the State through the Minister of Environment, Water and Climate to ensure that all the citizens of Zimbabwe have access to safe and clean water.[8] Furthermore, to ensure effective delivery of the State's' mandate, the Urban Councils Act empowers local authorities, in this case the City of Harare, to provide an adequate supply of water and maintain infrastructure in order to secure the provision of the supply of water.[9]The Act provides, in section 183 (1), that a council

1 L.L.M in Environmental Law; L.L. B (University of KwaZulu-Natal, South Africa); Lecturer at Herbert Chitepo Law School (Great Zimbabwe University) and Registered Legal Practitioner.
2 The Constitution of Zimbabwe Amendment (No. 20) Act 2013.
3 Water Act [Chapter 20:24].
4 Urban Councils Act [Chapter 29:15].
5 *Hopcik Investments (Pvt) Limited v Minister Environment, Water & Climate & Another* 2016 ZWHHC 137.
6 *Ibid* para 5.
7 *Hopcik*(n5 above) para 1.
8 See sec 77 (a) of the Constitution.
9 Urban Councils Act (n4 above). Furthermore, sec 2 of the Water Act provides that 'The Minister, by notice in the Gazette with the approval of the Minister to whom the administration of the Urban Councils Act has been assigned, may

may provide and maintain a supply of water within or outside the council area and for that purpose the council may in accordance with the Water Act take such measures and construct such works, whether inside or outside the council area, as it considers necessary for the purpose of providing and maintaining a supply of water.

The applicant averred that there had been no water supply to his property for a period of three years. *Hopcik* noted that although other properties located in its area were receiving a supply of water, the City of Harare was failing to ensure an adequate supply of safe, clean and potable water to all the residents of Harare.[10] It also alleged irresponsibility on the part of the City of Harare in its failure to attend to burst water pipes resulting in the lack of water supply to residents for prolonged periods of time.[11] It was the applicant's contention that the respondents were not taking their responsibilities seriously and were not taking any reasonable steps to ensure that there was adequate safe, clean and potable water to all its residents. Hence, the applicant sought an order compelling the respondents to ensure the supply of 15000 litres of potable water on a weekly basis to its premises.

The respondents defended the application by advancing several reasons as to why they were failing to ensure that there was adequate water supply to the applicant and to other affected residents of Harare. The City of Harare stated that despite numerous financial constraints, both the respondents were taking significant steps to remedy the dire situation.[12] Such steps included engaging investors and partners, as well as acquiring loans to upgrade and refurbish the aged infrastructure which frequently broke down causing leakages. The first respondent was said to have signed numerous memorandums of understanding and agreements with different countries and construction companies in order to build dams and drill boreholes so that there would be an improvement in water supply.[13] Another reason advanced by the respondents was that it was a mammoth task to keep up with the ever-increasing growth in population which already exceeds the capacity of the respondents to provide water for all the residents of the city.[14]

The City of Harare did not dispute its obligations under the Urban Councils Act but pointed out that when this law was enacted, the legislators envisaged a situation whereby the respondent would be unable to fulfil its obligations thereby using the word 'may' in spelling out its obligations.[15] The second respondent also acknowledged that since the applicant was not the only resident in this predicament, it would not be feasible to guarantee a minimum of 15000 litres of water to the premises on a weekly basis.

The court did not dispute that the country was facing many challenges in a harsh economic climate but suggested that the respondents should have a way of distributing the water supply in an equitable manner instead of having some residents completely without water for extended periods of time.[16]

declare a local board to be a local authority for the purposes of this Act, and shall specify the area which shall be the area under the local board's jurisdiction. This means that the authority given to the local authority, the council, in the Urban Councils Act to provide and maintain adequate water supply to its residents stems from the provision under the Water Act. The provision states that although it is the Minister's obligation to ensure that every citizen of Zimbabwe has access to adequate and clean water, the Minister may declare a local authority to carry out this mandate in a specific area.

10 *Hopcik*(n5 above) para 5.

11 As above.

12 *Hopcik*(n5 above) para 6.

13 As above.

14 *Hopcik*(n5 above) para 7.

15 As above.

16 *Hopcik*(n5 above) para 18.

The court failed to see any tangible steps that the respondents were taking to ensure that there was safe, clean and potable water to their residents. As such, it was held that the respondents were jointly and severally liable to supply potable water to the premises of the applicant within 3 months.[17]

The court highlighted the importance of adequate safe water to the survival of human beings. The court referred to organisations which are instrumental in the provision of and advocacy for clean potable water, like the World Health Organisation (WHO), and to international treaties which recognise the importance of the right to water. Zimbabwe is a signatory to international treaties such as the Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child and the International Covenant on the Economic Social and Cultural Rights (ICESCR).[18] All these international agreements reinforce the need to provide safe water to every citizen as a basic human right. Bringing the importance of access to adequate water closer to home, the court considered the South African case of *Mazibuko and Others v City of Johannesburg and Others*[19] which stated, in its crux, that the major reason the right to water is protected by the Constitution is that without water human survival would be impossible. Therefore, the right to water is a non-negotiable human right.

A discussion of section 77 of the Constitution was considered in the judgement. The obligation to ensure access to adequate water is placed on the State. Section 77 of the Constitution entrenches the right to food and water and stipulates that every person has a right to safe, clean and potable water. The Constitution places an obligation on the State to ensure the progressive realisation of the right to water through reasonable legislative and other measures. Although section 77 explicitly points out that it is the State's responsibility to ensure that the citizens of the country enjoy their right to water without hindrance, it further holds that the resources at the disposal of the State should be taken into cognisance in measuring the progress made to realise the fulfilment of this right. The court noted that the Constitution is not a stand-alone document in the implementation of the right to water. It works alongside the Water Act, the Public Health Act, the Rural District Councils Act and the Urban Councils Act to ensure that there is a progressive realisation of the right to safe, clean and potable water.

The court correctly pointed out that the Water Act[20] places a responsibility on the Minister of Environment, Water and Climate to ensure that every citizen of Zimbabwe has access to water for domestic and other purposes.[21] According to the Water Act, the Minister is supposed to take reasonable steps to ensure the realisation of the right to water and such steps include adopting appropriate policies which ensure that there is an equitable distribution of available water resources.[22] Furthermore, since it is the Minister who declares a local board to be a local authority for the purposes of carrying out the mandate of the Water Act,[23] it is the responsibility of the Minister to ensure that the

17 *Hopcik* (n5 above) para 19.
18 *Hopcik*(n5 above) 8.
19 *Mazibuko v City of Johannesburg* 2010 (3) BCLR 239 (CC).
20 See n3 above.
21 Sec 6 (1) (b) of the Water Act. It provides that one of the functions of the Minster is to 'ensure the availability of water to all citizens for primary purposes and to meet the needs of aquatic and associated ecosystems particularly when there are competing demands for water'.
22 Sec 6 (1) (c) of the Water Act. Included in the functions of the Minister is the obligation to ensure that there is 'equitable and efficient allocation of the available water resources in the national interest for the development of the rural, urban, industrial, mining and agricultural sectors'.
23 Sec 2 (a) of the Water Act stipulates that the Minister, by notice in the Gazette, with the approval of the Minister to

institution she or he delegates to supply water has the capacity to carry out such a mandate.

The court also considered the Urban Councils Act which empowers local authorities to provide and maintain water supply to an area. Local authorities are required to take measures like maintaining aged infrastructure to ensure that there is a provision of consistent supply of adequate water to their areas of jurisdiction. Regarding the use of the word 'may' in carrying out the responsibilities of local authorities, the court observed that when the Urban Councils Act was enacted the legislators did not intend to hold the State accountable for challenges beyond its scope.[24] Although the use of the word 'may' made provision for instances when the local authorities would be unable to fulfil their obligations, reasons for such failure have to be reasonable in order to be acceptable.[25] The court pointed out that if the reasons for a local authority's failure to provide safe, clean and potable water to its residents are reasonable, it can be absolved for such failure.[26]

The court observed that financial constraints summed up the respondents' reasons for failure to fulfil their obligations.[27] However, the respondents did not mention why they were facing such financial challenges and it was left up to the court to ask if such challenges may have been a result of the respondents' failure to prioritise pressing needs like the maintenance of aged infrastructure.[28] The court observed that although there had been forecasts of meetings with investors, nothing had materialised from these. The fact that the respondents could not show what they had done in the past 5 years to address the challenges around the provision of water to the citizens displayed a casual attitude towards this problem.[29]

3. An appraisal of the High Court's decision

The importance of this case cannot be overemphasized. Issues around access to clean water for domestic use have been a topic of contention among the citizens of Zimbabwe for numerous years. The outbreak of cholera from 2008 to 2009, which claimed 4288 lives, became a wake-up call to the dire situation that the country faces in the provision of safe, clean and potable water to its citizens.[30] Although this crisis was averted by the concerted efforts of the international humanitarian community and the Zimbabwean government, it is alarming that 6 years later, issues around the State's ability to provide its citizens with safe, clean and potable water are still under the spotlight.

Zimbabwe is a semi-arid country which usually experiences rain between the months of November to April every year. The recorded mean annual rainfall is low with an average of 657mm, with the Eastern Highlands receiving a little over 1000mm and the Lowveld receiving between 300-450mm.[31]

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whom the administration of the Urban Councils Act has been assigned, may declare a local board to be a local authority for the purposes of this Act, and shall specify the area which shall be the area under the local board's jurisdiction for the purposes of this Act. The purpose of a local authority will then be to ensure availability of water to the community which falls under its jurisdiction.

24 *Hopcik* (n5 above) para 14.

25 As above.

26 As above.

27 *Hopcik* (n5 above) para 15.

28 As above.

29 *Hopcik* (n5 above) para 16.

30 International Federation of Red Cross and Red Crescent Societies 'Zimbabwe-Cholera. Final Report' (2010) 2, available at http://www.ifrc.org/docs/appeals/08/MDRZW004ifr.pdf (Accessed 13 May 2018).

31 African Development Bank 'Water Resource Management, Supply and Sanitation: Zimbabwe Report', (2012) 11, available at http://www.afdb.org/fileadmin/uploads/afdb/Documents/GenericDocuments/9.%20Zimbabwe%20Report_Chapter%207.pdf (Accessed 16 June 2018).

The areas which receive adequate rainfall for agriculture constitute only 37% of the country and the rest of the country experiences erratic, unreliable rainfall which makes the country prone to droughts.[32] The rainfall cycles that the country experiences have been and continue to be affected by climate change and so it is no surprise that there are instances where the available water resources are not sufficient to meet the needs of the citizens. However, the Water Act empowers the Minister of Environment, Water and Climate to ensure that water resources are utilized in a resourceful fashion[33] and to ensure that research is carried out to gather information on hydrological and hydrogeological matters in order to ascertain the resources that are needed to develop the country's water resources to be able to meet the needs of every citizen.[34] The court correctly spelt out the responsibilities of the Minister regarding the availability and distribution of clean water to the citizens of Zimbabwe.

3.1 Progressive realisation of the right to water

The history of the right to water dates to the aftermath of World War II. When the Second World War ended, solutions were required by the international community on how best to protect human life and foster equitable development around the world. The need for such solutions resulted in the drafting of the 'Declaration on the Essential Rights of Man'[35] by the United Nation's Economic and Social Council. The drafting of the Declaration gave rise to the International Covenant on Civil and Political Rights (ICCPR) which is legally binding and affords protection to several basic human rights. Among the rights afforded protection under this Covenant is the right to water. The right to water is one of the rights which by implication, creates direct obligations on states to ensure that steps are taken towards its full realisation.[36] However, even though immediate obligations for the State exist in the protection of the right to water, it will not be found liable for the violation of the right where it fails to meet its obligations due to resource limitations.[37] Before this can happen, the State must first show that it has taken concrete, specific measures to ensure the full realisation of the right to water. Many Constitutions crafted in the new millennium, including the Constitution of Zimbabwe[38] and that of the Republic of South Africa,[39] have since stipulated the need to progressively realise the right to water.

In holding State institutions accountable under legislation, it is vital to have a clear comprehension of what the term 'progressive realisation' entails. Although the court mentioned this concept, it neglected to dissect it for meaning. The concept of 'progressive realisation' establishes the appreciation of the fact that complete achievement of social, economic and cultural rights is impossible in a short period of time.[40] However, this gradual realisation, which considers several factors dependent on

32 As above.
33 Sec 6 (2) (e) of the Water Act. It provides that one of the duties of the Minister is to 'ensure that water resources are utilized at all times in an efficient manner having special regard to its value and the economic and other benefits that may be derived from it'.
34 Sec 6 (2) (g) of the Water Act. It provides that the Minister of Environment, Water and Climate should 'ensure that research is carried out and information is obtained and kept on hydrological and hydrogeological matters such as the quality and quantity of the country's water resources, the utilization of the country's water resources and resources needed to develop the country's water resources sufficient to meet the reasonable needs of the nation'.
35 P Obani and J Gupta 'The Evolution of the Right to Water and Sanitation: Differentiating the Implications' (2015) Vol 24 (1) *RECIEL* 27.
36 As above.
37 United Nations Committee on Economic Social and Cultural Rights 'General Comment No. 15: The Right to Water (Articles 11 and 12 of the Covenant)' (2003) para 17.
38 See n2 above.
39 Constitution of the Republic of South Africa 108 of 1996.

the availability of resources at any given time, should not be construed to deprive the obligation of its core content. This concept is a reality check in the pursuit of the protection of basic human rights which reflects the realities of competing priorities and limited resource allocations that states contend with daily. Although the full realisation of such rights occurs over time, any retrogressive measures would have to be justifiable and such a consideration would take into account the maximum use of available resources.[41] As such, there is a rebuttable presumption that any deliberate retrogressive measures towards economic and social rights would constitute a violation of the rights.[42]

The idea of 'progressive realisation' can be better understood in the context of Third World countries where there is a constant trade-off for limited resources.[43] In ascertaining whether there is a gradual fulfilment of rights, two factors must be considered namely, the outcomes of the economic and social rights that citizens enjoy indicated by statistics and the State's capacity to ensure the full enjoyment of rights as determined by the resources available.[44] Therefore, to measure the progress of a state, it is not sufficient for it to merely protect certain rights, like the right to water through corresponding legislation but statistics on the ground and the capacity to fulfil obligations under law will determine whether there is regression, stagnation or progression.

The notion of progressive realisation embodies three elements.[45] Firstly, there must be deliberate and tangible steps toward the realisation of the rights.[46] In most jurisdictions, this is evident through legislation that not only entrenches the protection of such rights but also imposes obligations on the states to ensure the full enjoyment of the rights without hindrance. Secondly, deliberate retrogressive measures are a direct violation of the rights unless such measures are justifiable in reference to the totality of the rights.[47] Simply put, any measures, directly or indirectly implemented by the State, which have a retrogressive effect on the full realisation of rights are not permissible unless there is a rational and legal justification for them. Finally, progressive realisation necessitates specific measures to be in place for the vulnerable and marginalized groups of society.[48] States are required to go the extra mile to ensure that the vulnerable members of the society, like women, children and the elderly, enjoy the rights protected under law. Therefore, the progressive realisation of rights demands positive action from the State, no retrogressive measures, and extra consideration for the vulnerable members of society.

South African jurisprudence has examined the concept of progressive realisation of basic human rights. In the *Grootboom* case, the court observed that although the full enjoyment of the right to adequate housing cannot be realised in a short space of time, it is imperative for the State to take

40 M Green 'What We Talk About When We Talk About Indicators: Current Approaches to Human Rights Measurement' (2001) Vol 23 *Human Rights Quarterly*1071.
41 United Nations Committee on Economic, Social and Cultural Rights' General Comment No. 3: The Nature of State Party Obligations' (1991) Annex III.
42 M Green (n40 above) 1072.
43 S Fukuda-Parr, T Lawson-Remer and S Randolph 'Measuring the progressive realisation of human rights obligations: An index of economic and social rights fulfilment' (2008) *Department of Economics Working Paper Series* 22 (University of Connecticut) 6.
44 S Fukuda-Parr, T Lawson-Remer and S Randolph (n43 above) 7.
45 L Chenwi 'Unpacking "progressive realisation", its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance' (2013) *De Jure* 744.
46 As above.
47 Chenwi (n45 above) 745.
48 Chenwi (n45 above) 746.

positive steps to achieve its realisation.[49] Furthermore, the court defined progressive realisation to mean 'accessibility (that) should be progressively facilitated: legal, administrative, operational and financial hurdles should be examined and, where possible, lowered over time'.[50] This means that for there to be a gradual realisation of the right, it should be enjoyed by a greater number of people as times go by. In the *Minister of Health v New Clicks South Africa (Pty) Ltd,*[51] the court found that for there to be a progressive realisation of any right, the State is required to take reasonable, positive measures to address areas of deficiency. In *Soobramoney*,[52] the Constitutional Court held that the progressive realisation of rights like those to housing, food, health and water is largely dependent on available resources and that limitations of these rights usually correspond with the lack of resources for their realisation.[53] These cases portray the importance of resources in ensuring a progressive realisation of basic rights, an observation which was also noted in *Hopcik*. Legislation may protect basic rights but without resources to take positive measures towards their full enjoyment, such realisation would be a challenge.

In as much as progressive realisation of rights largely depends on the availability of resources, the obligation will still exist regardless of the decrease in resources. Measures can be taken by the State towards full realisation through the effective use of available resources.[54] As such, States must focus on an equitable distribution of and access to available resources to ascertain whether obligations are being met towards the progressive realisation of rights. The onus rests on the State to show how they have made use of available resources in ensuring that citizens have access to essential services like housing and water. Therefore, State obligations in this regard are not eliminated by reason of limited resources because resource constraints do not excuse inaction.[55]

In the *Hopcik* case, the respondents pointed out their efforts towards engaging investors in the water sector. The onus rested on them to show that they had done all that was necessary to ensure that there was continuous provision of water but that they had fallen short in this regard because of limited resources. The court correctly pointed out that the memorandums of understanding, the loans and grants which the respondents spoke of, to ensure a smooth functioning water sector, did not prove that they were working towards the full realisation of the right to water. As the court noted, it is unreasonable that after 5years, not one of the respondent's' efforts managed to yield tangible outcomes, resulting in the applicant being without water for 3 years, an unambiguous violation of the right to water.

The Committee on Economic, Social and Cultural Rights (CESCR)[56] notes that when a state, like in *Hopcik*, uses limited resources as an explanation for failure to meet its obligations towards the progressive realisation of rights, such an explanation should be considered in light of factors which include:

a) the country's level of development;

49 *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC).
50 *Grootboom* (n49 above) para 45.
51 *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (8) BCLR 872 (CC).
52 *Soobramoney v Minister of Health (KwaZulu* Natal) 1998 (1) SA 765 (CC).
53 *Soobramoney* (n52 above) para 11 and 43.
54 Chenwi (n45 above) 750.
55 United Nations Committee on Economic, Social and Cultural Rights (n41 above) para 11.
56 The CESCR supervises the implementation of the ICESCR through a reporting mechanism where states submit reports on a regular basis to the Committee on their implementation of the rights in the ICESCR.

b) the severity of the alleged breach, particularly whether the situation concerned the enjoyment of the minimum core content of the Covenant;

c) the country's current economic situation, particularly whether the country was undergoing a period of economic recession;

d) the existence of other serious claims on the State Party's limited resources, for example, resulting from a recent natural disaster or from recent internal or international armed conflict;

e) whether the State Party had sought to identify low-cost options; and

f) whether the State Party had sought cooperation and assistance or rejected offers of resources from the international community for implementing the provisions of the Covenant without sufficient reason.[57]

Although the court omitted to consider the meaning of the concept of 'progressive realisation' of the right to water or to test the reasons by the respondents for reasonableness, its decision to reject the arguments by the respondents was correct. However, the court could have provided comprehensive precedent if it had, in the least, applied the CESCR factors to the case to arrive at such a decision.

3.2 How much is 'enough water'?

Although the applicants prayed that the court ensures that the respondents provided a minimum of 15000 litres of water to the premises on a weekly basis, no explanation was given as to the calculation of the amount of water needed. The United Nations Development Program has quantified that an acceptable amount of water per person per day is at least 20 litres.[58] In the Argentine case of *Marchisio José Bautista y Otros*, the court ordered the local authority to provide 200 litres of safe drinking water per household daily until access to public water services was restored.[59] In *Mazibuko and Others v. City of Johannesburg and Others*, the South African Constitutional Court held that the 25 litres per person, per day stipulated in the Johannesburg's free basic water policy was reasonable for the residents of the poor suburb of Phiri.[60] Although the amount of water required would be considered on a case-by-case basis, a clear picture of the water situation in Zimbabwe would have been painted if the court also considered the amount of water that the applicants sought.

In the *Hopcik* case, the court omitted to interrogate the amount of water that the applicants required the respondents to provide. In a water-stressed country like Zimbabwe, where quantity and quality concerns are inseparable, the court erred in failing to assess whether the applicant's request was reasonable.

3.3 Local authorities' capacity to provide adequate access to water

57 United Nations Committee on Economic, Social and Cultural Rights (n41 above) para 10.
58 United Nations Development Program (UNDP) 'Human Development Report 2006: Beyond Scarcity – Power, Poverty and the Global Water Crisis' 2006 United Nations Development Program 8.
59 Ciudad de Córdoba, Primera Instancia y 8 Nominación en lo Civil y Comercial, Marchisio José Bautista y. Otros, Acción de Amparo (Expte. No. 500003/36).
60 *Mazibuko* (n19 above).

The City of Harare submitted to the court that it was difficult to keep up with the ever-increasing population as a justification for its failure to supply safe, clean and potable water to all its residents. This is a reality which does not only confront Zimbabwean cities but cities around the globe. African cities are growing at an exponential rate, exceeding their economic status and this results in the deterioration of standards in the provision of basic services like water, electricity, refuse collection and the maintenance of public roads.[61] Poor service delivery in these and other sectors in African cities tend to hamper productivity and adversely affect the wellbeing of urban residents. Hence, there is an urgent need to revise budgetary allocations for African cities in a bid to attempt to implement coping strategies to address the needs of an ever-increasing urban population.[62]

Studies have revealed that local authorities in Zimbabwe do not have the capacity to make decisions in areas affecting the development of urban infrastructure yet they shoulder the blame for failing to improve or update such infrastructure to ensure effective service delivery.[63] The capacity of local authorities to perform their functions, like the supply of safe, clean and potable water, is dependent on central government providing them with the capacity to do so. If the local authority is not provided with all the right tools to carry out its mandate, it will fail to do so. The court correctly pointed out that it is the responsibility of the Minister of Environment, Water and Climate to ensure that local authorities are able to provide clean, safe water within their jurisdictions.

Where local authorities are concerned, the reality is that most of them are not collecting enough through monthly rates levied on residents and ratepayers to ensure the supply of continuous, clean water. An example is the Masvingo City Council which, in 2016, had to hand over residents and ratepayers to debt collectors in a bid to recover US$36 million in outstanding bills.[64] The situation was dire for the Masvingo City Council as most of its customers with outstanding bills were state entities like the Zimbabwe National Army (ZNA) owing US$10,1 million, the Zimbabwe Republic Police (ZRP) owing US$3,5 million and the Zimbabwe Prisons and Correctional Services (ZPCS) owing US$2,1 million in unpaid rates as of 31 May 2016. The residents of the city owed US$ 5.3 million in unpaid rates.[65] Recently, the City of Harare opted to give 50% discounts to any person who or entity that clears outstanding arrears in a bid to encourage payment of outstanding bills.[66] This comes at a time when the government, businesses and rate-payers jointly owe the local authority over $784 million in unpaid bills.[67]

These examples reflect the challenge of non-payment of rates which most local authorities around the country are forced to contend with. Even though the issue of discounts is fairly new, one is left to ponder on who will bridge the 50% gap of what is owed to the local authority to ensure that it has the financial resources to provide adequate services in its area of jurisdiction. Although the issue of non-payment of rates, which is an impediment to the provision of basic services, has been a thorn in local authorities' side for decades, the court in *Hopcik* erred in not considering it as a factor in the

61 L Muzondi 'Urbanization and Service Delivery Planning: Analysis of Water and Sanitation Management Systems in the City of Harare, Zimbabwe' (2014) Vol 5 (20) *Mediterranean Journal of Social Sciences* 2907.
62 As above.
63 VR Mangizvo and N Kapungu 'Urban domestic water crisis in Zimbabwe' (2010) Vol 12 (2) *Journal of Sustainable Development in Africa* 695.
64 'Masvingo mulls debt collectors to recover US$36million' *NewsDay* 8 July 2016 7.
65 As above.
66 50pc discount for city rate payers' *The Herald* 24 July 2018.
67 As above.

respondent's failure to provide clean water to its residents.

The court described the attitude of the respondents regarding the provision of safe, clean water to the residents as 'casual' and not having prioritised it. The court observed that it was not provided with an account of how the respondents have tried to overcome their challenges in the supply of potable water for the past 5 years.[68] This shows that despite the development of laws which declare and seek to protect fundamental rights, like the right to water, there continues to be inconsistencies in the actual realisation of these rights.[69]

4. Conclusion

The decision of the court in *Hopcik Investment (Pvt) Limited v Minister of Environment, Water and Climate and City of Harare* is applauded as it confirms that the State can and should be held accountable to its citizens for its failure to fulfil obligations under law. The court correctly pointed out that it was not provided with acceptable reasons as to why the respondents were failing to provide water to the applicant and others affected. However, an adequate reflection of what the term 'progressive realisation' in relation to the right to water would have given a solid basis for the court's ruling. Furthermore, the failure to interrogate the reasonableness of the amount of water requested by the applicants poses a threat of leaving litigants thinking whatever amount they put forward in court will be granted, completely negating concerns around quantity and quality in a water stressed Zimbabwe. The court also noted the issue of lack of capacity by the local authorities to carry out their mandate but did not suggest or recommend any solution. The court should have made an order compelling the Minister of Environment, Water and Climate to make certain that the City of Harare and other local authorities around the country are sufficiently empowered to carry out their functions to ensure the full realisation of the right to water

68 *Hopcik*(n5 above) para 15.
69 T Landman 'Measuring Human Rights: Principle, Practice, and Policy' (2004) 26 (4) *Human Rights Quarterly* 907.

Correctly decided for the wrong reasons: A critique of the *Njodzi v Matione* (HH 37-16)

R. Fambasayi [1]

1. Introduction

The High Court's decision in declaring the constitutional validity of a delictual *actio injuriarum* claim based on adultery in *Njodzi v Matione,*[2] was correct but for the wrong reasons. After carrying out a constitutional test, the Court concluded that inherent dignity and the right to privacy are not absolute rights in terms of the Constitution of Zimbabwe Amendment (No.20) Act (Constitution). With respect, the court's finding is flawed, particularly in light of section 86(3)(b) of the Constitution that entrenches the right to human dignity as an absolute, illimitable and non-derogable right. This case note seeks to illustrate that the court correctly pronounced its findings yet for the wrong reasons. Relevant constitutional principles, constitutional values and rights, are critically considered to ascertain the correctness or otherwise of the High Court's conclusion on the constitutionality of the delictual claim for adultery damages in Zimbabwe.[3] As a caveat, the contribution is an analysis of the judgment only, without insight of the written submissions filed by the parties.

2. Background facts, analysis and a critique

The matter came before Mwayera J in the form of action proceedings. Before the commencement of trial (at the hearing date), the matter turned into a constitutional challenge of the delictual *actio injuriarum* claim based on adultery damages. Adultery is consensual sexual intercourse between an adult male and female person, when at least one partner is lawfully married to another person in a civil marriage.[4] Njodzi was married in terms of the Marriage Act,[5] and the marriage was still subsisting at the time of going to court. Consequently, she had married into a monogamous marriage of one woman and one man in union for life, to the exclusion of all other persons, while it lasts.[6] Njodzi sued Matione who was allegedly engaged in an adulterous love affair with Njodzi's lawfully wedded husband, to which a child was born of the relationship.

On the trial date, Matione raised a constitutional objection to the claim of adultery damages, on the strength of sections 171(1)(c) and 175(6) of the Constitution which empowers the High Court to determine on constitutional issues. The finding of the High Court in constitutional matters is not final and definitive, unless confirmed by the Constitutional Court.[7] In the High Court, Matione argued that for Njodzi to sue her alone to the exclusion of the wayward husband, the architect of the extra-marital relationship,[8] amounted to discrimination infringing on her right to equal treatment before the law. Section 56(3) of the Constitution provides for equality and non-discrimination in the following terms:

> Every person has the right not to be treated in unfairly discriminatory manner on such grounds as their nationality, race, colour, tribe, place of birth, ethic or social origin, language, class, religious belief,

*Rongedzayi Fambasayi. LLB Hons (UZ), LLM, LLD Candidate (NWU).Lecturer, Herbert Chitepo Law School, Great Zimbabwe University.

2 HH 37-16.

3 For a general discussion of the laws of adultery in Zimbabwe, see SE Ndebele 'Damages for adultery: A legal misfit or a necessity?' (2018) 12 *Pretoria Student Law Review* 136-145.

4 F Burton (2015) *Family Law.* (2nd ed.) New York: Routledge. A civil marriage is one solemnised in terms of the Marriage Act (Chapter 5:11).

5 Chapter 5:11.

6 *Hyde v Hyde* (1866) L.R. 1 P & D 133. See also JD Sinclair *The Law of Marriage* (1996) 813.

7 Section 175(1) of the Constitution.

8 *Njodzi v Matione* (n1 above) 1.

political affiliation, opinion, custom, culture, sex, gender, marital status, age, pregnancy, disability or economic or social status, or whether they were born in or out wedlock.

Ostensibly, it is plausible that the grounds relied upon were marital status and social status.[9] The right to equality and non-discrimination is a relative right, subject to limitations in terms of section 86 of the Constitution. The equality argument was dismissed, with the Court noting that suing the adulterous husband as the co-defendant is tantamount to suing oneself.[10]

Secondly, it was argued that adultery claims infringe the right to privacy[11] and the freedom of association and assembly of the third party being sued.[12] As a result, it was contended that it violates the right to privacy by making the third party's sexual life of public scrutiny.[13] Further, the third party's constitutional right to associate with any man or woman (he or she sexually desired) is infringed, notwithstanding the lover's marital status. Clearly, this contention failed to comprehend that the right to privacy and the freedom of association are relative rights. A court seized with a constitutional issue is obliged in terms of section 86(2) of the Constitution to carry out a limitation test.[14] It is apparent from the judgement that the application was premised on alleged violations of fundamental rights, that is, the right to equality before the law, the right to privacy, freedom of association, and the right to dignity.

The innocent spouse argued in opposition that marriage is a constitutionally protected institution.[15] This point was correctly made in that the right to marry and found a family is a justiciable and fundamental right.[16] The right to marry and found a family is, of course, relative in nature. She contended that a delictual claim of adultery has its roots in the Roman-Dutch common law, and is a remedy available to protect the institution of marriage. The remedy is a pecuniary compensation available to the innocent spouse against the adulterer or adulteress for the loss of *consortium* and *contumelia*.[17] The Court was persuaded to conclude that adultery damages are a measure to protect the sanctity of the marriage institution.[18] Further, it was noted that adultery demeans the institution of marriage and threatens its very existence. This position was fortified by case law decided under the Lancaster House Constitution, 1980, a different constitutional human rights framework from the

9 *Njodzi v Matione* (n1 above) 9.
10 *Njodzi v Matione* (n1 above) 3.
11 Section57 of the Constitution provides that;
Every person has the right to privacy, which includes the right not to have—
(a) their home, premises or property entered without their permission;
(b) their person, home, premises or property searched;
(c) their possessions seized;
(d) the privacy of their communications infringed; or
(e) their health condition disclosed.
12 Section 58 of the Constitution provides that;
(1) Every person has the right to freedom of assembly and association, and the right not to assemble or associate with others.
(2) No person may be compelled to belong to an association or to attend ameeting or gathering.
13 Court proceedings are conducted in open court, accessible to newspapers reporters, social media fanatics, and also court judgments that are made available to the public.
14 For a general discussion, see I Currie & J de Waal *The Bill of Rights Handbook* 6th Ed(2013) 150-175; S Woolman, T Roux & M Bishop *Constitutional Law of South Africa: Student edition* (2007) 34. See also I Maja 'Limitation of human rights in international and the Zimbabwean Constitution' (2016) Vol 1 *Zimbabwe Electronic Law Review*, 1-12.
15 See section 26 of the Constitution.
16 Section 78 of the Constitution.
17 For the distinction between *consortium* and *contumelia*, see *Chinyadza* v *Phiri* HH76-09; *Raitewi v Venge* HH152-11; *Gombakomba* v *Bhudhiyo* HH118-06 and *Mahachi v Zimba* HH 315-17.
18 *Njodzi v Matione* (n1 above) 3. See also Tanyanyiwa vs Huchu 2014 (2) ZLR 758, HH668-14.

present. In *Katsimbe* v *Buyanga*,[19] Robinson J condemned adultery declaring that:

> I wish to say that, in my view, where a third party is shown to have intruded sexually upon a marriage and to have contributed to the breach of duty of marital fidelity which each spouse owes the other by committing adultery with one spouse, the courts, in the absence of mitigating circumstances should be seen, in their award of damages, to come down hard on the adulterer or adulteress as opposed to treating him or her with kid gloves for a variety of expedient reasons...Hopefully, we have not reached the stage where we have to be told adultery is not something to be eschewed and condemned.

Despite the admonition, there has been a shift in how adultery is viewed by society. This perspective is evident in a few cases that had the occasion to give fresh breath to adultery and societal liberality in this area of the law. In *Gwatidzo v Masukusa,*[20] Chinhengo J noted that the awards have tended to diminish as a sign of the change in attitude and views towards adultery, and further stated that:

> The delict of adultery is no longer as momentous as it used to be in the olden days… The reality today is that society has adopted very liberal views towards the delict of adultery. And for the African man or woman whose cultural views are determined to a large extent by the culture and prevalence of polygamous marriages, the delict is that much more liberally viewed.

Sadly, the *Gwatidzo v Masukusa* case was never analysed or discussed in the *Njodzi v Matione* case. The failure to evaluate the relevance of this case is fatal, and may be attributed to the failure of counsel of both parties to bring to the attention of the court this important decision.

Further, the Court declared that adultery is still part of Zimbabwe's statutory law, particularly in relation to divorce and maintenance proceedings. However, it erred in proclaiming that adultery is a ground for divorce, thereby taking the view that it would be a contradiction to decide that the delictual claim for adultery damages is irrelevant.[21]

Section 4 of the Matrimonial Causes Act sets only two grounds for divorce, namely; irretrievable breakdown of a marriage and incurable mental illness or continuous unconsciousness. The fault principle is no longer part of the current divorce law.[22] Adultery is merely a guideline or factor used in determining whether a marriage has irretrievably broken down. To be considered as a factor constituting irretrievable breakdown, the adultery will have to be incompatible with the continuation of a normal marriage relationship.[23] Accordingly, the Court failed to distinguish an adultery claim with personal consequence upon a third party and adultery as a guiding factor to prove a ground for divorce. In the former scenario, a third party's fundamental rights may be infringed or violated, and in the latter it does not involve third parties, it is between the two parties to a *sui generis* marriage contract. It is suggested that it is possible – not a contradiction – to declare a delictual claim for adultery damages unconstitutional yet retaining adultery as one of the guidelines to determine and prove that a marriage has irretrievably broken down. One may also adopt the argument that a strong ground for the adultery claims to be declared unconstitutional exists given that there is a statutory remedy for divorce when adultery has been committed.

Furthermore, the Court considered the incorporation of adultery in maintenance laws as a reflection

19 1991 (2) ZLR 256 (H) 258-259.
20 2000 (2) ZLR 410, 421B-F.
21 *Njodzi v Matione* (n1 above) 5.
22 See W. Ncube *Family Law in Zimbabwe* (1989) 210.
23 Section 5(2)(b) of the Matrimonial Causes Act (Chapter 5:13).

of the legislature's attitude towards adultery. A maintenance court is empowered, in terms of section 10 of the Maintenance Act,[24] not to grant a maintenance order or to discharge an order of maintenance on the grounds of adultery, unless the adulterous spouse has been condoned. With respect, the refusal of spousal maintenance or discharge of an existing maintenance order on the basis of an adultery that has not been condoned offends section 26(c) and (d) of the Constitution. The constitutional provision confers equality of rights and obligations of spouses, and guarantees protection of the rights of spouses during or at the dissolution of a marriage. There cannot be a justifiable exception, in the name of an adultery committed, to the constitutional protection and guarantees. In other words, section 10 of the Maintenance Act is not constitutionally aligned. The Court concluded, without considering the provisions of section 26 of the Constitution, that 'for all intents and purposes the legislature condemns adultery'.[25] This legislative intent is inconsistent with the constitutional rights and freedoms enshrined in the Constitution. It is submitted, therefore, that the reasoning of the court was, in that respect, flawed.

The constitutional challenge was premised on an alleged violation of fundamental constitutional rights. Given the peculiarity of the matter, the applicant relied heavily upon foreign jurisprudence. However, the Court was not persuaded. In addressing the relevance of foreign law, the central question posed by the Court was 'whether in the Zimbabwean context the foreign decisions were applicable'? It is submitted that the appropriate crucial question revolves around the limitation of the alleged fundamental human rights, not the applicability of foreign decisions. It is common-place that foreign law is of a persuasive value and not binding upon Zimbabwe. Justifiably, section 46(1)(e) of the Constitution provides that a court may consider relevant foreign law when interpreting the Declaration of Rights. The use of the term 'may' leaves no doubt that reliance on foreign law is discretionary not peremptory.

More to it, it is axiomatic that the Court's conclusion was predicated upon 'public policy'.[26] By characterisation, 'public policy' is a reflection of, or represents the legal convictions of, or the values held dearest by or in a given community. It is considered as the concept of making policy conclusions and value decisions based on the wishes, often unspoken, and the perceptions, often but dimly discerned, of the people.[27] Ackermann argues that in constitutional adjudication the expression 'public policy' is loosely and incorrectly used, instead of rather adopting a constitutional policy.[28] Citing *Mapuranga* v *Mungate*[29] in which Malaba J (as he then was) remarked that public opinion prohibits adultery as an act of sexual incontinence, the Court fortified its position that public policy views adultery as unacceptable and a threat to the marriage institution.[30]

In the Court's view, section 3 of the Constitution entrenches constitutional founding values and principles which formulate the moral fabric based on culture, religion and traditional values.[31]

24 Chapter 5:09.
25 *Njodzi v Matione* (n1 above) 5.
26 *Njodzi v Matione* (n1 above) 6, 9 and 11.
27 *Carmichele v The Minister of Safety and Security and the Minister of Justice and Constitutional Development* 2001 (4) SA 938 (CC) 56. It takes into account the interests of parties and the conflicting interests of the community according to what the court conceives to be society's notions of what justice demands.
28 L Ackermann *Human Dignity: Lodestar for Equality in South Africa* (2014) 288-289.
29 1997 (1) ZLR 64.
30 *Njodzi v Matione* (n1 above) 7.
31 *Njodzi v Matione* (n1 above) 7.

Consequently, without considering the diverse multi-culture systems, religious affiliation and traditional orientation, the Court based its decision on the assumption that culture, religion and tradition frowns upon adultery. Other constitutional values and constitutional principles such as the supremacy of the Constitution,[32] fundamental human rights and freedoms,[33] inherent dignity and worth of each person[34] and equality of all human beings,[35] were marginalised in the determination.

As a matter of principle, in constitutional adjudication the interpretation and limitation of the justiciable rights in the Declaration of Rights should be guided by the limitation clause. It is suggested that constitutional adjudication based on public policy could never do justice to a multiplicity and multi-dimensional society such as Zimbabwe. However, should one persist with the public policy argument, there has to be a clear distinction between pre-2013 public policy and one that is based on the 2013 Constitution, due to their fundamental differences.[36] In this regard, Ackermann proposed the adoption of a constitutional policy informed by a constitutional framework of human rights.

In addition, the test to use in constitutional adjudication is whether or not the rights allegedly infringed are limitable, and the basis of the limitations thereof. Without undertaking a limitation and proportionality test, a court would do an injustice to constitutional adjudication. The right to privacy, freedom of association and the right to equality before the law are relative rights, limitable in terms of section 86(2)(b) of the Constitution, which reads:

> *The fundamental rights and freedoms set out in this chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity equality and freedom, taking into account all relevant factors including – the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;*

Except for quoting the relevant constitutional limitation provision, no analysis was made by the Court to show that the limitation of the rights allegedly infringed by a claim for adultery damages was in line with section 86(2). The limitation clause is value-laden, yet to receive judicial interpretation in Zimbabwe.

The limitation of the alleged rights is only in terms of a law of general application. It is noted that the term 'law' includes common law, legislation and customary law.[37] In the instance, a claim for adultery damages is a common law principle. The Court could have found a limitation based on this point, as read with other factors. To comply with the 'all-purpose criteria', the limitation has to be fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom.[38] How a courts determine the fairness, reasonableness, necessity and justification, serves a single purpose of applying the proportionality principle. In doing so, a court takes into account relevant factors such as the purpose of the limitation. If there is no purpose that

32 Section 3(1)(a) of the Constitution.
33 Section 3(1)(c) of the Constitution.
34 Section 3(1)(e) of the Constitution.
35 Section 3(1)(f) of the Constitution.
36 A detailed discussion on the constitutionally founded *boni mores* criterion, see F Du Toit 'The Constitutionally bound dead hand? The impact of the constitutional rights and principles on freedom of testation' (2001) 12 *Stellenbosch Law Review* 222.
37 IM Rautenbach & EFJ Malherbe *Constitutional Law* (2003) 318. See also *Shabalala v Attorney General of the Transvaal* 1996 (1) SA 725 (CC); *Hoffmann v South African Airways* 2001 1 SA (CC) 41 and *Barkhuizen v Napier* 2007 5 SA 323 (CC) 26.
38 Section86(2)(b) of the Constitution.

exists, the limitation becomes unconstitutional and invalid.[39] In the final analysis, *in casu*, the interests and protection of public morality justify the limitation of alleged rights. The High Court proceeded to declare that adultery damages are constitutional without undertaking a balancing exercise as is required by the limitation clause, and without a discussion of the justifiability of the limitation to the rights allegedly infringed.

Further, the right to human dignity was cited in the judgement. As such, it is pertinent to make a short comment. Human dignity is a central value and an indispensable normative value system[40] in developing constitutional jurisprudence based on human rights.[41] In Zimbabwe, the right to human dignity is an absolute right.[42] Human dignity is also a constitutional value.[43] The South African Constitutional Court pointed out that when balancing rights under the limitations clause, one must ask how the central constitutional value of human dignity is affected.[44] In *DE v RH,*[45] the right to dignity was used to assess and confirm the ruling of the Supreme Court in *RH v DE*[46] outlawing adultery damages in South Africa.[47] It is worth noting that the right to human dignity in South Africa is a relative right, and thus its contextual application is different from its framing in the Zimbabwean context. Therefore the approach taken by the High Court is devoid of this balancing exercise, except for weighing whose dignity is preferably important, between the third party and the innocent spouse. It is submitted that this approach is subject to criticism.

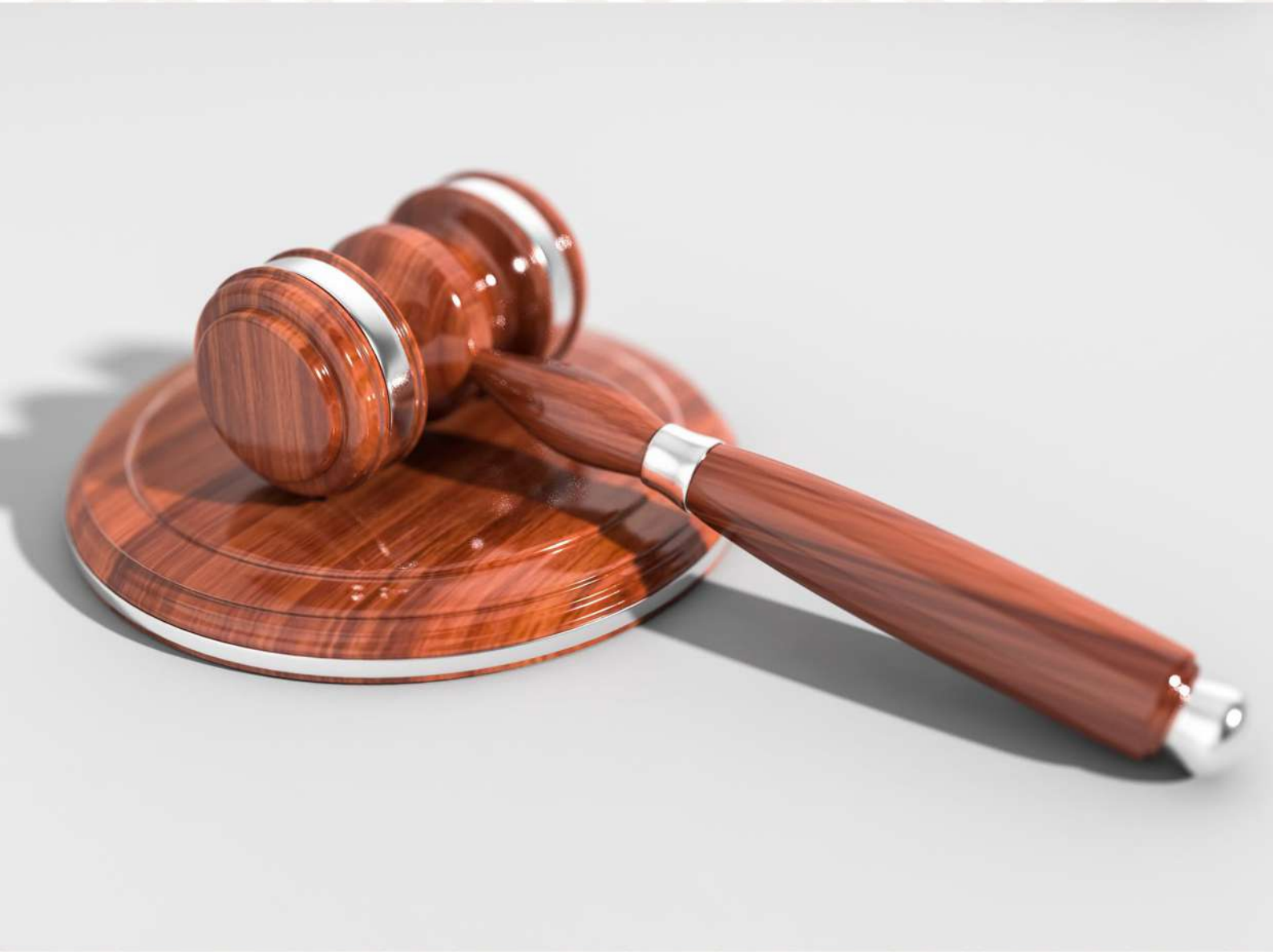
3. Conclusion

In conclusion, the High Court correctly ruled that there is nothing unconstitutional about claims based on adultery damages. This case note has argued that, in as much as the ruling was correct, the approach adopted to come to the finding was faulty. The interpretation of section 86(2) of the Constitution is the guiding constitutional provision in determining the constitutionality of any law or conduct. It has been noted that the Court erred in relying on adultery as a ground for divorce, yet adultery is simply one of the many guiding factors to prove that a marriage has irretrievably breakdown. Further, the consequences of adultery in the maintenance laws is inconsistent with section 26(c) and (d) of the Constitution. Given that there are other judgements such as the *Gwatidzo v Masukusa* case giving fresh breath to the issue of adultery and society's liberal approach to it, the *Njodzi v Matione* case seems to have disregarded the changing nature of the law and its application to a changing society.

Courts are enjoined, in constitutional adjudication, to give content to the limitation clause embedded in section 86(2) of the Constitution. Determining constitutional issues based on public policy amounts to adopting a blanket prohibition thereby failing the ultimate agenda of the constitutional policy. Some of the rights mentioned as having been allegedly infringed in this case are limitable by law of

39 IM Rautenbach & EFJ Malherbe (n35 above) 322.
40 Currie & de Waal (n12 above) 250.
41 L Ackermann (n26 above) 288. See *S v Makwanyane* 1995 (3) SA 391 (CC); *Carmichele v Minister of Safety and Security* (n 25 above).
42 Section 86(3) of the Constitution provides that no law may limit and no person may lawfully violate the right to human dignity.
43 See section 3 of the Constitution.
44 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 15.
45 2015 (5) SA 83 (CC).
46 2014 (6) SA 436 (SCA).
47 In May 2018, a similar approach to outlaw adultery damages was adopted in Botswana. In *Kgaje v Mhotsha* CVHFT-237-17 the Francistown High Court declared adultery damages as unconstitutional.

general application and to the extent that the said limitation is reasonable, necessary and justified for the purpose of and in the interests of public morality. Thus, it is plausible to argue that the decision of the court was correctly decided for the wrong reasons.



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editormsulr@staff.msu.ac.zw www.msu.ac.zw