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A Positive Step Towards Ending Child Marriages: A Review of the *Loveness Mudzuru & Anor vs Minister of Justice, Legal & Parliamentary Affairs N.O & Others Case*

Blessing Mushohwe*

1. Introduction

On the 20th of January 2016, the Zimbabwean Constitutional Court handed down a crucial landmark judgement on an issue that had for long remained unsolved in the fight against child sexual abuse. It outlawed child marriages in the long drawn case of Loveness Mudzuru & Ruvimbo Tsopodzi vs Minister of Justice, Legal & Parliamentary Affairs N.O; Minister of Women's Affairs, Gender & Community Development & Attorney General of Zimbabwe, (hereafter known as the Mudzuru & Tsopodzi case). On this day, Deputy Chief Justice Luke Malaba sitting with a full Constitutional Court bench ruled that any marriage between a man and a woman where one of them is below the age of 18 years is unconstitutional therefore illegal in Zimbabwe. This being a Constitutional Court judgement, it immediately effectively repealed sections of the Marriage Act[1] that allowed for a girl of 16 years and above to get married. It also in effect inserted an age limit of 18 years and above for marriage into the Customary Marriage Act[2] which was silent on the age of marriage and was thus allowing marriage at any age. Even though the judgement affects both boys and girls, as was expected, it was widely celebrated as a victory for the girl child since the issue of child sexual abuse and indeed child marriages in Zimbabwe is a gendered issue that almost affects girls only. The judgement therefore stands out as a landmark ruling that brought to an end an undesirable dark era where child sexual abuse and exploitation was being perpetrated and promoted under the guise of marriage.

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[1] [*Chapter 5:11*].

[2] [*Chapter 5:07*].

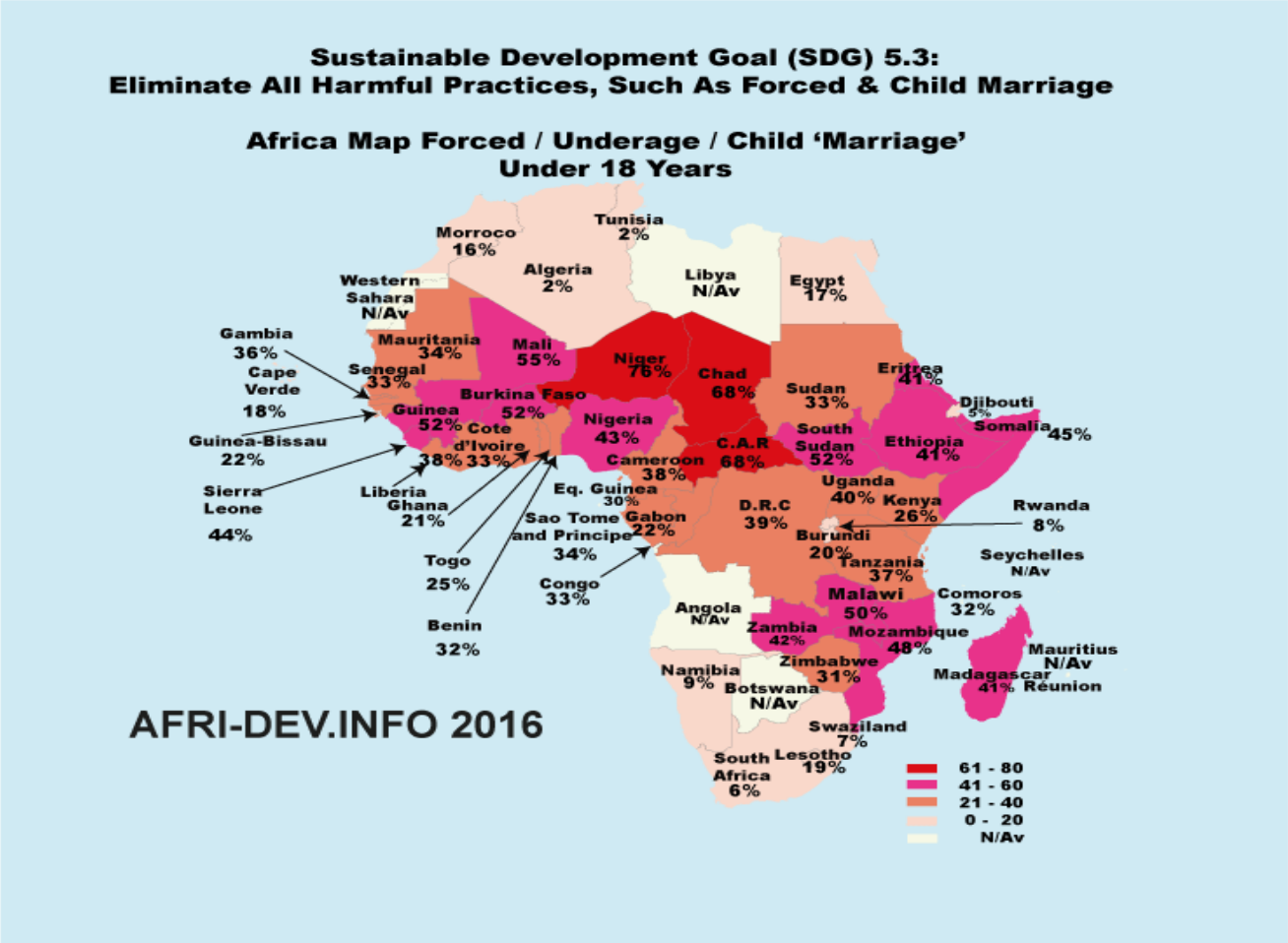
This article reviews the judgement with a view to unpack how it affects the socio-legal landscape of Zimbabwe. The review begins with an overview of the issue of child marriages in Zimbabwe and globally. The cumulative events that built up to the judgement are explored next, followed by an overview of the facts of the case. Further, an analysis is conducted of the critical issues dealt with in the judgement, highlighting the important legal aspects raised and dealt with and how they are going to affect the Zimbabwean society. The review ends with insights on the work ahead for the various stakeholders as regards the actual practical implementation of the judgement so that child marriages are effectively ended for good.

1. Background to Child Marriages Globally and in Zimbabwe

Child marriage is the entering into a marriage union between two people, one of whom is below the age of 18 years. The age of 18 is the benchmark age for the definition of a child according to the s 81(1) of the Constitution of Zimbabwe[3]; Article 2 of the African Charter on the Rights and Welfare of Children (hereafter referred to as the ACRWC)[4] and Article 1 of the Convention on the Rights of the Child (hereafter referred to as the CRC)[5]. According to an African Union communiqué in 2014 while launching its campaign on ending child marriages, *"Every year, about 14 million adolescent and teen girls are married, almost always forced into the arrangement by their parents"*.[6] UNICEF further states that more than 700 million women alive today were married before their 18th birthday and more than one in three (about 250 million) entered into the union before age 15.[7] Child marriages statistics, particularly in Africa are at times alarmingly high as shown by the child marriages map below.

[3] Constitution of Zimbabwe (Amendment No 20) Act of 2013.
[4] Entered into force on 29 Nov 1999. Ratified by Zimbabwe on the 19th of January 1995.
[5] Adopted by General Assembly Resolution 44/25 of 20 Nov 1989. Ratified by Zimbabwe on the 11th of September 1990. The CRC, however, sadly leaves room for domestic legislation to set an earlier age of attaining majority status. This is undesirable as it opens up opportunities for State parties to promote violation of various children's rights by simply lowering the age of majority in the particular country. The ACRWC notably and commendably does not allow for any such deviations by State parties from the set age of 18 years.
[6] African Union Communiqué titled *'Campaign To End Child Marriage In Africa: Call To Action'* on the continental launch of the African Union Campaign to End Child Marriage in Africa, 29 May 2014, African Union Commission Headquarters, Addis Ababa, Ethiopia.
[7] United Nations Children's Fund, *'Ending Child Marriage: Progress and Prospects'*, (2014), UNICEF, New York.

Figure 1: Child Marriage Prevalence across Africa[8]

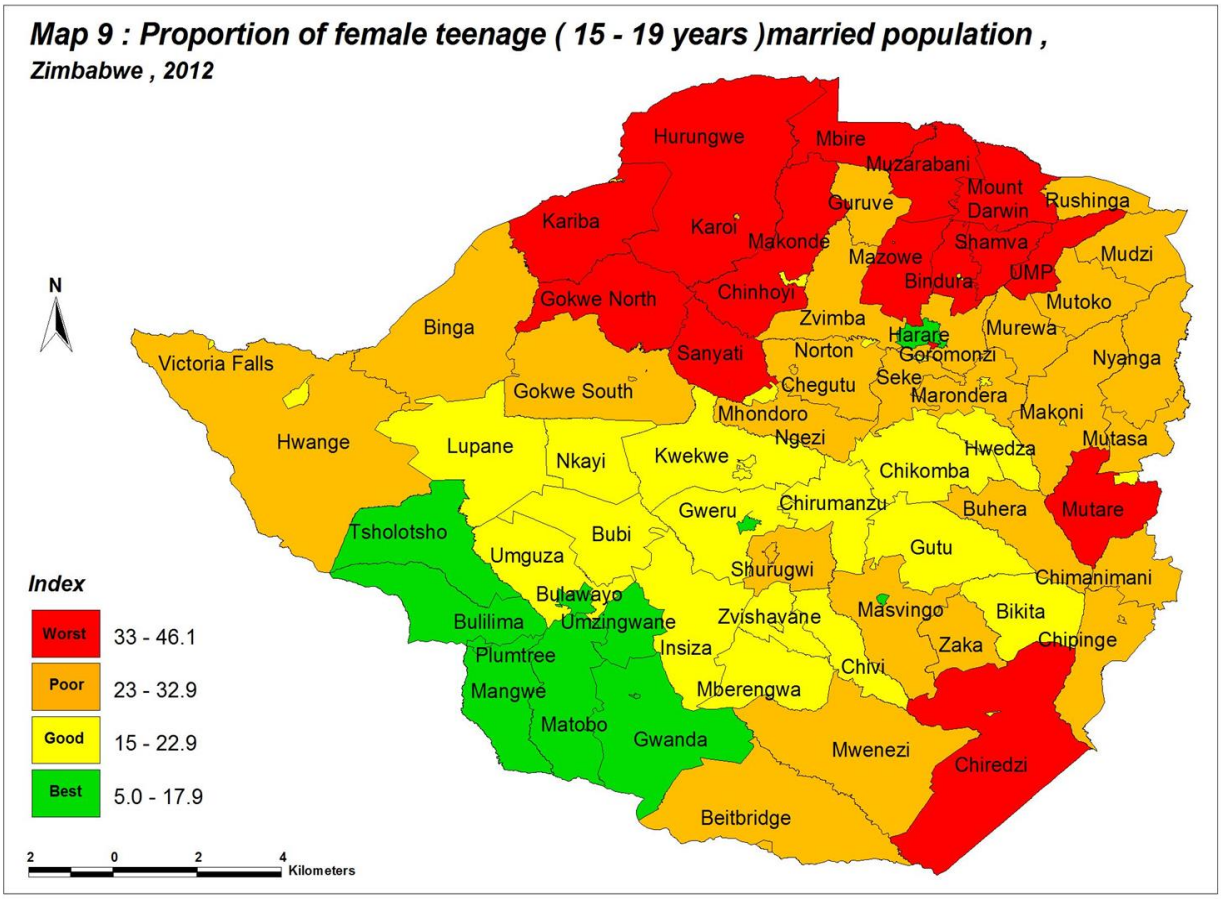


According to the Zimbabwe Multiple Indicator Cluster Survey (MICS) Report of 2014, child marriages in the country as of 2014 stood at 32.8%.[9] This translates to about one in three women and less than 1 in 20 (3.7 %) of men aged 20-49 who were first married or in union before age of 18 years. The Report further states that young people aged 15-19 years currently married or in union were 24.5% and 1.7% for women and men, respectively. Some Districts in Zimbabwe are, however, worse off on child marriages than others as shown in the District map below.

[8]Map derived from the Afri-Dev.Info 2016 Report, *'Multisectoral Information. Data, Research & Evidence for Health, Population, Human & Sustainable Development'*.

[9] Zimbabwe National Statistics Agency (ZIMSTAT), *'Multiple Indicator Cluster Survey 2014: Key Findings Report'*, (2014), Zimbabwe, p35-36.

Figure 2: District Prevalence Mapping of Teenage (Child) Marriages in Zimbabwe[10]



While the 32.8% national prevalence may sound meagre as compared to other countries such as Niger (76%), Malawi (50%) and Mozambique (48%) among others, the percentage is still disturbingly high, particularly considering the fact that it is essentially representing sexual abuse and exploitation of children which should not be tolerated at all, not even when the prevalence rate is relatively low.

Prior to the *Mudzuru & Tsopodzi* case under review, the issue of child marriages had never reached the courts as a subject nor had it been properly dealt with by the legislature. Two important pieces of law however, need mention as far as they seemed to entrench the practice of child marriages in Zimbabwe. First is the Marriage Act[11] which only prohibited

[10] UNICEF and Zimbabwe National Statistics Agency, *'Descriptive Child and Youth Atlas: Zimbabwe: A District and Ward Analysis of Social Determinants'*, (2015), Zimbabwe, p25,
[11] Note 2 above.

marriage of girls below the age of 16 meaning that between 16-18 years, a girl child could be married. Section 22(1) of the Act stated that: *"No boy under the age of eighteen years and no girl under the age of sixteen years shall be capable of contracting a valid marriage except with the written permission of the Minister, which he may grant in any particular case in which he considers such marriage desirable:…".* With this, in an absurd discriminatory manner, the law in Zimbabwe effectively allowed marriage of girls (children) when they reach the age of 16 years, despite the fact that they are still considered children below 18 years. As if this was not enough, the same clause still allowed even those children below the age of 16 years to be married provided the consent of the responsible Minister of Home Affairs has been granted, thus effectively entirely removing an age limit for marriages in the country. The age limit of 16 years for marriage in the Act was possibly in alignment with various laws on children existing in Zimbabwe then that defined a child as a person under the of 16 years.[12]

The Customary Marriage Act[13] which regulates customary marriages in Zimbabwe, on the other hand, simply did not have an age limit for customary marriages. Such silence meant that marriage of children could be allowed under customary law, including for those below the age of 16 years. The only limit would seemingly only come through criminal law that considers any sexual act with a child below the age of 12 years to be rape.[14] Section 64(1) states that both girls and boys less than 12 years are irrefutably presumed to be incapable of consenting to sexual intercourse or act of any type while s 65 defines this as rape. With sexual intercourse being a material component of a marriage, criminal law effectively made the marriage of girls below 12 years illegal. For those between 12-16 years, the Criminal Law Code makes such sexual intercourse an offence but *albeit*, a very light offence popularly known as Statutory Rape.[15]

The above therefore meant that children, at least above 12 and below 16 years could be married in Zimbabwe prior to the *Mudzuru & Tsopodzi* case, with the Minister's consent as dictated by the Marriage Act or at the risk of a Statutory Rape crime which attracted a very

[12] Section 2 of the Child Abduction Act [*Chapter 5:05*] and section 2 of the Children's Act [*Chapter 5:06*] among others.
[13] Note 3 above.
[14] Criminal Law (Codification and Reform) Act *[Chapter 9:23]* (hereafter known as the Criminal Law Code).
[15] Section 70 of the Criminal Law Code.

lenient sentence of usually a fine or community service and still allowing the perpetrator to marry the child which again could be considered a mitigatory factor in sentencing. This of-course would only happen where a case had been reported to the Police, which wasn't the case with many cases especially in the rural areas where acceptance of committing the sexual act and agreeing either to marry the child and/or to pay bride-price would be considered as a first preferred alternative before involving the Police.

Besides the above laws that seemed to perpetuate child marriages, the lone piece of legislation that could be used to prosecute child marriages was the Domestic Violence Act which in section 3(1)(I) defines child marriage as one of the abusive, discriminatory or degrading practices on women derived from cultural or customary rites or practices.[16] Section 4 of the same Act prescribes a sentence of a fine or imprisonment for a period not exceeding ten years for such. While this was possible, the litigation was possibly going to meet the same challenge of defining a child, which according to Acts mentioned earlier, prior to the new Constitution of 2013, would have been a person below 16 years of age. Thus using the Domestic Violence Act, a gap would still have remained for those above 16 but below 18 years. Again, all this would similarly have required a Police report first, which as discussed earlier, was normally overshadowed by family negotiations.

In brief, the child marriages story of Zimbabwe prior to the *Mudzuru & Tsopodzi* case was therefore that some laws seemed to encourage it either expressly or by omission while others prohibited it but lacking adequate substantive details of the crime, thereby discouraging any possible litigation thereto. Scope at law for challenging child marriages was therefore very limited. As such, the most that had been done on child marriages prior to the landmark judgement was from advocacy groups that have for long been calling for the end to the atrocious act of marrying children, which they rightfully described as sexual abuse and exploitation.

2. The Case and Events Building Up to the Judgement

The long drawn constitutional challenge on child marriages in Zimbabwe in the *Mudzuru & Tsopodzi* case started in October 2014. As summarised in the judgement, the two applicants

[16] [*Chapter 5:16*].

were young women aged 19 and 18 years respectively who approached the Constitutional Court in terms of s 85(1) of the Constitution of Zimbabwe.[17] Their case was basically that the fundamental rights of girl children were being infringed upon through the subjecting of girls to early marriages which is also sometimes known as child marriages. While the Respondents to the case opposed the submissions of the Applicants, the points raised will not be repeated but will be canvassed below as part of the analysis of the judgement, which mainly centre on the Respondents' opposition. It should however, be noted here that while there may have been a temptation for the Respondents not to oppose, particularly considering the clear blatant sexual exploitation inherent in child marriages, it is commendable that they opposed. It is their points in opposition that allowed the expansive and elaborate response from the Judge, which is now being celebrated as enriching to domestic jurisprudence on child rights and indeed as having shed light on some otherwise ambiguous and grey provisions of the Constitution of Zimbabwe.

From the Applicants' and the Respondents' submissions, the Court determined that four (4) issues for determination were apparent as follows:

(1) Whether or not the applicants have, on the facts, *locus standi* under s 85(1) (a) or s 85(1)(d) of the Constitution to institute the proceedings claiming the relief they seek.

(2) If they are found to have standing before the Court, does s 78(1) of the Constitution set the age of eighteen years as the minimum age for marriage in Zimbabwe.

(3) If the answer to issue No. 2 is in the affirmative; did the coming into force of ss 78(1) and 81(1) of the Constitution on 22 May 2013 render invalid s 22(1) of the Marriage Act [*Chapter 5:05*] and any other law authorising a girl who has attained the age of sixteen to marry.

(4) If the answer to issue No. 3 is in the affirmative; what is the appropriate relief to be granted by the Court in the exercise of the wide discretion conferred on it under s 85(1) of the Constitution.

These issues are discussed in the analysis below.

[17] The Applicants were represented by Mr Tendai Biti. His thorough canvassing of issues and presentation is commended as his arguments constituted most of the DCJ's reasoning and ruling.

During the period immediately prior to the beginning of the Constitutional Court challenge in October 2014 up to the delivering of judgement on the 20th of January 2016, a number of critical and complimentary events related to child marriages occurred. First were the launch of the African Union Campaign to End Child Marriages in May 2014 and the subsequent adoption of the African Common Position on the AU Campaign to End Child Marriages in Africa in July 2015[18]. At the same time in July 2015, the UN Human Rights Council also unanimously adopted a resolution on ending child marriages. Earlier in August 2014, the Zimbabwe Multiple Indicator Cluster Survey (MICS) Report[19] had been released with results showing an increase in child marriages in Zimbabwe. Next was the Motion in the Zimbabwean Parliament to end child marriages in January 2015;[20] followed by the meeting of the SADC Parliamentary Forum in Johannesburg in February 2015 and the subsequent drafting of the SADC Model Law on Child Marriages in August 2015.[21] More importantly however, was Zimbabwe's adoption of and launch of the AU campaign to end child marriages on the 31st of July 2015 which officially confirmed government's willingness to end child marriages in the country.[22] The collective result either directly or indirectly was the Constitutional Court ruling in the *Mudzuru & Tsopodzi* case declaring that child marriages are unconstitutional and therefore unlawful in Zimbabwe. This became a much celebrated landmark judgement in child rights, law and jurisprudence and indeed a deserved victory for those in the child rights sector who are engaged in an enduring fight against sexual abuse and exploitation of children in Zimbabwe.

3. Critical Review and Analysis of the Judgement

As expected, the judgement drew a lot of media attention, with various analyses of the judgement being proffered and published in the local media in the period following the

[18] Note 7. See also the adopted African Common Position on the AU Campaign to End Child Marriage in Africa, 06 July 2015.
[19] Zimbabwe National Statistics Agency (ZIMSTAT), *'Multiple Indicator Cluster Survey 2014: Key Findings Report'*, (2014), Zimbabwe, p35-36.
[20]Parliament of Zimbabwe, Votes and Proceedings of the National Assembly, Second Session–Eighth Parliament, 28th January, 2015.
[21] *'Moves to stop child marriages'*, Newsday, 02 February, 2015; *'SADC child model law takes form'*, Newsday, 17 August, 2015.
[22] '*Launch of AU campaign on ending child marriages in Zimbabwe'*, Zimbabwe Broadcasting Corporation, 31 July 2015.

ruling.[23] However, for academic purposes, an academic analysis is proffered in this paper.

The 56 page judgement delivered by DCJ Malaba impressively unpacks and interprets the Constitutional law of Zimbabwe as regards marriage law and indeed the concept of a child in relation to marriages.

3.1. *Locus Standi*

The Respondents in their opposing papers had alleged that the Applicants had no right to approach the court *(had no locus standi)* because:

1. They had not alleged that their own rights as individuals had been infringed by child marriages since none of them had alleged that they entered into any marriage (civil or customary) with the man that made them pregnant; and
2. They had not satisfied the provision of acting in the public interest because they had not given any names of children whose fundamental rights had been infringed through the alleged child marriages and on whose behalf the Applicants purported to act.

This contention by the Respondents became crucial in the *Mudzuru & Tsopodzi* case as it afforded the court the opportunity to reflect on the issue of *locus standi* and public interest litigation.

Locus standi is a Latin word that means 'a place to stand'. In law, it means the right to bring an action or to challenge some decision, to be heard in court, or to address the Court on a matter before it.[24] It is the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case.[25] *Locus standi* on enforcement of fundamental human rights and freedoms is dealt with in s 85(1) of the Constitution of Zimbabwe. The DCJ commendably

[23] *'Thoughts on the Constitutional Court Landmark Judgement on Child Marriages'*, AlexMagaisa.Com, 21 January 2016; *'A Key Step to Ending Child Marriages'*, Sunday Mail, 24 January 2016; *'A Note on the Child Marriage Judgement'*, Prepared by Derek Matyszak, Senior Researcher, Research and Advocacy Unit, January 2016.

[24] J Law & E.A Martin, Oxford Dictionary of Law: Seventh Edition, (2009), p333.

[25] 'Locus Standi Law & Legal Definition', http://definitions.uslegal.com/l/locus-standi/.

took the opportunity to elaborate on 2 grounds of *locus standi* as stated in s 85(1)(a) and (d).

In explaining the first ground for *locus standi*, the DCJ quoted the Chief Justice Chidyausiku who in *Mawarire v Mugabe NO and Others*[26] stated that:

> *"Certainly this Court does not expect to appear before it only those who are dripping with the blood of the actual infringement of their rights or those who are shivering incoherently with the fear of the impending threat which has actually engulfed them. This Court will entertain even those who calmly perceive a looming infringement and issue a declaration or appropriate order to stave the threat, more so under the liberal post-2009 requirements."*

The principle highlighted here and being commendably confirmed in the *Mudzuru & Tsopodzi* case is that *locus standi* is not only satisfied when one has already been a victim of an infringement. Contrary to the suggestions of the Respondents, the Applicants in the child marriage case or in any other case need not prove actual victimhood and certainly need not wait for an infringement to occur first before they can approach the court. A perceived threat of an infringement can entitle them to approach the court. While this was simply confirmation of an already established principle from *Mawarire*, the confirmation is crucial in that it cements the general acceptance of the principle and indeed shows consistency of the court in following its own previous pronouncements on crucial principles, as is required by rules of judicial precedent.

The DCJ went on to discuss the opposition of *locus standi* based on s 85(1)(d) which relates to acting in the public interest. As a definition, according to Budlender, *"Public interest law focuses on the wider public interest rather than the more private interests of a particular individual, and to this extent, it represents an approach which is different from traditional legal aid programmes"*.[27] He further explains that public interest litigation thus is an attempt to produce a legal decision which will affect the conditions and circumstances of a whole class or group.

[26] CCZ 1/2013 at p8.
[27] G Budlender, 'On Practising Law' in H Corder (Ed) *Essays on Law and Social Justice* (1988), p322.

While correctly noting the erroneous interpretation proffered by the Respondents, the DCJ argues that s 85(1) in its entirety must be accorded a liberal, broad and generous interpretation rather than the narrow traditional conception of *locus standi*. In this regard, he aptly states that, *"The object is to overcome the formal defects in the legal system so as to guarantee real and substantial justice to the masses, particularly the poor, marginalised and deprived sections of society."* This critical view by the DCJ is supported by Cote & Van Garderen, who while commenting on s 38 of the South African Constitution[28] (which is similar to s 85(1) of the Constitution of Zimbabwe) said,

> *"This clause has expanded the traditional law of locus standi by a considerable amount. No longer must the person who was directly affected by the unlawful action find the resources to bring a matter to court. This provision allows for a number of parties, particularly those with far more resources than the average person, to bring such an application."*[29]

The reference made by the DCJ to '*justice to the masses, particularly the poor, marginalised and deprived sections of society*' is particularly important to child rights law especially considering the disempowered and vulnerable status of children in society who for various obvious reasons, cannot normally stand up for their own rights. In this regard, the DCJ rightfully describe children as falling *"into the category of weak and vulnerable persons in society."*

The endorsement of public interest litigation in such matters affecting vulnerable and poor masses allows even for institutional applicants to bring matters in the public interest for social justice of the less privileged or those that cannot afford the usually high costs of litigation. Even more welcome is the DCJ's insistence on keeping *'concepts such as "public interest" broad and flexible to develop in line with changing times and social conditions*

[28] Act 108 of 1996.

[29] D Cote & J Van Garderen, 'Challenges to public interest litigation in South Africa: External and internal challenges to determining the public interest', (2011) Vol 27, *South African Journal for Human Rights*, p171. See also J Brickhill & M DuPlessis, 'Two's company, three's a crowd: Public interest intervention in investor-state arbitration (Piero Foresti v South Africa), (2011) Vol 27 *South African Journal for Human Rights*, p152 where they state that *"Our courts are increasingly recognising that certain matters cannot be resolved simply as disputes between the parties, but must necessarily involve the perspectives and voices of organisations or entities that may not have a direct legal interest in the matter in the traditional sense, often asserting (their conceptions of) the public interest."*

reflective of community attitudes". Indeed with this clarity on public interest litigation, the country will most likely witness an increase in such cases even beyond the realm of child rights, particularly in the socio-economic rights front, especially from NGOs. This has been and still is the case in South Africa.[30] Matyszak therefore aptly sums up the commendable elaboration on *locus standi* by the DCJ by stating that, *"It is also to be celebrated that the judgment eschews its erstwhile, stifling and restrictive approach to "locus standi" and now allows an individual to approach the court to enforce the rights of the public at large, even where the individual has no self-interest in the matter."*[31]

Still on *locus standi*, the DCJ also makes a critical observation-*cum*-reminder that *"constitutional invalidity of existing legislation takes place immediately the constitutional provision with which it is inconsistent comes into force."* As noted by Magaisa, while the much talked about realignment of the law with the Constitution is crucial, there is no need for waiting for the process to complete for one to hold an offensive provision invalid.[32] Similarly, one need not wait for the Constitutional Court to pronounce constitutional invalidity of a provision in domestic legislation, as was the case in the child marriages case under review. Where the Constitutional provision is clear and requiring no further interpretation or clarity, the apparent inconsistent provision in the domestic law becomes automatically invalid from the date the Constitution or the particular Constitutional provision came into effect.

3.2. Reading of International Law into Zimbabwean Cases

Another much celebrated positive of the *Mudzuru & Tsopodzi* case is the expansive reference by the DCJ to international law in the form of international treaties and conventions as they relate to the issue of child rights and child marriages. In its attempt to interpret s 78(1) as read with s 81(1) of the Constitution of Zimbabwe, the court resorted to

[30] Cases such as the *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC); *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC); *Leon Joseph v City of Johannesburg* 2010 (4) SA 55 (CC); *Treatment Action Campaign v Minister of Health* (No 2) 2002 (5) SA 721 (CC)); *President of the Republic of South Africa v Modderklip Boerdery* (Pty) Ltd 2005 (5) SA 3 (CC); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC); *Occupiers of 51 Olivia Road v City of Johannesburg* 2008 (3) SA 208 (CC), among others which all took the form of public interest litigation.

[31] D Matyszak (n24 above).

[32] A Magaisa (n24 above).

international law. This is justified by s 46(1)(c) of the Constitution of Zimbabwe which requires a court to take into account international law and all treaties and conventions to which Zimbabwe is a party to when interpreting any provision of the Constitution contained in the Declaration of Rights.

In this regard, the DCJ begins by acknowledging the place and obligations of Zimbabwe in the international community by virtue of ratification of certain international conventions and treaties. He first notes the CRC and ACRWC and highlights the state's obligation *"to protect and enforce the rights of the child as enshrined in the relevant conventions to ensure that they are enjoyed in practice."*[33] The Convention on the Elimination of All Forms of Discrimination Against Women,[34] is also referred to in as far as it relates to its Committee recommending the appropriate age of marriage as 18 years. In giving a background to the marriage laws as set in s 22(1) of the Marriage Act, the DCJ further makes reference to the Universal Declaration of Human Rights (UDHR)[35] and the Convention on Consent to Marriage, Minimum Age of Marriage and Registration of Marriages.[36]

While avoiding the risk of restating the otherwise very thorough and clear analysis of the relevant international law by the DCJ, it is important to highlight the willingness of the highest court in Zimbabwe to embrace the guidance of international law in interpreting constitutional provisions, including importantly, on children's rights which have not had as many cases being decided at such high levels. While the use of international law in interpreting domestic laws is not necessarily new in Zimbabwe, the continued application particularly at the level of the Constitutional Court is critically important for assessing consistency of the courts in use of international law and indeed in creating and developing precedent that can continue to be followed by other lower courts.[37] It indeed reflects Zimbabwe's willingness to have its human and child rights practices measured against international norms and standards. This is aptly stated by the DCJ when he said, *"...the court has to take into consideration the current attitude of the international community of which Zimbabwe is a party, on the position of the child in society and his or her rights."* This is

[33] This is a requirement of Article 4 and 1 of the CRC and ACRWC respectively.
[34] Adopted by the United Nations General Assembly Resolution 34/180 of 18 December 1979.
[35] Adopted by the United Nations General Assembly Resolution 217 (III) of 10 December 1948.
[36] Opened for signature and ratification by General Assembly Resolution 1763 A (XVII) of 7 November 1962.
[37] A Magaisa (n24 above).

crucial also for similar interpretation of legal provisions both in and outside the child rights sector.

3.3. Other Positives from the Judgement

In so using international law, the DCJ was attempting to give meaning to s 78(1) as read with s 81(1) of the Constitution of Zimbabwe. The Respondents in interpreting the meaning of the *'right to found a family'* in s 78(1) had argued for a literal meaning which would not equate it to the right to enter into a marriage. The DCJ however, commendably went for a generous, purposive interpretation of the provision, coming to the conclusion that, *"Section 78(1) of the Constitution sets eighteen years as the minimum age of marriage in Zimbabwe. Its effect is that a person who has not attained the age of eighteen has no legal capacity to marry. He or she has a fundamental right not to be subjected to any form of marriage regardless of its source. The corollary position is that a person who has attained the age of eighteen years has no right to marry a person aged below 18 years."*

The above interpretation of s 78(1) immediately struck down sec 22(1) of the Marriage Act or any other law, practice or custom authorising a person, both male and female less than 18 years of age to marry or to be married. As clarified by the DCJ, this includes any unregistered customary law union or any other union including one arising out of religion or religious rite.[38]

Indeed the generous, purposive interpretation taken by the DCJ here commendably drives the point home that technical issues of strict legal interpretation should not be allowed to lead to negative consequences of perpetrating child sexual abuse and exploitation. By further declaring that *"There are no provisions in the Constitution for exceptional circumstances"*, the DCJ effectively plugs any possible gaps that may otherwise later be used by adults to again prey on children for sexual satisfaction under the guise of marriage. In so doing, he decisively mirrors the Zimbabwean society's abhorrence of child sexual abuse and exploitation and by so proclaiming, legally puts the matter of child marriages to rest.

[38] This covers the various religious and customary practices that were major drivers of child marriages such as *'kuzvarira, kuripa ngozi, sara pavana, kuputswa, inter alia,* among the Shona people.*'*

This approach taken by the DCJ is however, criticised by Matyszak who identifies some situations where marriage with an under 18 should have been allowed in 'special circumstances' such as when the husband is 19 and the girl is 17 years.[39] He argues that such a marriage will be *"in the best interests of a child, including a soon to be born or recently born child"* between the two teenage couple as is recognised by Article 2 of the United Nations Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage.[40] Persuasive as this argument may sound, it is submitted that the blanket ban adopted by the DCJ is commendable as it serves among others, as a deterrence measure from irresponsible sexual conduct even between teenagers that may lead to the need for marriage.

The DCJ is also commended for departing from a purely legalistic reasoning but rather acknowledging the inter-disciplinary nature of the issue of child marriages through proffering a detailed description of the social consequences of child marriages.[41]

4. The Work Ahead for Full Implementation of the Judgement

While the judgement is certainly welcome for child protection and indeed for development of jurisprudence around child rights, a deeper look into it and the environment in which it will have to be enforced brings one to a rude awakening that while this single battle has been won, there is still a whole lot more to be done if the country is indeed going to truly end child marriages.

4.1. Alignment of the Relevant Laws to the Child Marriages Ban

As regards the law itself, there clearly is need now for stakeholders to begin lobbying the powers that be, particularly legislators to urgently amend the relevant statutes in the form of the Criminal Law Code, the Children's Act (which is currently under review), the Marriage

[39] D Matyszak (n24 above).
[40] Note 37 above.
[41] It should ideally be the duty of every judicial officer to consider and canvass the social implications of any legal issue that they may be dealing with where applicable. This emphasises the fact that laws do not operate in a vacuum but are implemented in society and indeed regulate day-to-day social interactions, among others. The canvassing of such social consequences of a given legal issue is especially important at Constitutional Court level where the court plays a critical role of giving meaning to constitutional provisions that reign supreme in the country.

Act and the Customary Marriage Act among others to reflect the unlawfulness of child marriages as a criminal offence and to clearly indicate the sanctions attached to those who contravene the said law.[42] This refers to legal sanctions for violation of the new ban and the development of an enforcement mechanism for the ban on child marriages.[43]

As of now, sanctions against child marriages can practically only be enforced through s 3(1)(i) and 4 of the Domestic Violence Act as discussed earlier.[44] While the Domestic Violence Act can be used alone in the meantime, there evidently is need for alignment of all other statutes mentioned above to unambiguously criminalise the act for avoidance of any doubt. In so legislating, sanctions against violations of the ban must be for those that actually marry children below the age of 18 years, those that arrange and take part in the marriage of such a child and those that may have forced (in various ways) the child to get married. It may also be important to consider sanctions against those that know of a child marriage having taken place and decide not to report it to the Police within a reasonable stated period of time.

4.2. Possible Review of the Age of Consent to Sex

Still on laws, the judgement opened up other areas which now require urgent consideration such as the issue of Age of Sexual Consent which remains at 16 according to the Criminal Law Code as discussed earlier[45] while marriage is now at 18 years. Without a review of the age of consent to sex, a situation arises where children may now have unrestrained sex from 16 years with whomever, even a 60 year old man, and even possibly getting pregnant from such as long as the sexual activity does not lead to marriage. This certainly defeats the purpose of the child marriages ban in the sense that the sexual manipulation and exploitation that used to happen in child marriages can still continue as before with the only difference being that this time around the man no longer fears being forced to marry the girl because the law does not allow it. Such a situation may have the undesirable effect of

[42] Work in this regard seems to be underway. See '*MPs sign petition to ban child marriages'*, Herald, 18 March 2016; and *'Zimbabwe ramps up pressure on parents to stop child marriages'*, News24Zimbabwe, 18 March 2016. Civil Society Organisations such as WLSA, ZWLA, ROOTS among others have also been assisting with the drafting of the new Marriage Bill.

[43] A Magaisa (n24 above).

[44] See part 2 above.

[45] *Ibid*.

encouraging sexual irresponsibility among men who are now protected from forced marriage by the law.

Where the sexual acts result in pregnancy, the judgement may also have the effect of further putting the burden of care for the newborn child on the girl's parents. Such may force especially traditional rural societies to revert back to the arrangement of marrying off the child, *albeit* in secrecy, thereby continuing sexual abuse of children. In considering solutions to the issue of age of consent, caution must however, be exercised on the temptation to simply raise the age of sexual consent to 18 years as this has its own practical complications and possible child rights violation issues thereto.

The law also needs to be clear on what happens if the child marriage is between children who are both under 18 years and are both mutually agreeing to it. While a child at law cannot consent to any form of marriage, it may happen that two children aged 17 enter into such a union. Clarity is thus needed on how the law will handle this.[46]

In light of the above, it is clear that lawmakers still have work to do in order that the child marriages ban is legally enforceable without the apparent negative side effects especially on the girl child that it mainly seeks to protect.

5. Community Outreach and Education on Child Marriages

Having dealt with the law, it should however, also be critically understood that generally laws alone do not end criminal activities. In-fact, it is human nature to become defensive and rebellious towards rules and the same should be expected even of this noble judgement against child marriages. There is need from the onset to understand that this ban will have to be enforced in communities where children are often married off mostly by their elders in religious settings or in traditional practices for various reasons. As such, community engagement, advocacy and awareness in such settings should become the crux of the fight against child marriages. A crucial part of this awareness raising should be explaining the

[46] The *Mudzuru vs Tsopodzi* judgement outlaws situations of an adult over 18 marrying a child below 18 years. The scenario of children marrying each other, most likely in an unregistered customary marriage, which is common particularly in rural areas, is not addressed. Since the marriage between the two children is evidently invalid, does the law envisage a situation where the children will be arrested for child marriage? If so clarity is needed on processes and sanctions for entering into such a marriage for the two children.

unlawfulness of child marriages and the legal consequences for those who commit the offence in terms of the Constitution and other aligned laws mentioned above. But more importantly, the awareness and advocacy should emphasise on developing an understanding with communities on what child marriage is, why it is wrong for a child to be married, why it is good for a child not to get married early and critically what can community members do when they witness child marriages in their communities. With such a community engagement approach, community members participate in ending child marriages out of understanding and appreciation of the benefits of not marrying off children, rather than out of fear of the law alone.

6. Conclusion

The above was a review of the much celebrated Constitutional Court ruling on child marriages in the *Mudzuru & Tsopodzi* case. While it was noted that Zimbabwe's child marriages problem is relatively lower as compared to other African countries, the problem still needs vigorous efforts to totally end it since it is part of the many atrocious forms of sexual abuse and exploitation on children. The judgement by DCJ Malaba was commended for expounding on critical issues such as the question of *locus standi* and public interest litigation. With the clarity given, possibilities for more cases involving social justice for the poor and vulnerable are opened, including for further advancement of child rights. The reading of international law into the interpretation of Constitutional provisions in Zimbabwe was also highly commended as progressive as it pushes the country to international standards in child rights and other human rights norms. While the judgement is indeed progressive, some gaps with the law that undesirably appeared as a result need to be plugged, particularly as regards the age of consent to sex. Ultimately, for the ban to be effectively implemented in the short and long-term, community outreach and education on child marriages needs to be at the centre of all interventions.

Foreign Direct Investment and Zimbabwe's Indigenisation and Economic Empowerment Act: Friends or Foes?

T. Chidede* and TV. Warikandwa**

1. Introduction

The implementation of Zimbabwe's indigenisation policy as well as the promulgation of relevant enabling legislation has triggered an unintended economic slowdown. The economic slowdown has been exacerbated by economic sanctions imposed on Zimbabwe by the United States of America (USA) and European Union (EU)[1] in response to the land reform programme.[2] Subsequent economic hardships faced by many of the country's citizens as a result of the economic slowdown have generated vigorous debates amongst Zimbabwe's policy makers, business as well as labour unions regarding the practicality of a sustained implementation of the indigenisation policy and its enabling legislation.[3] Part of the issues informing the debates has been the significant decline in Foreign Direct Investment (FDI).[4] Questions have thus been raised regarding the efficacy of the manner of implementation of Zimbabwe's Indigenisation and Economic Empowerment Act (IEEA)[5] and its suitability to affording room for stimulating FDI.[6] In addressing issues relating to a need to grow FDI in Zimbabwe, it is submitted that the indigenisation programme is necessary

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[1] M Hove, "The Debates and Impact of Sanctions: The Zimbabwean Experience", (2012) 3(5) *International Journal of Business and Social Science* at 72.

[2] See *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* (2/2007) [2008] SADCT 2 (28 November 2008); *Albert Fungai Mutize & Others v Campbell & Others* SADCT 08/2008; and *Nixon Chirinda & Others v Campbell & Others* SADCT 09/2008. See also PN Ndlovu, "Campbell v Republic of Zimbabwe: A moment of truth for the SADC Tribunal" (2011) 1 *SADC Law Journal* at 63; and DP Zongwe, "The Contribution of Campbell v. Zimbabwe to the Foreign Investment Law on Expropriations", (2009) 5 *Comparative Research in Law & Political Economy Research Paper No. 50/2009* at 12.

[3] Hove (2012) at 72.

[4] The Reserve Bank of Zimbabwe has pointed out that "Net foreign direct investment decreased to United States Dollars (USD) 300,6 million in 2014, from USD 373,1 million in 2013."

[5] Indigenisation and Economic Empowerment Act [Chapter14:33] of 2008.

[6] T Kandiero; M Chitiga, "Trade openness and Foreign Direct Investment in Africa", (2006) 9(3) *South African Journal of Economics and Management Science* at 355. See also B Karbay, "Foreign Direct Investment and host country policies: A rationale for using ownership restrictions" (2010) 93 *Journal of Development Economics* at 218. See further D Maytyszak, "Chaos clarified – Zimbabwe's 'New' Indigenisation Framework" February 2016, Harare, Research and Advocacy Unit at 1-20; Special Correspondent, "Demystifying indigenisation and empowerment" The Sunday Mail 8 February 2015 at 6; and T Biti, "Minister of Finance: The 2013 National Budget Statement" (2013) Government of Zimbabwe.

and therefore not subject to debate. There is an undying need to increase room for participation of all marginalised persons, groups and communities in Zimbabwe in the economic mainstream.[7] The indigenisation policy and IEEA adopted by Zimbabwe's government resonate with the purport, spirit and objective of key economic empowerment goals set out in section 14(1) of the 2013 Zimbabwean Constitution. Section 14(1) of Zimbabwean Constitution provides that the State must "…facilitate and take measures to empower, through appropriate, transparent, fair and just affirmative action, all marginalised persons, groups and communities in Zimbabwe."[8]

The approach adopted by the Zimbabwean government in pursuit of the country's indigenisation policy is therefore not illegal or *contra bonos mores*. Justification at law of the indigenisation programme in Zimbabwe can be found in the two leading cases of *De Sanchez v Banco Central de Nicaragua*[9] and *AMCO v Indonesia*.[10] Here, the courts unequivocally emphasised that states do enjoy a customary international law right to regain ownership of industries as part of their territorial and economic sovereignty. This approach is consistent with the school of thought that a substantial foreign ownership of national resources and/or business sectors threatens national and economic sovereignty.[11] Therefore, in order to regulate the influx of foreign owned business entities which pose a significant threat to economic sovereignty, some governments elect to craft and implement policy interventions aimed at limiting foreign ownership.[12]

However, the courts' decisions in *De Sanchez v Banco Central de Nicaragua* and *Amco v Indonesia* should not be taken to suggest that pursuing the indigenisation policy is a just cause for negating the attraction of FDI as a complimentary economic approach to realising sustainable economic growth. Scholars like Munyedza have argued that the approach

[7] See section 14(1) of the 2013 Zimbabwean Constitution. See also section 2(1) of the IEEA which defines an "indigenous Zimbabwean" as "… any person who before 18th April 1980 was disadvantaged by unfair discrimination on the grounds of his or her race, and any descendant of such person, and includes any company, association, syndicate or partnership of which indigenous Zimbabweans form the majority of members or hold the controlling interest."

[8] See the Constitution of the Republic of Zimbabwe, 2013 (hereafter "the Constitution").

[9] *De Sanchez v Banco Central de Nicaragua* 770 F.2d 1385 US Court of Appeals 5th Cir September 19 1985.

[10] *AMCO v Republic of Indonesia* (Merits) 1992 89 ILR 368 at paragraphs 405 and 466.

[11] R Leal-Arcas, *International trade and investment law: Multilateral, regional and bilateral governance*, United Kingdom: Edward Edgar Publishing Limited (2010) at 178.

[12] One classical example of a government which has adopted an indigenisation approach is South Africa which has seen its parliament enacting laws such as the Broad-Based Black Economic Empowerment Act 53 of 2003 and Broad-Based Black Economic Empowerment Amendment Act 46 of 2013.

adopted by the Zimbabwean government in attempting to increase the participation of previously disadvantaged indigenous people in the economic mainstream scares away foreign investors.[13] Munyedza's view has the law and economics school of thought as its basis in that it places emphasis on the need to ascertain any law's and policy's economic impact before a decision to implement them is adopted.[14] As such, it is important to employ the law and economics school of thought as a mechanism to evaluate the IEEA's suitability to growing FDI in Zimbabwe.

However, questions have to be raised regarding how else, in a global economic environment driven by a neoliberal economic agenda,[15] the indigenisation programme could have been implemented without incurring a backlash from global super powers such as the USA and the United Kingdom (UK).[16] The USA and UK have contributed a vast majority of foreign owned companies which have operated in Zimbabwe since its independence up until the implementation of the indigenisation programme.[17] It is therefore common cause that the USA and UK would resist the indigenisation policy in pursuit of their business interests. In view of the foregoing, it is reiterated that the underlying objectives of the indigenisation programme as embedded in the IEEA should not be opposed. Rather than condemning the indigenisation programme, it is plausible to propose that the indigenisation policy and the IEEA be implemented in a manner that compliments a favourable business environment for both domestic and foreign investors.[18] It is expected that such an approach could assist in easing the current economic hardships the country is facing.

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[13] See P Munyedza, "The impact of the Indigenisation and Economic Empowerment Act of Zimbabwe on the financial performance of listed securities", (2011) 37(1) *Business and Economic Journal* at 9.

[14] K Davis; Trebilcock MJ, "What role do legal institutions play in Development", 20 October 1999 https://www.imf.org/external/pubs/ft/seminar/1999/reforms/trebil.pdf (accessed 03 May 2016).

[15] The neoliberalism policy and ideology model places significance on free trade. It allows for minimal state intervention in socio-economic affairs and aggressively advocates for the freedom of capital and trade. G Monibot, *How did we get into this mess? Politics, equality, Nature* (2016) Verso Books: London at 12; D Harvey, "Neo-liberalism as creative destruction", (2006) 88B *Geografiska Annaler* at 145; A Gamble, *Crisis without end? The Unravelling of Western Prosperity* (2014) Palgrave Macmillan: Victoria at 10; and VI Genev, "The 'Triumph of Neoliberalism' reconsidered: Critical remarks on ideas-centered analyses of political and economic change in post-communism", (2005) 19(3) *East European Politics and Society* at 343.

[16] See TV Warikandwa; PC Osode, "Legal Theoretical Perspectives and their Potential Ramifications for Proposals to Incorporate a Social Clause into the Legal Framework of the World Trade Organisation", 2014 28(2) *Speculum Juris* at 41.

[17] United States Global Investment Center, *Zimbabwe Mining Laws and Regulations Handbook Volume 1: Strategic Information and Basic Mining Law*, (2012) International Business Publications: Washington at 243.

[18] Staff Reporter, "Change indigenisation law, IMF tells Zim" New Zimbabwe 11 March 2015. See also G Munyuki, "Repeal Indigenisation Act: Robertson" Nehanda Radio 14 July 2014. See further NKC Independent

The article is divided into five parts. The first part introduces the thesis of the article and briefly discusses objectives underpinning the indigenisation policy. The second part advances the argument that foreign investment is a vital component for enhancing economic development in Zimbabwe. FDI should be viewed as a mechanism for generating resources aimed at funding indigenisation programmes. The third part critically examines the approach to the indigenisation policy as set out in the IEEA with a view to assessing its shortcomings in advancing foreign investment. Part four proffers modest recommendations towards meeting the needs implicit in the indigenisation policy *vis-a-vis* FDI, whereas part five offers concluding remarks.

1.2 A synopsis of the IEEA's objectives

The Zimbabwean colonial government utilised deliberate and systematic disempowerment mechanisms which led to the exclusion of indigenous Zimbabweans from the economic mainstream.[19] As a result, the ushering in of a new political dispensation in 1980 generated a lot of expectations especially among the indigenous persons who wished for the reversal of inequalities inherited from the era of colonial rule.[20] The Zimbabwean government has introduced legislative and policy initiatives aimed at addressing colonially induced imbalances thus increasing previously disadvantaged indigenous persons' access to national resources and participation in the economic mainstream, added to facilitating business control or ownership.[21] The IEEA is one such contemporary measure introduced by the government to address the economic imbalances and its policy objectives are to: 1) economically empower indigenous Zimbabweans[22] by increasing their participation through

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Economists, "Zimbabwe – IMF's diagnosis after Article IV consultations", http://www.moonstone.co.za/zimbabwe-imfs-diagnosis-article-iv-consultations/ (accessed 21 January 2016).

[19] S Moyo, "Three decades of agrarian reform in Zimbabwe", (2011) 38 *Journal of Peasant Studies* at 493. See also S Moyo, "Land concentration and accumulation after redistributive reform in post-settler Zimbabwe", (2011) 38 *Review of African Political Economy* at 257. See further Makwiramiti who opines that the settler power restricted the emergence of an indigenous capitalist class across almost all sectors of the Zimbabwean economy. Am Makwiramiti, "In the name of economic empowerment: A case for South Africa and Zimbabwe" 11 February 2011 http://www.polity.org.za/article/in-the-name-of-economic-empowerment-a-case-for-south-africa-and-zimbabwe-2011-02-24 (accessed 08 February 2016).

[20] D Clarke, *Foreign companies and international investment in Zimbabwe*, Gweru: Mambo Press 1980 at 15.

[21] Clarke (1980) at 15. For instance, immediately after independence in 1980, there were a plethora of legislative and policy initiatives by the government to acquire millions of hectares of land from the white commercial farmers in order to redistribute to the indigenous citizens. See generally S Moyo, "Land reform and redistribution in Zimbabwe since 1980" in Moyo S & Chambati W (eds), *In land and agrarian reform in Zimbabwe: Beyond white-settler capitalism* Dakar: Council for the Development of Social Science Research in Africa (2013).

[22] See section 2(1) of the IEEA regarding the definition of an indigenous Zimbabwean.

economic expansion, and growing their productive investment in the economy so as to create more wealth for poverty eradication;[23] 2) create conditions that will allow the disadvantaged Zimbabweans to participate in the economic development of their country and earn themselves self-respect and dignity;[24] 3) develop a broad-based domestic private sector that is the engine of economic growth and development in a growing market economy;[25] and democratise ownership relations in the economy and eliminate racial differences arising from economic disparities.[26] The IEEA provides for a need for indigenisation in the resource and non-resource based sectors.[27]

The Indigenisation Economic Empowerment (IEE) General Notice 114 of 2011 provides for indigenisation in the mining sector by requiring businesses operating in the sector to dispose 51 percent equity to designated entities. The indigenisation policy as reflected in the IEEA unambiguously insists that all foreign-owned companies with a share capital above US$500 000 operating in Zimbabwe are to cede 51 percent of their shares or interest therein to indigenous Zimbabweans.[28] Further, a number of economic sectors have been reserved for indigenous Zimbabweans.[29] By implication, there shall be no non-indigenous business which will be allowed to invest in the reserved sector unless under special circumstances as determined by line Ministries and approved by Zimbabwe's Cabinet. The current sector specific compliance provisions are set out as follows:

Sector Compliance Provisions as Provided by Enabling Regulatory Instruments

[23] Section 3(1)(a) of the IEEA.
[24] Section 3(1)(a)-(g) and 3(2)(a)-(b) of the IEEA.
[25] See section 3(1)(a)-(g) and 3(2)(a)-(b) of the IEEA.
[26] See section 3(5)-(6) of the IEEA. See also the IEEA's for a specific outline of its intent and objectives.
[27] Section 3(5) of the IEEA provides that: "The line minister may prescribe that a lesser share than fifty-one per centum or a lesser interest than a controlling interest may be acquired by indigenous Zimbabweans in any business in terms of subsections (1)(b)(iii), (1)(c)(i), (1)(d) and (e) in order to achieve compliance with those provisions, but in so doing he or she shall prescribe the general maximum timeframe within which the fifty-one per centum or the controlling interest shall be attained."
[28] See section 3(1) of the IEEA.
[29] These reserved economic sectors include the following: agricultural production of food and cash crops; transport (buses, taxis and car hire services); retail and wholesale trade; barbershops; hairdressing and beauty salons; employment agencies; estate agencies; valet services; grain milling; bakeries; tobacco grading and packaging; tobacco processing; advertising agencies; milk processing; provision of local arts; marketing and distribution. See section 3, 4 and 5 of Statutory Instrument 66 of 2013 [CAP 14:33 IEE (General) (Amendment) Regulation, 2013 (No.5). See also the National Indigenisation and Economic Empowerment Board website available at http://www.nieeb.co.zw/index.php/sectors/reserved-sectors (accessed 02 February 2016).

Sector	Minimum net asset value	Lesser share of non-indigenous businesses	Years to comply
Indigenisation and Economic Empowerment General Notice 459 of 2011			
Manufacturing	Of or above one hundred dollars ($100 000)	26%	1st year
		36%	2nd year
		46%	3rd year
		51%	4th year
Indigenisation and Economic Empowerment General Notice 280 of 2012 – Other Sectors			
Financial Services	See Part I of Notice 280	51%	1 year
Tourism	See Part II of Notice 280	51%	1 year
Education and Sport	See Part III of Notice 280	51%	1 year
Arts, Entertainment and Culture	See Part IV of Notice 280	51%	1 year
Engineering and Construction	See Part V of Notice 280	51%	1 year
Energy	See Part VI of Notice 280	51%	1 year
Services	See Part VII of Notice 280	51%	1 year
Telecommunications	See Part VIII of Notice 280	30-51%	1 year

Transport and motor Industry	See Part IX of Notice 280	51%	1 year

Source: Government of Zimbabwe IEE General Notices 459 of 2011 and 280 of 2012

To realise the IEEA's set objectives, in 2013, the government of Zimbabwe crafted an economic blueprint, the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZIMASSET) with a view to achieving sustainable economic growth and development as well as social equity, *inter alia*, anchored on indigenisation, empowerment and employment creation.[30] Chapter 3 of the ZIMASSET states that the blueprint is also expected to consolidate the gains and opportunities brought by the indigenisation policy and increase FDI, among other things. The objectives of the ZIMASSET explicitly seek to further the indigenisation programme as well as grow FDI. Zimbabwe is a mineral rich country with an abundance of diamond, gold and platinum deposits amongst other mineral resources. Such minerals attract resource-seeking investors. It is therefore not surprising that between 1990 and 1999, Zimbabwe attracted FDI estimated at United States Dollars (USD) 950 million.[31] However, critics have said that the ZIMASSET is not implementable within a short period of time due to the financial challenges facing the country.[32] A clear indicator of these financial challenges is the significant decline in FDI from USD 950 million, in the period 1991 to 1999, to USD 400 million between 2000 and 2011.[33] This indicates a decline in FDI by USD 550 million. In effect, between 2000 and 2011, FDI in Zimbabwe measured a negative real economic growth rate averaging 5%.[34]

[30] See the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (ZIMASSET), October 2013 – December 2018.

[31] See the Reserve Bank of Zimbabwe First Quarter Monetary Policy Statement, April 2014. See also the Government of Zimbabwe's ZIMSTATs for 2012, 2013 and 2014.

[32] See "Corruption scares investors", 24 July 2015 http://www.zbc.co.zw/index.php?option=com_content&view=article&id=53379:corruption-scares-investors&catid=41:top-stories&itemic=86 (accessed 18 March 2015).

[33] See the Reserve Bank of Zimbabwe First Quarter Monetary Policy Statement, April 2014. See also the Government of Zimbabwe's ZIMSTATs for 2012, 2013 and 2014.

[34] See Index Mundi (2014) Zimbabwe GDP-real growth rate, www.indexmundi.com/g/asps?c+zi&v+66 (accessed 27 April 2016). See also MN Sikwila, "Foreign direct investment: does it matter? A case for Zimbabwe", (2015) 11 *Research in Business and Economics Journal* at 1-12. See also S Manda, "Capital flows and current account dynamics in Zimbabwe", (2014) 2(4) *Journal of Economics and International Business Management* at 82-99.

The table below provides further evidence of the negative effects of the continuous decline in FDI.

Current account (percentage of Zimbabwe's Gross Domestic Product at current prices)

	2006	2011	2012	2013	2014	2015	2016(e)
Trade balance	-7.7	-28.7	-23.5	-23.1	-23.7	-17.9	-19.3
Exports of goods	28.3	40.3	30.7	27.4	27.2	23.9	23.9
Imports of goods	36.0	69.0	54.1	50.5	50.9	41.8	43.1
Services	-2.0	-6.9	-7.0	-6.9	-5.6	-5.0	-3.2
Factor income	-5.1	-8.3	-7.7	-7.5	-7.5	-7.2	-6.6
Current transfers	7.2	14.0	13.5	12.1	13.7	12.3	11.8
Current account balance	-7.6	-29.8	-24.6	-25.4	-23.1	-17.8	-17.2

Source: African Economic Outlook 2015; (e) estimates

It is without doubt that within the Zimbabwean government there have been divided views over the need to attract FDI. The current Minister of Youth, Indigenisation and Economic Empowerment, Mr Patrick Zhuwao has allegedly steadfastly objected to attracting FDI in favour of promoting an exclusively indigenisation agenda.[35] Is there merit in Minister Zhuwao's approach? Addressing this question requires reference to be made to contemporary debates advanced regarding the benefits of FDI to African countries. At the centre of these debates are concerns regarding the value addition of FDI investments from the Western investors as opposed to their Asian counterparts, in particular China.[36] FDI must translate to a transfer of property to the host country and grow economies.[37]

[35] D Mutori; JB Paradza, "Patrick Zhuwao on FDI – tyranny of the misinformed", The Zimbabwean 19 February 2016.

[36] PJ Keenan, "Curse or cure? China, Africa, and the effects of unconditioned wealth", (2009) 27 *Berkeley Journal of International Law* at 84.

[37] M Sornarajah, "The international law on foreign investment", 3rd edition 2010 Cambridge: Cambridge University Press at 8. See also T Makova, "Foreign Direct Investment and Economic Growth in Zimbabwe: An ARDL bounds test approach", (2010) 1 *Journal of Strategic Studies* at 38; KH Zhang, "Does FDO Promote Economic Growth? Evidence from East Asia and Latin America", (2001) 19(2) *Contemporary Economic Policy* at 175; K Olofsodotter, "Foreign Direct Investment, Country Capabilities and Economic Growth", (1998) 34(3) *Weltwirtschafliches Archive* at 534; LRJ De Mello, "FDI-led Growth: Evidence from Time Series and Panel Data", (1999) 51 *Oxford Economic Papers* at 133; and E Borensztein; JD Gregorio, JW Lee, "How Does Foreign Direct Investment Affect Economic Growth?" (1998) 45 *Journal of International Economics* at 115.

However, there appears to be a general realisation in Africa that Western investors are reluctant to grow African economies whereas Asian investors especially those from China are perceived to have, through FDI, driven economic growth and infrastructure development.[38] Perhaps this is the perspective that Minister Zhuwao held in his steadfast pursuit of an ultra-indigenisation agenda that, on the face of it, is not entirely FDI responsive. Contrary to Minister Zhuwao's arguably anti-FDI stance, Zimbabwe's Minister of Finance, Patrick Chinamasa has pronounced that there was need to introduce:

> "…frameworks, templates and procedures for implementing the indigenisation policies in a manner that both promotes investment and eliminates discretionary application of the law. Such measures will contribute immensely towards the ease of doing business in the country and will render the services sector of our country conducive for Foreign Direct Investment".[39]

Minister Chinamasa's pronouncement also appears to be an attempt at reconciling differences between the government of Zimbabwe, the International Monetary Fund and the World Bank, due to the implementation of the IEEA.[40] Minister Patrick Chinamasa's views were then augmented by the President of Zimbabwe Mr Robert Mugabe's public pronouncements regarding the need to implement indigenisation laws in a manner that does not frustrate foreign investors, especially those in the banking sector.[41]

2. Is indigenisation more important than FDI in Zimbabwe?

Whilst Zimbabwe must not be seen to mortgage its riches for little or no significant returns, the benefits obtained from FDI by the host country must be weighed against what it losses in the same process. The process of weighing FDI losses against its benefits is not easy as allegations of foreign investors plundering national resources with little benefits being received by host nations are so often advanced. For example, Chinese investors have been

[38] H Edinger; J Jansson, "China's Angola model comes to the DRC", (2008) *The China Monitor Issue* 34, at 4-6. China has used the R41, resource for infrastructure contracts with Angola with significant infrastructure development being observed in Angola. The Western investors were reluctant to invest in a country which had been destroyed by war yet it was resource rich. The story of Angola today is now different due to the China-Angola R41 resource for infrastructure investment contract.

[39] P Chinamasa "2016 National Budget Presentation" Harare 26 November 2015.

[40] "Change indigenisation law, IMF tells Zimbabwe" New Zimbabwe 11 March 2015.

[41] "Indigenisation: President has spoken" Herald Zimbabwe 15 April 2016 also available at http://www.herald.co.zw/indigenisation-president-has-spoken/ (accessed 03 May 2016).

accused of being ruthless extractors of African resources.[42] Similar accusations have been levelled against Western investors.[43] Ofodile has branded FDI practices of China on the continent as the third scramble for Africa,[44] whilst Konings labelled them a strategic partnership for the continent.[45] The West has also been accused of being exploiters of Africa's resources without significantly contributing to the continent's development.[46] Whatever the nature of Western and Chinese business practices on the continent, statistical evidence points to China's business activities in Sub-Saharan Africa translating to an annual 5% economic growth over the past decade[47] with the net effect of this economic growth being "…the bolstering of human development indicators across the continent and improving African people's standards of living."[48] This therefore is clear evidence of the importance of FDI to Zimbabwe or any country for that matter, regardless of whether it is from the West or China.

Nevertheless, it is important to point out that though China has been the largest foreign investor in Zimbabwe with a total FDI of over USD 600 million in 2013, it has cautioned the Zimbabwean government regarding the manner of implementing the IEEA to the extent that

[42] C Mapaure "Chinese Investments in Zimbabwe and Namibia: A Comparative Analysis" September 2014 http://www.ccs.org.za/wp-content/uploads/2014/10/CCS_PhanW_Clever_2014.pdf (accessed 25 March 2016).

[43] M Renner, "Breaking the Link between Resources and Repression" http://www.globalchange.umich.edu/gctext/Inquiries/Module%20Activities/State%20of%20the%20World/Resources%20and%20Repression%202002.pdf (accessed 09 May 2016). See also NL Peluso; CR Humphrey, LP Fortmann, "The rock, the beach, and the tidal pool: People and Poverty in natural resource-dependent areas", (1994) 7(1) *Society & Natural Resources: An International Journal* at 23.

[44] UU Ofodile, "Trade Empires and Subjects-China-Africa Trade: A New Fair Trade Arrangement or the Third Scramble for Africa", (2008) 41(2) *Vanderbilt Journal of Transnational Law* at 509.

[45] P Konings, "China and Africa: Building a Strategic Partnership", (2007) 23(3) *Journal of Developing Societies* at 341.

[46] DW Pear, "Africa: Incredible Wealth, Exploitation, Corruption and Poverty for its People" 29 January 2014 http://nocache.therealnews.com/t2/component/content/article/170-more-blog-posts-from-david-william-pear/1944-africa-incredible-wealth-exploitation-corruption-and-poverty-for-its-people- (accessed 09 May 2016).

[47] D Brautigam; Xiaoyang T, "African Shenzhen: China's special economic zones in Africa", (2011) 49(1) *The Journal of Modern African Studies* at 27. See also The World Bank, 11 April 2016 "Africa's Pulse: An analysis of issues shaping Africa's economic future" http://www.worldbank.org/content/dam/Worldbank/document/Africa/Report/Africas-Pulse-brochure_Vol7.pdf (accessed 09 May 2016).

[48] M Pigato; W Tang, "China and Africa: Expanding Economic Ties in an Evolving Global Context" I March 2015 http://documents.worldbank.org/curated/en/2015/03/24177102/china-africa-expanding-economic-ties-evolving-global-context (accessed 11 May 2016). See also A Zafar, "The Growing Relationship between China and Sub-Saharan Africa: Macroeconomic, Trade, Investment, and Aid Links", (2007) 22(1) *World Bank Research Observer* at 103.

negatively impacts FDI.[49] The increasing investment gap and recession in foreign aid has made developing countries to turn to FDI as a mechanism to circumvent development financing constraints.[50] There is empirical evidence that countries are engaging in a race to the bottom syndrome or "beggar-thy-neighbour" investment incentive competition in an effort to lure investors.[51] This is a strategy to increase FDI inflows by removing all investment and trade restrictions thereby attracting investors out of neighbouring countries.[52] FDI is necessary in developing economies to accelerate economic development because these countries cannot achieve these goals through their domestic investment.[53]

FDI is largely viewed as one of the major contributors to economic growth[54] as well as a means to alleviate poverty and acquire additional funding for national programmes.[55] Gross Domestic Product (GDP) is the most commonly used tool to measure a country's economic growth.[56] GDP is the total value of goods and services produced in an economy within a certain period of time and can be measured by adding up all of the economy's income,

[49] "Chinese ambassador warns Zimbabwe" New Zimbabwe 02 April 2016 also available at http://www.zimbabwesituation.com/news/zimsit-m-chinese-ambassador-warns-zimbabwe/ (accessed 03 May 2016).

[50] JW Musila; SP Sigue´ "Accelerating foreign direct investment flow to Africa: From policy statements to successful strategies" (2006) 32 *Managerial Finance* at 577. See also E Mahembe; NM Odhiambo, "Macroeconomic Processes on Regional Economic Management: A critical review of FDI inflows and economic growth in low-income SADC countries: prospects and challenges", (2014) 12(1) *Problems and Perspectives in Management* at 7.

[51] WW Olney, "A race to the bottom? Employment protection and foreign direct investment", (2013) 91 *Journal of International Economics* at 191. See also JC Anyawu, "Why does foreign direct investment go where it goes? New evidence from African countries", (2012) 13(2) *Annals of Economics and Finance* at 433; H Jauch, "Africa's clothing and textile industry: The case of Ramatex in Namibia" in Jauch H & Traub-Merz R (eds) *The future of the textile and clothing industry in Sub-Saharan Africa* (Bonn: Friedrich-Ebert-Stifung 2006).

[52] Olney (2013) at 191.

[53] H Okuda, "Foreign direct investment and economic growth: co-integration and causality analysis of Nigeria", (2009) 11(1) *African Finance Journal* at 54. See also Y Olalekan, "Fiscal incentives for FDI and infrastructure development: economic diversification options for SADC countries", (2013) 15(1) *African Finance Journal* at 13; E Borensztein; J De Gregoria, JW Lee, "How does foreign direct investment affect economic growth?" (1998) 45 *Journal of International Economics* at 115.

[54] Leal-Arcas (2010) at 170. See also LE Trakman, "Foreign direct investment: hazard or opportunity?", (2009) *George Washington International Law Review* at 12; B Hoekman; MM Kostecki, *The political economy of the world trading system: The WTO and beyond* 3rd ed Oxford University Press: Oxford 2009 at 14.

[55] It is argued that FDI significantly contributes to poverty alleviation when it is targeted at labour intensive industries and when interactions with local firms can create spill overs. L Colen; A Guariso, "What type of foreign direct investment is attracted by bilateral investment treaties?" in Moran TH, Graham EM & Blomstrom M (eds) *Does foreign direct investment promote development?* Institute for International Economics: Washington DC (2005) at 139.

[56] Musila and Sigue (2006) at 28.

investment, government purchases and net exports.[57] Zimbabwe's real GDP decelerated to 3.7 percent from an estimated 4.4 percent in 2012.[58] Zimbabwe's economy remains unstable with an unsustainably high external debt, massive deindustrialisation and lack of investment.[59] The government should thus establish and implement an effective enabling policy environment for investment otherwise it may not achieve sustainable economic growth.[60] According to the 2012 World Bank Doing Business Report, Zimbabwe was ranked 122 out of 183 countries considered with respect to the country's ability to protect investment.[61] It is a generally accepted view that the best way to lock a nation into a sustainable economic development mode is to advance policies that are favourable and guarantee foreign investment protection.[62]

After the year 2000, there have been a series of government initiatives and policies which were hostile to FDI and magnified risks for foreign investors and this prompted substantial foreign disinvestment.[63] For instance, the land reform policy and soaring inflation rates spearheaded foreign disinvestment.[64] The land reform policy, in particular, strained Zimbabwe's relations with the US and the EU since most of the farms appropriated belonged to their nationals.[65] As a result, economic sanctions were imposed by the US, the EU and Australia against Zimbabwe[66] and eventually led to a critical shortage of foreign

[57] Statistics South Africa, "Measuring South Africa's economic growth" 2014 http://www.statssa.gov.za/articles/15%20measuring%20gdp.pdf (accessed 02 January 2016).
[58] See the African Economic Outlook Report for 2014 available at http://www.africaeconomicoutlook.org/fileadmin/uploads/aeo/2014/PDF/E-Book_African_Economic_Outlook_2014.pdf (accessed 02 January 2016).
[59] African Economic Outlook Report (2014) at 38.
[60] AB Zampetti; P Sauve, "International investment" in Guzman AT & Sykes AO (eds) *Research handbook in international economic law* United Kingdom; Edward Elgar Publishing Limited 2007 at 217.
[61] See the World Bank Doing Business Report 2012 available at http://www.doingbusiness.org/~/media/FPDKM/Doing%20Business/Documents/Annual-Reports/English/DB12-FullReport.pdf (accessed 02 January 2016).
[62] Zampetti and Sauve (2007) at 217.
[63] DL Richards; RD Gelleny, "Economic globalisation and human rights" Cambridge: Cambridge University Press (2009) at 17-38. However, it should be pointed out that whilst the Zimbabwean government adopted policies that prompted foreign disinvestment, it also adopted mechanisms to remedy such disinvestment. One such mechanism is the Kadoma Declaration signed by the country's social partners on the 4th of September 2009 in Harare. See in particular articles 1, 2 and 3 of the Kadoma declaration.
[64] Richards and Gelleny (2009) at 185.
[65] See US Department of State Diplomacy in Action (2012).
[66] See US Department of State Diplomacy in Action (2012).

currency, decline of FDI inflow[67] and Zimbabwe was unable to obtain financial and credit loans from multilateral financial institutions such as the World Bank, International Monetary Fund and the African Development Bank.[68] Furthermore, high levels of hyperinflation, valueless currency as well as complicated exchanged-rate policies made it difficult for investors to obtain foreign currency amid continued shortages of fuel, electricity and other important goods.[69]

According to the 2006 World Investment Report compiled by the United Nations Conference on Trade and Development (UNCTAD), FDI inflows dropped from US$103 million in 2005 to US$40 million in 2006 as a result of Zimbabwe's severe economic crisis.[70] In 2014, the IMF reported that Zimbabwe's economic environment remains difficult and unstable and urged that policy efforts be directed towards restoring fiscal and external sustainability.[71] Given that scenario, it is a common cause that the economy or industrial base of Zimbabwe urgently needs FDI capital to finance and support its indigenisation as well as developmental programmes. This view informs the imperative proposition that foreign investment should be harnessed to the realisation of specific development objectives that each individual country has set for itself.[72]

3. The IEEA's position in advancing FDI

The major obstacle to the success of the IEEA lies in the manner in which it has been implemented.[73] Empirical evidence shows that since the inception of the IEEA there have been considerable FDI outflows and dwindled FDI inflows in Zimbabwe.[74] The UNCTAD observed that the indigenisation policy had a significant impact on FDI flow in and out of the

[67] The Report on attracting FDI by the Foreign Affairs Parliamentary Portfolio Committee has cited sanctions by the EU and the US, corruption and inadequate funding of the ZIA as some of the major challenges impeding foreign investors into Zimbabwe. See "Corruption scares investors".
[68] US Department of State Diplomacy in Action (2012).
[69] US Department of State Diplomacy in Action (2012).
[70] See Annex B of the UNCTAD "World Investment Report 2006. FDI from developing and transition Economies: Implications for development" 2006) available at http://www.unctad.org/en/Docs/wir2006ch5_en.pdf (accessed 02 January 2016).
[71] IMF "2014 Article IV Consultation—Staff Report: Press release and statement by the executive director for Zimbabwe" IMF Country Report No. 14/202 (2014).
[72] Zampetti and Sauve (2007) at 217.
[73] "German investors wary of indigenisation, says ambassador" The Zimbabwean 12 February 2014, available at http://www.thezimbabwean.co/news/zimbabwe/70490/german-investors-wary-of-indigenisation.html (accessed 14 February 2016).
[74] Munyedza (2011) at 9.

country.[75] In order to lure FDI, investors need clarity regarding the provisions of the IEEA and what they seek to achieve with regards to issues such as: 1) the recent imposition of the indigenisation levy by Minister Patrick Zhuwao and its legitimacy; 2) whether or not the specified share transactions issues regarding the 51% equity threshold are negotiable or not; 3) the submission of indigenisation plans; and 4) the plausibility of payment against compliance with the law.[76]

The manner of implementing the IEEA has been contested since its inception in 2007.[77] The former governor of the Reserve Bank of Zimbabwe, Gideon Gono warned government to guard against implementing the IEEA in a manner that would frustrate and threaten foreign investors.[78] The Canadian ambassador to Zimbabwe, Lisa Stadelbauer, has argued that Canadian investors are hesitant to invest in Zimbabwe because of the uncertainties informing the application of the indigenisation law in the country.[79] A case in point with regards to a need to clarify the framework of the IEEA is that in December 2015, IEE General Notice 394A titled "Frameworks, Procedures and Guidelines for Implementing the IEEA" was gazetted by the government with the Finance Minister, Mr Chinamasa being credited for the legal instrument. Minister Chinamasa provided for a 5 year compliance period with the IEEA. The publishing of General Notice 394A immediately drew the attention of Minister Zhuwao whose ministry is responsible for indigenisation. Minister Zhuwao disagreed with Minister Chinamasa's 5 year period and instead proposed a 1 year compliance period. The differences between the two ministers' pronouncement presented a basis of confusion amongst investors. However, guidance on ascertaining an investor friendly implementation period could be obtained from the "10-point plan for economic growth" introduced by the President of Zimbabwe, Mr Robert Mugabe, which advocates amongst other issues for a need to promote private sector investment.[80] To that end, Minister Chinamasa's longer

[75] See the UNCTAD World Investment Report (2011), available at http://unctad.org/en/PublicationsLibrary/wir2011_en.pdf (accessed 14 February 2016).

[76] For a detailed analysis of these issues see Matysyak (2016) at 15-18.

[77] See *Southmark Trading (Pvt) Ltd v Karoi Properties (Pvt) Ltd* 2013 ZWHHC 52.

[78] See the RBZ *Monetary Policy Statement* (2009), available at http://www.rbz.co.zw/pdfs/2011%20MPS/MPS%20July%202011%2028.07.pdf (accessed 14 February 2016).

[79] News Day, "Zimbabwe's indigenisation policy scares away Canadian investors" News Day 14 March 2014, available at https://www.newsday.co.zw/2014/03/14/zimbabwes-indigenisation-policy-scares-away-canadian-investors/ (accessed 14 February 2016).

[80] L Gumbo, "10-point plan for economic growth" Herald Zimbabwe 26 August 2015 http://www.herald.co.zw/10-point-plan-for-economic-growth/ (accessed 03 May 2016).

compliance period might be regarded as investor friendly. Recently, the IMF head of mission, Domenico Fanizza, speaking at press briefing, pointed out that Zimbabwe needs to review its indigenisation laws to attract FDI and generate money to pay off its IMF debt.[81]

Another problem with regards to the IEEA emanates from section 3(5). Section 3(5) provides as follows:

> "The line Minister may prescribe that a lesser share than fifty-one percent or a lesser interest than a controlling interest may be acquired by indigenous Zimbabweans in any business in terms of subsections [3]*(1)(b)(iii),* (1)(c)(i), (1)(d) and (e) in order to achieve compliance with those provisions, but in so doing he or she shall prescribe the general maximum timeframe within which the fifty-one percent or the controlling interest shall be attained."[82]

Zimbabwean policy makers through their pronouncements appear to suggest that the 51% equity share threshold can be negotiated.[83] However, the last part of section 3(5) of the IEEA points out that "…but in so doing he or she shall prescribe the general maximum timeframe within which the fifty-one percent or the controlling interest shall be attained." From the wording of section 3(5), there appears to be no room for a negotiation regarding the 51% equity threshold. Again, the mixed statements from policy makers have the potential to scare away potential investors as investing under such circumstances could be tantamount to undertaking a high risk business venture.

The challenges besetting the implementation of the IEEA have been compounded by Minister Zhuwao's pronouncement of an indigenisation levy in pursuit of the objectives set out in section 17(1)-(6) of the IEEA. Matyszak has argued that the objectives of the levies provided for in section 17 could be equated to the imposition of surcharge against all businesses whether indigenous or not, to facilitate indigenisation and empowerment programmes.[84] However, Minister Zhuwao imposed a 10% levy on all foreign owned business on their annual income in the first year rising to 12.5% in the second year. According to Minister Zhuwao, the levies were meant to raise internal resources for funding

[81] Staff Reporter "Change indigenisation law, IMF tells Zimbabwe" New Zimbabwe 11 March 2015, available at http://www.newzimbabwe.com/news-21129-Change+indigenisation+law,+IMF+tells+Zim/news.aspx (accessed 22 May 2015).
[82] See section 3(5) of the IEEA.
[83] Matyszak (2016) at 16.
[84] Matyszak (2016) at 16.

the indigenisation programmes and would be distributed through community share ownership schemes. Non-compliance with the levy was accompanied by possible closure of foreign firms which do not comply with the March 31, 2016 deadline. The Confederation of Zimbabwean Industries then sought dialogue with government regarding the imposition of the levy which threatened private sector investment.

It is important to point out that, regardless of the reservations from Western investors concerning the IEEA, the Chinese have not been deterred from investing in Zimbabwe under the "harsh indigenisation dominated economic conditions" with exceedingly positive outcomes. China has injected over half a billion USD in FDI into Zimbabwe. Between 2008 and 2010, China invested up to USD 45 million. In 2011, the investments rose to over USD 460 million.[85] There is also significant evidence of investments towards infrastructure development with an estimated USD 3, 5 billion thermal power project expected to produce 1000 megawatts being undertaken by China Railway International.[86] In the mining sector, despite the Zimbabwean government's recent order to cease mining operations at the Marange Diamond Fields,[87] Anjin Diamond Mine has become one of the leading diamond miners in the Kimberly Process and has injected USD 300 million to a mining venture that was producing more than 7 million carats annually.[88] Further Chinese investment projects include plans to build the Kunzvi Dam with a capacity of 158, 4 million cubic meters of water with Avik International a Chinese company being one of the contractors in a project estimated to cost at least USD 370 million.[89]

An illustration of the turnover of China's projects in Zimbabwe is made in the diagram below:

[85] Z Chun, "China Zimbabwe Relations: A Model of China-Africa Relations?" http://www.saiia.org.za/occasional-papers/643-china-zimbabwe-relations-a-model-of-china-africa-relations/file (accessed 03 May 2016).

[86] Muronzi C "China consolidates stranglehold on Zimbabwe" Zimbabwe Independent 29 August 2014 available at http://www.theindependent.co.zw/2014/08/29/china-consolidates/ (accessed 03 May 2016).

[87] Dzirutwe M "Zimbabwe orders diamond mines shut, says not nationalising" available at http://af.reuters.com/article/investingNews/idAFKCN0VV126 (accessed 09 May 2016).

[88] Sibanda M & Makore G "Tracking the Trends: An Assessment of Diamond Mining Sector Contributions to Treasury with Particular reference to Marange Diamond Fields" available at http://www.slideshare.net/ZELA_infor/tracking-the-trend-an-assessment-of-diamond-mining-sector-tax-contributions-to-treasury-with-particular-reference-to-marange-diamond-fields (accessed 03 May 2016).

[89] "Chinese Firm to build Kunzvi Dam" Herald Zimbabwe 30 November 2012.

China's Project turnover in Zimbabwe for the period 2002-2012 in million USDs

2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
73.82	45.64	47.62	89.32	75.30	86.64	158.88	65.09	138.05	398.91	382.96

Source: National Data, National Bureau of Statistics of China, 20 May 2014

Chinese companies have been willing to employ Zimbabweans in the pursuit of their projects in the process creating the much needed employment.[90] An illustration of the preparedness of the Chinese firms to employ locals has been made in the table below.

Statistical evidence of Chinese companies employing Zimbabweans

Company name	Number of Locals Employed	Number of Chinese Employed
Anhui Foreign Economic Construction	4000	-
Nantong Construction Group	690	35
Sinosteel Zimbabwe	7000	4
Sino-Zimbabwe Cement Plant	400	30
Tianze	160	8

Source: Government of Zimbabwe 2015

However, regardless of the positives drawn from FDI from China, one cardinal principle that should not be lost by the Zimbabwean government in implementing the indigenisation policy is that lack of clarity essentially undermines foreign investor confidence. The IEEA sets a tone that there should be no expropriation of shares by the government for indigenisation purposes. Rather, shares should be acquired at a fair market value. However, the IEE Regulations[91] do not give clarity as to whether or not companies will be appropriately

[90] JW Chikuhwa *Zimbabwe: The end of the first Republic* New York: Algora Publishing (2013) at 532.
[91] See IEE General Notice 114 (General) Regulations of 2011.

compensated for the 51 percent share ceded to the locals. With regard to the mining sector only, the 2011 IEE Indigenisation Regulations provide that, "…the value of shares or other interests required to be disposed of to a designed entity … shall be calculated on a basis of valuation agreed to by … the Minister and the non-indigenous mining business concerned."[92] In this regard, it is apparent that the implementation challenges of the indigenisation policy are a consequence of inherent problems in its conception and misalignment of the enabling IEEA with the Constitution and the Indigenisation Regulations.

The IEEA focuses more on ownership and control. Section 3 of the IEEA seeks to bestow majority (51 percent) ownership and control of the country's resources to the indigenous Zimbabweans. Foreign investors will only be able to own 49 percent of their investments. The 51- 49 percent threshold is non-negotiable. The IEEA appears to use a one-size-fits-all approach to indigenisation without exceptions.[93] It mandates that 51 percent shares of every "public company and any other business" shall be owned by an indigenous Zimbabwean.[94] However, there are attempts by the government to review the IEEA to make it flexible. Such attempts have translated into the formulation of a new indigenisation framework.[95] The new framework aims at ensuring that the pursuit of the indigenisation and economic empowerment objectives are in conformity with the government's initiatives to attract FDI and ensure ease of doing business for investors. The framework was introduced after joint consultations between Finance and Economic Development Minister Patrick Chinamasa, Youth, Indigenisation and Economic development Minister, Patrick Zhuwao and the Reserve Bank of Zimbabwe Governor, Dr John Mangudya. This approach suggests a renewed awareness of the significance of pursuing an integrated approach to attracting FDI and implementing indigenisation policies.

Nevertheless, it is submitted that the two empowerment models, Production Sharing Model (PSM) and Joint Empowerment Investment Model (JEIM), still remain as the best

[92] See section 3(2) of IEE General Notice 114 (General) Regulations of 2011.
[93] Section 3(1)(a), 3(1)(b)(iii), 3(1)(c)(i), 3(1)(f) and 3(5) of the IEEA.
[94] Section 3(1)(a), 3(b)(iii), 3(1)(c)(i), 3(1)(f) and 3(5) of the IEEA.
[95] F Share, "New indigenisation framework unveiled" Herald Zimbabwe 5 January 2016. For example, the new framework seeks to invoke section 17 of the IEEA so that it recognises businesses that are complying with indigenisation legislation. This would be done by providing compliance rebates, indigenous shareholding rebates, and rebates for achieving socially and economically desirable objectives.

possibilities of meeting the IEEA's ideological, legal and policy necessities.[96] PSM is a broad cover for an assortment of production sharing agreements signed between governments and extraction companies concerning how much of a resource extracted from the country each will receive. Investors will be allowed to recover their initial capital investment or appropriate return on investment and operational costs before the sharing of production outputs or profits.[97] JEIM, with the exclusion of mining, agriculture and particular tourism investments, will see locals being encouraged to enter into joint ventures as a way of generating capital built wholly on Zimbabwean-owned enterprise.[98]

4. Recommendations

It is possible to advance foreign investment through the IEEA, but, in order to achieve this; a few significant refinements to it are required. It is therefore proposed as follows:

a) The IEEA needs to be clarified and/or amended to render it more investor-friendly than it currently is. Whilst foreign investors/companies must not be granted greater rights than domestic investors/companies or the state, they should be assured of the right to conduct business on an equal basis without suffering discrimination due to their foreign origin. It is hoped that such an approach safeguards economic empowerment of indigenous persons and development at the same time encouraging foreign investment.

b) The IEEA should go beyond exclusively focusing on ownership of already existing foreign business firms but also on technical, human capital and managerial skills development of the black entrepreneurs (indirect empowerment) as well as the economic development of the nation as a whole.[99] Such an approach will not scare away investors in fear of losing control over their businesses. South Africa's Black Economic Empowerment (BEE) generic scorecards could provide guidance on allocating percentage points to criteria such as ownership (20%), management

[96] See "Indigenisation Act to be amended" available at http://harare24.com/index-id-news-zk-20562.html (accessed 12 February 2016). See also "Govt in major climb-down" Sunday Mail 25 May 2014 also available at http://www.sundaymail.co.zw/govt-in-major-climb-down-indigenisation-act-to-be-amended-major-victory-for-gono-policy-moderates-investors-will-be-allowed-to-recover-costs-production-sharing-model-proposed/ (09 May 2016).

[97] "Indigenisation Act to be amended".

[98] "Indigenisation Act to be amended".

[99] See Chikuhwa (2013) at 534.

control (10%), employment equity (15%), skills development (15%), enterprise and supplier development 15%, preferential procurement (20%) and socio-economic development (5%).[100]

c) The IEEA should also develop a financing plan to support the previously disadvantaged indigenous entrepreneurs. Revenue obtained from FDI could be one such source of financing the indigenisation programme. However, creating a hostile business environment will not attract but scare away the much needed FDI.

d) Similar to the BEE, the IEEA should recognise that all sectors have different thresholds because of different circumstances. A one-size-fits-all or blanket approach to economic empowerment is not the most appropriate and convenient approach to employ. Foreign investors should "be allowed to recover their initial capital investment, an appropriate return on investment and operational costs before the sharing of production outputs or profits."[101]

5. Conclusion

This article demonstrated that the IEEA must be commended as a sound legal instrument for advancing the inclusive participation of previously disadvantaged indigenous Zimbabweans in the mainstream of the nation's economy. Equally important, it has been proposed that the IEEA should be implemented in a manner that promotes the attraction of the much-needed FDI into the country. Further, it has also been pointed out that the IEEA needs to be clarified and/or amended in order to provide certainty and confidence to foreign investors. At the time of writing the article, the Zimbabwean government had embarked upon clarifying the harmony between attaining IEEA objectives and creating a sustainable investment environment. The government of Zimbabwe must be commended for trying to address the concerns relating to the negative impact of an ultra-indigenisation policy through developing a policy framework to clarify its indigenisation laws. Should the policy framework be a success, the much needed balanced approach between the pursuit of FDI and indigenisation will be realised. It is clear that indigenisation alone will not lead to the levels of economic growth envisaged by the country's policy makers. To that end, the ZIMASSET policy may not succeed and the country's economic challenges will persist. It is

[100] See Amended Broad-Based Black Economic Empowerment Codes of Good Practice, 2012.
[101] "Indigenisation Act to be amended".

therefore hoped that the views advanced in this article will inform a robust approach to pursuing FDI and realising the objectives of the plausible indigenisation programme.

RESIGNATION OF AN EMPLOYEE UNDER ZIMBABWEAN LABOUR LAW: A UNILATERAL ACT

T G Kasuso*

1. Introduction

The common law recognizes the right of an employee to terminate a contract of employment by giving the employer the agreed notice period or reasonable notice.[1] This is an inherent feature of a contract of employment for an indefinite period and when notice is given the contract is regarded as having been lawfully terminated.[2] Termination on notice at the instance of the employee is referred to as resignation and is not a dismissal.[3] It is statutorily recognized in s12 (4) of the Labour Act [Chapter 28:01] (the LA)[4] which governs the time periods that apply when a contract of employment is terminated on notice at the instance of either the employer or employee. Though the Labour Amendment Act No. 5 of 2015 (the LAA), in s12 (4a), caveated the employer's right to terminate the contract of employment on notice, the employee's right to resign on notice at any time was retained. Notwithstanding, resignation in Zimbabwe is heavily regulated by the common law.

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[1] It is in this context that Grogan J in *Workplace Law* (2000) 72-3 states that;

> "Both the employee and the employer may, by giving the statutory or agreed or reasonable notice terminate the contract of employment. That a contract of employment has been entered into does not under the common law or statutory law give either a vested right to the continuance of the resulting employment relationship in perpetuity. Consequently, either party may give the other agreed or, in the absence of agreement on this point, the prescribed notice of termination."

[2] As for a fixed term contract, none of the parties has the right to terminate the contract prior to the expiry of the fixed period. It is not an inherent feature of fixed term contracts. It can only be terminated on notice if the contract provides for such termination, otherwise any termination would amount to repudiation. See Wallis MJD, *Labour and Employment Law* (1992) 5-10; Gwisai M *Labour and Employment Law in Zimbawe* (2006) 148; *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49.

[3] A resignation is termination at the instance of the employee whilst a dismissal is termination at the behest of the employer. See van Niekerk A *et al*, *Law @ Work* (2012) 224.

[4] In its own words section 12(4) of the LA provides as follows;

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

Usually the legal act of resignation is unambiguous whilst in some cases it is not as straightforward as it seems. This often results in courts being called upon to determine whether an employee resigned or not. Some of the problematic situations involve cases where employees facing disciplinary action resign impulsively so as to avoid the stigma associated with a dismissal, but later on regret the act and attempt to resurrect the contract by withdrawing the resignation. Despite resignation, some employers have proceeded to conduct disciplinary hearings against employees. It is also common for employers to refuse to accept an employee's resignation. In other instances, it is not unusual for employees to allege that when they resigned they did not appreciate the consequences of their actions due to emotional stress or that it was a moment of weakness or madness. Others claim that they resigned under protest, undue influence or duress rendering the termination constructive dismissal. Though the demise of the employment relationship is brought by an employee's voluntary and deliberate conduct, the act of resignation has in some cases proved difficult to comprehend. This has inevitably raised several questions relating to the true nature of the juristic act constituted by resignation.

There are various questions that have arisen regarding resignation, and both the legislature and the judiciary have gone a long way in answering these questions. Various academic writers have weighed in, creating a lot of relevant jurisprudence on this issue. The questions vary from the simple and straightforward to the complicated. For instance, what in essence constitutes a resignation? How should resignation be communicated, and at what stage does resignation become effective? What is the effect of a resignation on the employment relationship? Is there an obligation on the employer to accept or reject a resignation? What are the remedies available to an employer against an employee who resigns without giving notice? Can a resignation be withdrawn by an employee? Can an employer continue with disciplinary proceedings if an employee resigns so as to avoid such proceedings? Is it possible for an employee who has committed an act of misconduct to be given an option to resign or face disciplinary action? What is the difference between resignation and constructive dismissal, retirement, retrenchment, and mutual termination? Is an employee entitled to any terminal benefits on resignation? This article attempts to ascertain the true

nature of the legal act of resignation and debunk the fallacies associated with resignation.[5] In essence, it sheds some light on the diverse questions raised above and the legal and practical implications of the legal provisions relating to resignation. The mechanics of resignation will further be discussed against the backdrop of the abovementioned problematic questions. Critical to this discussion are rights of both employees and employers, and the implications on the relationship between these two parties on resignation.

2. The juristic act of resignation

The LA does not define the term resignation, meaning that the legislature has entrusted the courts to establish the actual definition and scope of the term 'resignation'. In *Madondo v Conquip Zimbabwe (Pvt) Ltd*[6], the SC accepted the Oxford Advanced Learners Dictionary definition to the effect that resignation is an act of giving up one's job or position. Barker and Holtzhausen[7] define resignation as,

> "……the termination of employment on the employee's initiative, of his or her own volition and without employer coercion."

Therefore, from this definition, it is clear that the act of resignation is a voluntary and deliberate unilateral act by the employee in terms of which he or she brings the employment relationship to an end without the consent of the employer. It can either be on notice or without notice.[8] In the absence of agreement as to the notice period, the period applicable will be governed by s12 (4) of the LA. This provision is only ousted by the contract of employment or any other legislation which regulates notice period, provided that these allow for a longer period.

[5] In terms of s3 (1) of the LA, the Act applies to all employers and employees except those whose conditions of employment are otherwise provided for in the Constitution. In other words, it does not apply to state employees or civil servants. This article only deals with resignation in respect of employees in the private sector and quasi-state institutions such as local authorities, parastatals and state universities, who are covered by the LA. Logistical constraints preclude the examination of the equally problematic issue of resignation of state employees. These are covered by a plethora of Regulations but notable examples include s 15 of the Public Service Rgns, 2000; s 15 of the Health Service Rgns, 2006 and s 14 of the Judicial Service Rgns, 2015.

[6] SC 25/16.

[7] Barker FS and Holtzhausen MME, *South African Labour Glossary* (1996) 127.

[8] Madhuku L, *Labour Law in Zimbabwe* (2015) 93.

To be legally effective a resignation must be clear, in that it must indicate an employee's intention to give up his or her job or position or leave employment.[9] Put differently, the resignation must be unambiguous and leave no doubt that the employee has given up his or her job. But how can one determine whether or not an employee has resigned? For instance, employees use very clear and unambiguous words or terms, such as, *"I am resigning, leaving or quitting"*. In this instance, the words have clear literal meanings and are unlikely to create controversy or disputes.

It should be added that in most circumstances where the need to establish whether or not there was a resignation arises, a court has to evaluate what the intention of the parties was.[10] In the South African case of *Fijen v Council for Scientific and Industrial Research,*[11] it was held that the test for establishing resignation is that an employee has to:

> "……either by words or conduct, evince a clear and unambiguous intention not to go on with his contract of employment."

In *Mafika Sihlali v SABC,*[12] Van Niekerk J held that a resignation is established by:

> "…….a subjective intention to terminate the employment relationship, and words or conduct by the employee that objectively viewed clearly evinces that intention."

As demonstrated in the following cases, a court will look at the facts objectively from a reasonable employer perspective.[13] If the employee's conduct and/or words clearly and unequivocally lead a reasonable employer to the conclusion that the employee did not intend to continue with his or her employment, a finding that the employee has resigned will be made.

In *Lee Group of Companies v Ann Clare Elder,*[14] an employee completed her probation and remained in employment. No dissatisfaction with her work was raised but permanent employment was not confirmed. She made several requests for confirmation of permanent

[9] See *Amazwi Power Products (Pty) Ltd v Turnbull* (2008) *ILJ* 2554 (LAC); *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (SCA); *Lottering & Others v Stellenbosch Municipality* [2010] 12 BLLR 1306 (LC)
[10] van Niekerk A *et al* n3 224.
[11] (1994) 15 *ILJ* 759 (LAC) at 772 C-D.
[12] (2010) 31 *ILJ* 1447 (LC).
[13] Smit N, Resignation – An Act That Is Not As Straightforward As It Seems? (1) *TSAR* (2011) 107; Freedland MR, *The Personal Employment Contract* (2003) 420.
[14] SC 6/05.

employment but the employer did not respond. One day she met a member of management whom she confronted regarding her status. She was told that the employer was not happy with her performance and she was not going to be confirmed as a permanent employee. Disturbed by this news she packed her personal belongings and left the employer's premises without any explanation. She only came back three days later with a doctor's report to the effect that she was suffering from severe reactive depression due to the altercation she had with a member of senior management. She also brought an apology letter. The employer took the stance that the employee had verbally resigned and this had already been confirmed by the employer in a letter addressed to the employee accepting the resignation. When the employee challenged the termination of her contract which she perceived to be an unfair dismissal, the court held that the issue for determination was whether or not the employee had resigned. The court looked at the facts of the case objectively and concluded that the conduct of the employee in leaving the workplace abruptly, going on to stay away for three days and the letter by the employer, indicated an unequivocal and unambiguous intention to resign.[15]

Recently in *Madondo v Conquip Zimbabwe (Pvt) Ltd,*[16] the Supreme Court (SC) concluded that resignation is established by looking at what a reasonable employer would have understood by an employee's words or actions. In this case the Appellant was suspended by the Respondent. After the suspension Appellant completed a document called "Pension Withdrawal Claim Form" in terms of which she stated the reason for withdrawal of the pension as "*leaving Conquip*". The withdrawal form was signed by the General Manager of Respondent resulting in Appellant receiving her pension contributions from Marsh Employee Benefits Zimbabwe (Pvt) Ltd. The pension benefits could only be withdrawn on retirement, resignation or death. When the Appellant challenged the disciplinary proceedings which had been instituted by the Respondent, the Respondent aborted the same and indicated that the Appellant had resigned. The Appellant then claimed unfair dismissal and the issue for determination was whether the Appellant had resigned from employment. The SC held that by filling the Pension Withdrawal Form and writing the

[15] See also *Murire v NSSA* HH 124/97; *Chimanikire & Anor v The Posts and Telecommunications Corporation* SC 199/95; *Riva v NSSA* 2002 (1) ZLR 412 (H).
[16] SC 25/16.

reason as "*leaving Conquip*" the Appellant had resigned. The document carried a clear and unequivocal notice directed to the employer that she was giving up her job.[17]

What is clear from these cases is that resignation is a question of fact dependent on the evidence and conduct of the individual employee. Where evidence shows that an employee exercised his right to terminate his or her relationship with the employer, the resignation takes effect immediately when the conduct is committed or becomes apparent to the employer. However, it must be noted that the hallmark of a resignation is that it is a voluntary and deliberate unilateral act of the employee. It is this fact which differentiates resignation from constructive dismissal.

Constructive dismissal only arises when an employee terminates the contract of employment with or without notice because the employer made continued employment intolerable for the employee.[18] It is a dismissal since the resignation of the employee is not voluntary but as a result of the employer's conduct, which compels him or her to terminate the contract of employment. The requirements for constructive dismissal include the following: that the termination of the contract of employment must have been at the instance of the employee, by resigning or otherwise. Secondly, the termination by the employee must have been as a result of the employer's conduct. The employer's conduct must have been brought about by its act or omission, but need not necessarily be intended to bring the employment relationship to an end. Thirdly, the employee who claims constructive dismissal must objectively establish that the situation has become so unbearable that he or she cannot be expected to work any longer. This is viewed from the perspective of a reasonable person in the shoes of the employee. The employee must prove that he or she would have carried on with the employment relationship had it not been for the employer's conduct. Lastly, the employee must exhaust all possible remedies before

[17] See *Jakazi v The Anglican Church of the Province of Central Africa* SC 10/13; *The Church of the Province of Central Africa v The Diocesan Trustees for the Diocese of Harare* 2012 (2) ZLR 392 (S); *Muzengi v Standard Chartered Bank* 2002 (1) ZLR 334 (S)

[18] This common law principle is codified in section 12B (3) (a) of the LA which provides that;

"(3) An employee is deemed to have been unfairly dismissed –

(a) if the employee terminated the contract of employment with or without notice because the employer deliberately made continued employment intolerable for the employee."

resigning.[19] The onus to prove constructive dismissal on the basis of these requirements lies on the employee.[20]

When a resignation is as a result of force, coercion, duress or undue influence it will amount to constructive dismissal. For instance, in *Fonda v Mutare Club,*[21] an employee who had incurred shortfalls was forced to resign as an alternative to having the matter handed over to the police and be prosecuted. The court did not hesitate to conclude that the resignation was tainted with duress, thus constituting constructive dismissal. The resignation had been triggered by the employer. However, it will not amount to constructive dismissal if an employee facing disciplinary action is given a choice to resign. In the absence of duress, undue influence or threats, if that employee takes up the alternative of resigning, he or she cannot flip flop and complain of constructive dismissal. In *Mudakureva v Grain Marketing Board,*[22] an employee was hauled before, a disciplinary committee. He was found guilty of committing acts of misconduct but before the penalty of dismissal was imposed he was given an option to resign. He elected to resign and thereafter claimed that he was forced to resign. He challenged the termination. Though the matter was decided on other grounds, the attitude of the court was clear that there was nothing wrong in an employer giving an employee a reasonable alternative option like resignation.[23] The same position is applicable to employees who resign so as to avoid disciplinary processes. In the absence of undue influence or duress, they cannot cry foul and claim constructive dismissal.[24]

3. Is acceptance of a resignation necessary for its validity?

There is a general perception by employers that they have a right to accept or reject a resignation. In the case of *Murire v NSSA,*[25] the High Court (HC) held that once a resignation is tendered, it is up to the employer to accept the resignation. The court insinuated that an employer had an option to either accept or reject a resignation and its validity was

[19] van Niekerk A *et al* n3 223.
[20] Grogan J, *Dismissal, Discrimination and Unfair Labour Practices* (2007) 107.
[21] HH 40/91.
[22] 1998 (1) ZLR 145 (S).
[23] See also the following cases; *Kandoma v Shades of Black Cosmetics (Pvt) Ltd* SC 189/06; *Astra Holdings v Kahwa* SC 97/04; *Thomas Miekles Stores v Mwaita & Anor* 2007 (2) ZLR 85. For a detailed discussion of Zimbabwean law on constructive dismissal see Mucheche C, *Unlocking the Law on Constructive Dismissal in Zimbabwe* in *A Practical Guide to Labour Law in Zimbabwe* (2013) 70-84.
[24] See *Muzengi v Standard Chartered Bank* 2002 (1) ZLR 334 (S); *Riva v NSSA* 2002 (1) ZLR 412(H).
[25] HH 24/97.

dependent on its acceptance by the employer.[26] With all due respect, this proposition is incorrect. The correct view is the one adopted in the South African case of *Rustenburg Town Council v Minister of Labour & Ors,*[27] and a long line of cases thereafter to the effect that resignation is a unilateral act that does not need to be accepted by the employer. Murray J stated that;

> "The giving of notice is a unilateral act: it requires no acceptance thereof or concurrence therein by the party receiving notice, nor is such party entitled to refuse to accept such notice and to decline to act upon it."

This statement has been cited with approval in several Zimbabwean cases.[28] However, there is nothing at law that precludes an employer from accepting a resignation. The rationale behind this principle lies in international labour standards, the Constitution and labour legislation which outlaw forced labour.

Forced labour is universally condemned and ILO Forced Labour Convention No. 29 of 1930 and Abolition of Forced Labour Convention No. 105 of 1957 prohibit all forms of forced or compulsory labour.[29] These conventions define forced labour as:

> "……all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."

Zimbabwe ratified the abovementioned conventions on 27th of August 1998 and they are entrenched in the Constitution which guarantees the right not to be made to perform forced or compulsory labour.[30] This right must be read with the right to fair and safe labour practices guaranteed by s65 of the Constitution. The aforementioned right is given effect in s 4A (1) of the LA which provides that no person shall be required to perform forced labour. The LAA then defines forced labour as:

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[26] A similar argument was accepted in the following South African cases, *Uthingo Management (Pty) Ltd v Shear NO* (2009) *ILJ* 2152 (LC); *Chemical Energy Paper Printing Wood & Allied Workers Union v Glass Aluminium 2000 CC* (2000) *ILJ* 695 (LAC).

[27] 1942 TPD 220.

[28] See *Bulawayo Municipality v Bulawayo Indian Sports Ground Committee* 1955 SR 114; *Kadada v City of Harare* HH 26/94, *Muzengi v Standard Chartered Bank Zimbabwe Ltd & Anor* 2002 (1) ZLR 334 (S); *Saltrama (Pvt) Ltd v Majindwi* SC 79/04 *Riva v NSSA* 2002 (1) ZLR 412 (H); *Lee Group of Companies v Ann Clare Elder* SC 6/05; *A. C Controls (Pvt) Ltd v Midzi & Anor* HH 75/10.

[29] These conventions must be read with Protocol of 2014 to the Forced Labour Convention, 1930 and Forced Labour (Supplementary Measures) Recommendation No. 203 of 2014.

[30] See s 55 of the Constitution which must be read with ss 24, 51, 53, 54 and 64.

> "…..any work or services which a person is required to perform against his or her will under the threat of some form of punishment."

Thus, if validity of a resignation was dependent on its acceptance by the employer, the employer could simply reject the resignation and compel an employee to work against his or her will. Such conduct is a criminal offence and an unfair labour practice in terms of s 4A (3) of the LA as well as a violation of an employee's fundamental rights under the 2013 Constitution.[31]

4. Communicating A Resignation

There is no set method of communicating a resignation.[32] The Shorter Oxford Dictionary defines to communicate as "the imparting, conveying or exchange of ideas, knowledge etc (whether by speech, writing or signs)". A resignation can be conveyed through various forms of communication. It can either be oral or written communication or by conduct,[33] as long as the words or conduct are unambiguous and unequivocal that an employee does not intend to fulfill his or her part of the contract of employment. If the communication is written it can only be effectively conveyed to its recipient's mind by its reading. Such communication must be directed to the employer and in particular, a responsible person in the sense that it must be conveyed to someone who has authority to receive such communication. Usually it is the employee's immediate superior unless the parties agree that it must be communicated to a specific authority. On the same token, if required to do so in writing, then the notice of resignation must be given in writing for it to be valid.[34] On

[31] In *Mafika Sihlali v SABC* (2010) 31 *ILJ* 1477 (LC) Van Niekerk J succinctly summarized the rationale as follows;

> "In other words, it is not necessary for the employer to accept any resignation that is tendered by an employee or to concur in it, nor is the employer party entitled to refuse to accept a resignation or decline to act on it. (See *Rosebank Television and Appliance Co. (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd* 1969 (1) SA 300 (T)). If a resignation is to be valid only once it is accepted by employer, the latter would in effect be entitled, by a simple stratagem of refusing to accept a tendered resignation, to require an employee to remain in employment against his or her will. This cannot be – it would reduce the employment relationship to a form of indentured labour."

For a discussion of this decision see Le Roux PAK, Resignations – an update: The final unilateral act of an employee (2010) 19/6 *Contemporary Labour Law* 51.

[32] *Madondo v Conquip Zimbabwe (Pvt) Ltd* SC 25/16.

[33] Sometimes referred to as implied resignation. It is where an employee conducts himself or herself as to lead a reasonable employer to believe that the employee has terminated the contract. See Selwyn N, *Selwyn's Law of Employment* (2011) 455.

[34] *ANC v Municipal Manager, George Local Municipality & Ors* [2010] 3 BLLR 221 SCA.

this aspect it may be necessary to have regard to recent case law on how a resignation must be communicated.

In *Madondo v Conquip Zimbabwe (Pvt) Ltd supra,* an employee had completed a document called "Pension withdrawal Claim Form" in terms of which she indicated reason for withdrawal as "leaving Conquip." The SC accepted that by that act the employee had communicated to the General Manager her resignation. The document was accepted as carrying a clear and unequivocal message or notice of resignation. In *Riva v NSSA supra*, Riva was suspended by NSSA. Before disciplinary proceedings could be instituted against him he wrote a letter to the following effect *"I wish to give three months' notice to terminate my employment with NSSA as per my contract. I wish to buy the car, cell phone and cell line as per my contract."* NSSA did not respond to this letter and ten days later Riva wrote to NSSA retracting the notice of resignation since he had not received any confirmation. At this juncture NSSA wrote to Riva accepting his resignation. Riva then approached the High Court seeking a *declaratur* to the effect that he had not resigned as the letter was a mere offer to resign. This argument was shot down by the court which held that the letter was not an offer to resign but a clear and unequivocal statement of intention to resign. In the South African case of *Mafika Sihlali v SABC supra* an employee send a short message service (text) message to SABC's Group CEO indicating that "*he quit with immediate effect*". He contended that this did not constitute a valid termination because it was a requirement for notice of termination to be reduced to writing. The court rejected this argument and held that the *sms* was written communication and the resignation had been communicated to the proper person.[35]

Once communicated to the appropriate authority, a resignation takes effect and it becomes binding such that it cannot be withdrawn without consent of the employer.[36] This applies to both the act of resignation and the notice of resignation. Most employees utter words indicating an intention to resign as a result of uncertainty or a manifestation of anger and emotions. After realizing that their impulsive decision is ill conceived, they attempt to withdraw the resignation. In this regard, the following sentiments by Murray J in *Rustenburg*

[35] See also *Jafta v Ezemvelo KZN Wildlife* (2009) *ILJ* 131 (LC).
[36] See Whitear- Nel N, Grant B and Van Rensburg J, Is an attempted retraction of a resignation consistent with a claim for constructive dismissal? (2012) *ILJ* 2300; *Du Toit v Sasko (Pty) Ltd* (1999) 20 *ILJ* 1253 (LC).

Town Council v Minister of Labour & Ors supra are apposite and endorsed with respect herein:

> "… if so, it seems to follow that notice once given is final, and cannot be withdrawn - except obviously by consent – during the time in excess of the minimum period of notice. In the present case, the position was undisputed, and I think undisputable, the town clerk is the authorized agent of the applicant council empowered to receive communications to it: once therefore the resignation in question had been lodged with him, it constituted a final act of termination by the third respondent, the effects whereof he could not avoid without the permission of the applicant council."[37]

Madhuku submits that this position is correct where an employee resigns on notice, whilst it presents problems when an employee summarily resigns or gives short notice.[38] In such cases the employee is in breach of the contract, entitling the employer to either hold the employee to what is left of the contract or to cancel the contract summarily and sue for damages. It is in these circumstances that it has been argued that it is necessary for the employer to accept a resignation. However, as shall be discussed herein below resignation without notice is still a valid unilateral act by the employee of bringing the employment relationship to an end without the employer's consent.[39]

Though it is trite that a resignation can only be withdrawn with consent of the employer, it is possible for an employee to withdraw his or her resignation as long as the communication of the resignation has not reached the employer. This was the case in *ANC v Municipal Manager, George Local Municipality & Ors.*[40] In this case a councilor resigned in writing in terms of s 27 (a) of the Local Government: Municipal Structures Act 117 of 1998. The sealed letter was delivered to the receptionist of the Municipal Manager. The letter was not read as the Municipal Manager had other pressing commitments. The author of the letter then came and withdrew the letter before it had been read by the Municipal Manager. The issue

[37] This dicta has since been endorsed by Zimbabwean courts in the following cases; *Monteiro v Wankie Colliery Co. Ltd* HH 100/95; *Kujinga v Forestry Commission* SC 29/93; *Muzengi v Standard Chartered Bank Zimbabwe Ltd & Anor* 2002 (1) ZLR 334 (S); *A. C Controls (Pvt) Ltd vb Midzi & Anor* HH 75/10; *Lee Group of Companies v Ann Clare Elder* SC 6/05; *Riva v NSSA* 2002 (1) ZLR 412 (H); *Jakazi & Another v The Anglican Church of the Province of Central Africa & Ors* SC 10/13.
[38] Madhuku L n8 93.
[39] This issue is discussed in detail under remedies available to the employer par 6.
[40] [2010] 3 BLLR 221 (SCA).

which was before the court was whether Jones had resigned as a councilor given that his letter of resignation was withdrawn before it had been read by the Municipal Manager. The court held that an employee who wished to resign must communicate his intention to the employer. If required to do so in writing, the notice of resignation must be in writing and will only become effective when conveyed to its recipient's mind by its reading. Consequently, if the communication has not been read an employee would be entitled to withdraw his or her resignation without consent of the employer. What is critical is that the withdrawal of the resignation must be done before the communication is read by the employer.[41]

5. The Effect of a Resignation

A resignation brings the employment relationship to an end.[42] The rights and duties which arise from the employment relationship are extinguished. In the event of resignation on notice, it does not terminate the employment relationship on the date the notice is given but on expiration of the notice period.[43] Though an employee can give notice at any time, if the notice is given latter than the first day of the relevant period of the month, it will only expire at the end of the next month and not the month it was given.[44] If the employee having given notice and elects not to render his or her services, the employer has no obligation to remunerate the employee on the basis of the common law maxim, *no work no pay*. The situation is different if the inability to work is at the instance of the employer.[45] In that case, the employer has an obligation to pay the employee cash in *lieu* of notice since the employer would have waived the right to notice.[46] Apart from cash in *lieu* of notice an

[41] For a commentary of this case see Smit N, Resignation – An Act that is not as straightforward as it seems? (2011) 1 *TSAR* 100.
[42] van Niekerk A *et al* n3 224; Grogan J, *Workplace Law* (2011) 15; Grogan J, *Dismissal* (2010) 21-22; Rycroft A and Jordaan B, *A Guide to South African Labour Law* (1992) 90.
[43] See *SALSTAFF obo Bezuidenhout v Metrorail* [2001] 9 BALR 926 (AMSA); *Lottering & Ors v Stellenbosch Municipality* [2010] 12 BLLR 1306 (LC).
[44] Gwisai M n2 150.
[45] In Britian, New Zealand and Australia such an employee is said to be on garden leave. This is where an employee who has resigned and is serving notice is instructed by the employer not to report for duty whilst he is paid his remuneration during the notice period.
[46] See s12 (7) of the LA. One disquieting practice by employers is to force an employee who is serving resignation notice to set off his or her vacation leave days with the notice period. Such a practice has no basis in the LA and the common law. The South African Basic Conditions of Employment Act 75 of 1997, has made it abundantly clear in s 20 (4) (b) that an employer may not require an employee to take annual leave during any period of notice of termination. In addition, employers in South Africa have an obligation to give an employee

employee who has resigned is also entitled to wages and benefits upon termination prescribed in s13 of the LA. With the exception of cash in *lieu* of notice, all the other wages and benefits are applicable in cases of summary resignation.[47] The right to terminal benefits prescribed in s13 of the LA does not override the employer's right to set off any liquidated debts owing to the employee.[48] This position is also supported by the proviso in s 12A (7) of the LA.[49]

Notwithstanding this, some employees, on resignation claim from their employers a gratuity, severance pay or a retrenchment package. A resignation is different from a retrenchment. Whilst a resignation is termination at the instance of the employee, a retrenchment is at the instance of the employer. It is defined in s 2 of the LA as:

> "….terminate the employee's employment for the purpose of reducing expenditure or costs, adapting to technological change, reorganizing the undertaking in which the employee is employed, or for similar reasons, and includes the termination of employment on account of the closure of the enterprise in which the employee is employed."

On retrenchment an employee is entitled to the minimum retrenchment package of not less than one month's salary for every two years of service as compensation for loss of employment.[50] This is in addition to the wages and benefits prescribed in s 13 of the LA. Retrenchment and resignation cannot be conjoined as they do not co-exist. Accordingly, the benefits that arise from both are claimed differently and under different legal situations and scenarios. This position was echoed in *Matema v ZINWA,*[51] where the court ruled that it is ludicrous at law for an employee who has resigned to be entitled to a retrenchment package since the contract of employment is as good as dead. With voluntary retrenchment, it has

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who has resigned a certificate of service. In the Zimbabwean context it's the equivalent of a recommendation letter and there is no legal obligation imposed by the LA on employers to issue one on resignation.

[47] These include outstanding vacation, outstanding medical aid, and any pension where applicable.

[48] Madhuku L n8 111. These deductions must be confined to those permitted by s12A (6) of the LA which prohibits deductions or set-off of any description from an employee's remuneration except in limited circumstances.

[49] It allows an employer to deduct from the total remuneration due to an employee on termination an amount equal to any balance which may be due to the employer in terms of s 12A (6) (a), (c), (e) and (f).

[50] See s 12C (2) of the LAA. Retrenchment in Zimbabwe is regulated by ss 12C and 12D of the LA as amendment by the LAA read with the Labour (Retrenchment) Regulations SI 186 of 2003.

[51] HH 103/04.

the same consequences with a resignation since employees voluntarily resign in return for some consideration.[52]

As for gratuity, it is not a terminal benefit as contemplated by s 13 of the LA. In *Standard Chartered Bank Zimbabwe Ltd v Matsika*[53] a gratuity was defined as a pecuniary present of an amount fixed by the giver in recognition of an inferior's good offices and paid either as a lump sum or in instalments. In labour law it signifies an amount of money given to an employee in recognition of service rendered for a specific period or on leaving employment. It can only arise *ex contractu* or *ex lege*. For instance, some contracts of employment and collective bargaining agreements provide that an employee who has served a given number of years is entitled to certain payments on termination of employment for whatever reason. In such cases a resigning employee will be entitled to gratuity as a terminal benefit. Be that as it may, in the absence of agreement or a statutory obligation an employee who has resigned is not entitled to a gratuity.

As for retirement it has clear and different connotations from resignation though the legal effect may be the same. When an employee reaches the agreed or specified retirement age, the contract of employment automatically comes to an end. It is not a dismissal for purposes of the LA and it is not a resignation.[54] Such an employee is not entitled to a retrenchment package. However, if an employee takes up early retirement, such a situation is comparable to a resignation and the results are the same.[55] The main distinction between the two is that retirement occurs after a prescribed period of qualifying service whilst resignation can be tendered at any given time.

It is also necessary that a resignation be distinguished from mutually agreed termination of employment. Since the employment relationship is constituted by agreement between the employer and employee, it can also be terminated by agreement, mutual termination. In this instance therefore, termination is not unilateral or at the instance of either party but

[52] See *Retrenched Employees of National Breweries Ltd v National Breweries & Ors* 2003 (1) ZLR 71 (H); *Storia Mpofu & Anor v Thomas Miekles Stores* LC/H/242/13.
[53] 1997 (2) ZLR 389 (S).
[54] As posited by van Niekerk A *et al* n3 226 the question of whether an employee has reached retirement age is a matter of fact and is determined from the contract of employment, applicable policies and relevant pension fund rules.
[55] See *Mutare Board & Paper Mills (Pvt) Ltd v Kodzanayi* 2000 (1) ZLR 641 (SC); *Athol Evans Hospital Home v Marata* SC 66/05; *Munhumutema v Tapabwa* 2010 (2) ZLR 509 (H); *Water and Allied Workers Union of Zimbabwe v City of Harare* HH 238/15.

both parties – by mutual consent. The parties enter into a new contract which takes precedence over the initial contract. This form of termination assumes that the employee enters into the agreement to terminate with the full knowledge of its implications and that there has been no misrepresentation by the employer that induced the employee to conclude the agreement otherwise it will amount to constructive dismissal.[56] Accordingly, an agreement to terminate the contract must be reduced to writing as provided for in s 5 (c) of the Labour (National Employment Code of Conduct) Regulations, 2005 read with s12 (4a) (b) of the LAA[57] and the reason for the agreement is irrelevant. The agreement to terminate is final such that a party can only withdraw from it by consent of the other.[58] From the foregoing it is clear that the main distinction between resignation and mutual termination is that the former is a unilateral act, whereas the latter requires consent of both parties. Even where an employer accepts or acknowledges resignation of an employee that does not make the termination mutual.[59] The position is different where an employee offers to resign and the employer communicates with the employee that the offer is being accepted or there is a counter offer which the employee accepts. Such termination is no longer resignation but becomes mutual termination. In this regard Madhuku[60] correctly states that:

> "…the offer to resign is an invitation to enter into a mutual agreement of termination, which if the employer accepts the employment relationship is brought to an end by mutual termination and not a resignation.[61]

Since it is accepted that a resignation terminates the employment relationship at the instance of the employee, an employer who has instituted disciplinary proceedings cannot continue with the same once an employee has resigned. It is an exercise in futility since the employer- employee relationship is no longer in existence. This was the position of the SC in

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[56] See Basson A C *et al*, *Essential Labour Law* (2005) 53; Madhuku L n8 114-116.
[57] See also *Choga v Johnston's Motor Transport (Pvt) Ltd* 1998 (2) ZLR 560 (H); *Ruturi v Heritage Clothing (Pvt) Ltd* 1994 (2) ZLR 374 (S); *Clarke Engineering Transport v Chikozho* SC 104/04.
[58] Gwisai M n2 156.
[59] See *Tafuma v Tudor House Consultants (Pvt) Ltd* 2002 (2) ZLR 1 (H); *Mushonga v National Railways of Zimbabwe* 1986 (1) ZLR 111 (H).
[60] Madhuku L n8 95.
[61] The general principles of offer and acceptance in the law of contract are applicable to the offer to resign; *Monteiro v Wankie Colliery Co. Ltd* HH 100/95; *Kujinga v The Forestry Commission* SC 29/93. These cases must be distinguished with *Riva v NSSA* 2002 (1) ZLR 412 (H) in which the HC rejected an employee's contention that his letter was an offer to resign and not a statement of resignation. Thus, the offer to resign must be carefully drafted so that it is not mistaken for an intention to resign.

Muzengi v Standard Chartered Bank.[62] In this case Muzengi was employed by the Bank as Branch Manager. Disciplinary proceedings were instituted against him and he responded by tendering a resignation letter. Despite this act, the employer proceeded with the hearing and found him guilty. He was suspended pending the decision of a labour relations officer to dismiss him. He then submitted a second resignation letter which the Bank accepted. Thereafter Muzengi alleged constructive dismissal. The court held that Muzengi had resigned voluntarily when he submitted his first letter of resignation, thereby bringing the employment relationship to an end. There was no need for an inquiry or the second resignation letter. The employee-employer relationship had been lawfully terminated and one cannot discipline or dismiss a person who is not an employee unless the employer accepts withdrawal of the resignation.[63] Resignation has the effect of placing an employee beyond the reach of disciplinary proceedings. It must also be noted that if an employee resigns on notice the contract is terminated at the end of the notice period. But the employee remains subject to his or her normal terms and conditions of employment. If he or she commits an act of misconduct whilst serving notice he or she may still be disciplined and dismissed.

6. Remedies Available To the Employer

Resignation of an employee without notice or on short notice is not illegal, nor is it an unfair labour practice under the LA. Unfair labour practices under the LA can only be committed by employers, trade unions and workers committees on employees.[64] The position of the law is set forth by Madhuku[65] as follows:

> "Not everything that is "unfair" is an unfair labour practice under the Labour Act. To be an "unfair labour practice" an action (or omission) must be specifically described as such by the Act. In other words, one has to point to a specific provision within the Act that prescribes the action as an "unfair labour practice." If a practice is not specified as unfair in the Labour Act, it cannot be raised as an "unfair labour practice" under the Act ……"

[62] 2002 (1) ZLR 334 (S) which confirmed the HC decision of *Muzengi v Standard Chartered Bank & Anor* 2000 (2) ZLR 137 (H).
[63] See also *Murire v NSSA* HH 124/97; *Lee Group of Companies v Ann Clare Elder* SC 6/05; *Thomas Miekles Stores v Mwaita & Anor* 2007 (2) ZLR 185 (S).
[64] See ss 8 - 10 of the LA read with the preamble to the Act.
[65] Madhuku L n8 78.

The question which then arises is whether an employer has a remedy against an employee who resigns without giving notice or who gives short notice? Section 65(1) of the Constitution guarantees "*every person*" the right to fair and safe labour practices. The term "*every person*" refers to both natural and juristic persons, employees and employers. An employee may commit conduct against an employer which may be lawful but unfair.[66] For instance, resignation is a lawful act of terminating the employment relationship, but resignation without giving notice is unfair on the employer. This conduct despite not being prescribed as an unfair labour practice in the LA is a practice that is contrary to s 65(1) of the Constitution, therefore unfair.[67] Thus, an employer's remedy can lie in raising an action based on s 65(1) of the Constitution. Nevertheless, South African courts have refused to grant employers relief against employees on the basis of s23 of the South African Constitution which is equivalent to s65 of the Constitution of Zimbabwe, on the ground that the common law provides employers with adequate remedies.[68] Traditionally, the common law envisaged the employer as the holder of power, and the employee as the bearer of duties. Section 65 is aimed at destroying this unfair fictitious position and seeks to balance the patent inequality of bargaining power inherent in the employment relationship. Against this backdrop it is submitted that there are no compelling reasons to give employers remedies under the Constitution when the common law as demonstrated herein below provides sufficient recourse.

The employer's remedy as indicated above lies in the common law and specifically the general principles of the law of contract. Every employee has a right to resign and resignation is not a breach of contract. Grogan[69] and Brassey[70] submit that resignation

[66]Tsabora J & Kasuso TG, 'Reflections on constitutionalising of individual labour law and labour rights in Zimbabwe' (2017) 38 *ILJ* 43 at 56.

[67] See the South African cases of *National Union of Metal Workers of SA v Vetsak Co-operative Ltd & Ors* 1996 (4) SA 577 (H); *Council for Scientific and Industrial Research v Fijen* (1996) 17 *ILJ* (IC).

[68] In *National Entitled Workers Union v CCMA* (2007) *ILJ* 1223 (LAC) the court held that;

> "In general the position of employers is different from that of employees, particularly in this country. In general terms it can be said that, when an employer has lost an employee due to resignation, the employer does not need the courts to deal with the situation. Employers will normally simply look for another employee and, in most cases, will find an employee to replace the one who has resigned. Where the employee has resigned without giving notice in circumstances where he was obliged to give notice, usually the employer does not even sue the employee for damages which in law he would be entitled to do……However, if an employer wants to sue an employee in such a situation, he does have a right to do so both at common law and the BCEA. Employers hardly use even this right."

[69] Grogan J, *Dismissal, Discrimination and Unfair Labour Practices* (2007) 157.

[70] Brassey M, *Employment and Labour Law* (1998) 108.

without giving the agreed notice makes the termination breach of contract such that its acceptance is in principle necessary since repudiation terminates the contract if the employer elects to act on it. To the contrary, deficient notice does not contaminate the act of resignation or make the resignation a nullity. There is a distinction between notification to terminate and the date of termination which is determined by the notice period. A deficient notice can only constitute a breach with regard to the period of notice which should have been served. This entitles the employer to either cancel the contract and claim damages against the employee or hold the employee to the contract and require that he or she serve the notice period. This view was embraced by Cheadle AJ in *Lottering & Ors v Stellenbosch Municipality supra,* in which he stated that:

> "…. As a matter of principle a decision to terminate on notice can never be a repudiation [sic] or a breach although the failure to properly give notice may do so. The breach is not the decision to terminate but the failure to give proper notice."[71]

This view is jurisprudentially sound. If notice is deficient, the resignation remains a lawful act of bringing the employment relationship to an end with no room for the employer to accept or reject it.[72] Put differently, the breach is not the decision to terminate but the failure to give notice. This breach will entitle the employer two alternative remedies namely, specific performance or damages.[73]

In respect of the first remedy, the breach will entitle the employer to hold the employee to the contract by demanding that he or she gives proper notice and render services for the notice period. Thus, specific performance is the primary remedy[74] and will only be refused if a recognized hardship to the defaulting party (the employee) is proved. However, a court will also consider the following factors; the terms of the contract of employment, the relationship between the employer and employee, the nature of the services or work performed by the employee and prejudice or hardship to be suffered by the innocent party

[71] See also *Nationwide Airlines (Pty) Ltd v Roedieger & Anor* (2006) 27 *ILJ* 1469 (W); *Honono v Willowvale Bantu School Board & Anor* 1961 (4) SA 408 (A); *Pemberton NO v Kessell* 1905 TS 174.
[72] Quoting Deakin S and Morris C*, Labour Law* (1995) 94, Madhuku L n8 93-94 argues that the automatic or unilateral theory states that a repudiatory breach going to the root of the contract automatically terminates the contract.
[73] Smit N 'Resignation- An Act That Is Not As Straightforward As It Seems' (2011) 1 *TSAR* 110.
[74] This is different with English law position where the remedy of specific performance is a secondary or equitable remedy.

(employer) vis a vis that which will be suffered by the employee.[75] Despite the fact that this is the primary remedy available to the employer this relief is granted in exceptional cases.

In *Nationwide Airlines (Pty) Ltd v Roediger supra,* a pilot was required to give three months' notice of termination but gave one month notice. The employer approached the HC seeking an order enforcing the notice provisions or an order for specific performance. In exercising its discretion the court granted the relief sought by the employer. It held that the employer was entitled to three months' notice and not one month notice given by the employee. The employee had entered into the contract freely and he was a highly skilled professional contracting on equal terms with the employer. The three month notice period had not been forced on him. Furthermore, the court also took note of the fact that the potential harm to the employer related to its inability to replace a pilot with a sufficiently qualified pilot within two to three months. This would likely result in the cancellation of flights and a potential loss to the employer of approximately R1 million per flight. The court followed the precedent which had been set in the case of *Santos Professional Football Club (Pty) Ltd v Igesund.*[76] In *Immaculata Secondary School v Bvuma and Another*[77] two school teachers had resigned without giving the requisite notice period. The employer approached the HC on an urgent basis seeking an order interdicting the teachers from breaching their contracts of employment. The court noted that the employees were not illiterate and had contracted freely and voluntarily. There was no evidence that the relationship between them and the school had irretrievably broken down to such an extent that their notices of termination would be impossible. Furthermore, it was the court's finding that learners were likely to suffer prejudice as a result of the absence of the teachers. It was therefore in the best interests of the learners that the teachers serve their notice periods. They could not abandon them during the second half of the academic year and the court accordingly granted specific performance with costs. Public interest demanded that the parties adhere to their contracts.

However, the suitability of the remedy of specific performance can be questioned in the Zimbabwean context in light of the relevant provisions of the Constitution. One of the

[75] These considerations are discussed in detail by Naude T, Specific performance against an employee: *Santos Professional Football Club (Pty) Ltd v Igesund* (2003) *SALJ* 269.
[76] 2003 (5) SA 73 (C). For detailed discussion of this case and the appeal decision see Naude T, *supra*.
[77] [2012] ZAGPJHC 168; *Penrose Holdings (Pty) Ltd v Clark* (1993) 14 *ILJ* 1558 (IC).

objectives of the Constitution is that the state and all institutions and agencies of government at every level must adopt reasonable policies and measures, within the limits of the resources available to them, to provide everyone with an opportunity to work in a freely chosen activity, in order to secure a decent living for themselves and their families.[78] The Constitution also guarantees the right to dignity[79], freedom from slavery or servitude[80], freedom from forced or compulsory labour[81] and freedom of profession, trade or occupation.[82] Similar provisions are also found in the Constitution of South Africa and it has been argued that on the basis of these provisions the remedy of specific performance is unconstitutional.[83] This argument has been rejected by the South African courts and it is likely that Zimbabwean courts will follow suit.[84] It has been noted that the same Constitution values dignity, equality and freedom. When parties freely and voluntarily enter into contracts of employment courts must respect these contracts and enforce them in the event of breach by either party. Thus, an employee must not cry foul if he or she is ordered to serve the notice period, during which she or he will receive remuneration. This does not amount to forced labour and the discretion to grant specific performance must be exercised with restraint. It must only be granted in exceptional circumstances.

The other alternative remedy available to an employer is a claim for damages arising from a breach of contract through the failure to serve notice.[85] It is common for employers to deduct from an employee's terminal benefits an amount which is equivalent to notice pay as damages for resigning without giving notice.[86] With respect, this approach has no legal basis and is outlawed by the LA. Section 12A (6) of the LA bars employers from resorting to self-help by precluding them from effecting any deductions or set off of any description

[78] Section 24 of the Constitution.
[79] Section 51.
[80] Section 54.
[81] Section 55.
[82] Section 64.
[83] Currie I and De Waal J, *The Bill of Rights Handbook* (2001) 380.
[84] See *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 (5) SA 73 (C); *Immaculata Secondary School v Bvuma and Another* [2012] ZAGPJ HC 168; Mould K, The Suitability of the Remedy of Specific Performance to a Breach of a "Player's Contract" with specific reference to the Mapoe and Santos Cases (14) 2011 *PER/PELJ.*
[85] *A. C Controls (Pvt) Ltd v Midzi & Anor* HH 75/10.
[86] Employers borrow this approach from s 15(5) of the Public Service Rgns, 2000, which provides that,

> "A member who leaves the Public Service without giving the appropriate notice shall in respect of his failure to do so, pay the State such sum, not exceeding three months' salary……"

As indicated in n6 these Regulations only apply to civil servants or state employees and not those in the private sector.

from an employee's remuneration save for those prescribed in subsections (a) to (e).[87] The proper route is for the employer to institute a claim for damages for the breach. The employer will have to provide compelling proof of damages with an easily identifiable quantum for the claim to succeed. The approach was summarized in *Aaron's Whole Rock Trust v Murray and Roberts Ltd & Anor*[88] as follows:;

> "Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to him (but of adequate sufficiency) so as to enable the court to quantify his damages and to make an appropriate award in his favour. The court must not be faced with an exercise in guesswork, what is required of a plaintiff is that he should put before the court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss."

It is necessary to illustrate that proving these damages is not an easy feat. In *South African Music Rights Organisation (SAMRO) v Mphatsoe*[89] an employee resigned without giving the employer the agreed notice. The employer claimed damages equal to the value of the services that it alleged the employee would have provided over the period, which it equated to the remuneration he would have earned for the period he was in breach. The court held that the employer had failed to prove any damages it had suffered and there was no logic in assuming that damages equated to the remuneration the employee would have earned over the notice period. As the court noted, the damages could even have been more and depending on the facts, the employer could have suffered no loss at all. Whilst in other cases the employer could have benefited rather than suffer loss as a result of resignation of an employee as it is relieved of the duty to pay remuneration. The court then concluded that these damages must be quantified and it was not proper for an employer to just pluck a figure from the air.[90]

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[87] See *S v Never Simon* HH 84/04; *Muchabaiwa v City of Harare* HH 252/99; *City of Bulawayo v Fuyana* SC 68/95.; *Bevcorp (Pty) Ltd v Nyoni & Ors* 1992 (1) ZLR 352 (S).
[88] 1992 (1) SA 652.
[89] [2009] JOL 23 476 (LC).
[90] The notion in *National Entitled Workers Union v CCMA* (2007) *ILJ* 1223 (LAC) that damages for breach are equivalent to the notice pay the employee was entitled to was rejected. See also *Air Traffic and Navigation Services Co v Esterhuizen* [2014] ZASCA 138.

In *Labournet Payment Solutions (Pty) Ltd v Vasloo*[91] an employee resigned without giving the employer the agreed notice. The employer sued for damages in the sum of R53 000-00 which was equivalent to the income the employee would have earned had she served her notice period. The court held that in calculating damages there must be a connection between the breach and the damages alleged to have been suffered. The enquiry as held by the court is two pronged. Firstly, the factual causation must be determined. This entails showing that 'but for' the breach the employer would not have suffered loss. The second enquiry involves establishing legal causation. The court will determine whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether the loss is too remote.[92] The employer had argued that the damages arose automatically from the breach, therefore it was entitled to damages equivalent to the notice pay. This argument was rejected by the court which held that the employer had failed to show the alleged loss it had suffered as a result of the breach. Accordingly, the claim was dismissed as damages for breach do not arise automatically. Thus, it can be concluded that an aggrieved employer in the event of deficient notice of resignation can claim specific performance or, alternatively damages for the breach.

Regrettably, dispute resolution mechanisms established under the LA, such as the Labour Court (LC) do not have jurisdiction to entertain such claims. The Labour Court is a creature of statute and its exclusive jurisdiction is only limited to those matters enumerated in s 89 of the LA.[93] Though the LC has exclusive jurisdiction over labour matters, s89 of the LA did not take away the inherent power of the HC. The significance of this provision is that jurisdiction of the LC remains explicitly confirmed to matters under s 89(1).[94] The LA does not make resignation without notice an unfair labour practice and it does not provide any remedy. In

[91] (2009) ILJ 2437 (LC)

[92] *International Shipping Company (Pty) Ltd v Bentley* 1990 (1) SA 680.

[93] This must be read with s 89(6) which provides,

> "No court other than the Labour Court shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1)."

[94] See *Nyahora v CFI Holdings (Pvt) Ltd* SC 81/14. It must be noted that by virtue of s 171 (1) of the 2013 Constitution, which provides that, the HC has original jurisdiction over all civil and criminal matters throughout Zimbabwe, jurisdiction of the HC in all labour matters has been restored. In other words, the inescapable conclusion is that the HC has concurrent jurisdiction with the LC to deal with purely labour matters at the first instance. This view was endorsed in *Kuchena v SIRDC* HH 180/16; *Chitiki v Pan African Mining (Pvt) Ltd* HH 656/15; *Confederation of Zimbabwe Industries v Mbatha* HH 125/16; *Mazarire v Old Mutual Shared Services (Pvt) Ltd* HH 187/14. This interpretation has since been criticized in *Nyanzara v Mbada Diamonds (Pvt) Ltd* HH 63/16; *Machote v Zimbabwe Manpower Development Fund* HH 813/15 and *Triangle Limited & Ors v Zimbabwe Sugar Milling Industry Workers Union & Ors* HH 74/16.

any event, s 89(1) does not clothe the LC with jurisdiction to hear and determine claims for specific performance and damages in unfair resignation cases.[95]

7. Conclusion

This contribution demonstrated that resignation is a voluntary, unilateral act by the employee whose effect is to terminate the contract of employment. It is established by a subjective intention to terminate the employment relationship, and by unambiguous words or conduct by the employee that, objectively viewed, clearly evince an intention to give up one's job. Once communicated and becomes apparent to the employer, a resignation takes effect and need not be accepted by the employer. It also follows that it cannot be withdrawn without consent of the employer. Furthermore, on resignation an employee has a right to be paid wages and benefits on termination in terms of s13 of the LA, whilst an employer has a right to be given notice of termination. In the event that an employee resigns without notice or gives insufficient notice, it entitles the employer to elect whether to cancel the contract and saddle the employee with a claim for damages or, alternatively, hold the employee to the contract and claim specific performance. It is therefore imperative that a decision to resign must be an informed one and not triggered by emotions or done impulsively. In essence an employee must resign within his or her rights while at the same time not trampling upon the employer's rights.

[95] This unsavoury situation is uncalled for, it evokes concerns regarding legal certainty, forum shopping and undermines legislative intent. It is submitted that the LC must have exclusive jurisdiction in all labour matters including the power to handle employer claims in situations of unfair resignation. Clearly, stripping the LC of its jurisdiction over labour matters will render this specialised court redundant and its establishment nugatory.

INTERPRETING THE SCOPE OF FISCAL DEVOLUTION UNDER ZIMBABWE'S 2013 CONSTITUTION

Matshobana Ncube*

1.1 Introduction

The Constitution of Zimbabwe Amendment (No.20) Act 2013 was enacted on the 22nd May 2013,[1] and makes provision for a unitary state,[2] with devolution and decentralisation of governmental powers and functions.[3] This is one of the foundational principles underpinning the state of Zimbabwe as outlined in section 3 of the Constitution.[4] The Constitution thus explicitly creates a three tier system of the state,[5] comprising central government, provincial government, and metropolitan councils and local authorities.[6]

With regards to the local government sphere, the 2013 Constitution has imbued the local governments with a 'constitutional' as opposed to merely 'legislative' status as was the case under the previous constitutional regime.[7] Local authorities now have the constitutional authority to govern the affairs of the people within their area of jurisdiction on their own initiative.[8]

Arising out of this constitutionally mandated devolved system of government is the issue of fiscal devolution which is an integral part of the concept of devolution.[9] Section 276(2)(b) as read with section 276(2) of the Constitution specifically requires Parliament to enact a law that confers a power on local authorities to levy rates and taxes and generally to raise sufficient revenue for them to carry out their objects and responsibilities. There is no similar

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[1]Section 3(1) of Part 2 of the Sixth Schedule of the Constitution.

[2] Section 1 of the Constitution.

[3] Section 3(2)(l) of the Constitution.

[4] The section provides for founding values and principles underlying the state of Zimbabwe.

[5] Section 5 of the Constitution.

[6] (ibid).

[7]This was in terms of the Urban Councils Act and the Rural District Councils Act.

[8] Section 276(1) of the Constitution of Zimbabwe.

[9] P Drummond and A Mansoor, *Macro-Economic Management and the Devolution of Fiscal Powers*, IMF Working Paper, WP/02/76 (2002) 6, available at https://www.imf.org/external/pubs/ft/wp/2002/wp0276.pdf, (accessed on 10 May 2016).

provision in respect of provincial and metropolitan councils yet they are a tier within the devolved framework. The question that arises then is how these entities are expected to fund themselves if there is no conferment of such a power. The constitution further provides for the equitable sharing of national resources within the three tier system.[10]

This paper assesses fiscal devolution outlined in the Constitution and examines its scope. However, in assessing fiscal devolution provisions in the Constitution, the paper first highlights the provision on fiscal devolution and then considers how the issue of supremacy of the constitution impacts the interpretation of the fiscal devolution provision.

1.2 The Scope of Fiscal Devolution in the Zimbabwean Constitution

Fiscal devolution refers to the transfer of revenue, spending and borrowing powers from central government to subnational tiers of government.[11] In Zimbabwe, Section 276(1) of the Constitution confers powers of self-governance on local authorities. It provides as follows:

> (1) Subject to this Constitution and any Act of Parliament, a local authority has the right to govern, on its own initiative, the local affairs of the people within the area for which it has been established, and has all the powers necessary for it to do so.

The Constitution in section 276(2)(a) further requires Parliament to enact a law that will confer powers on local government to levy rates and taxes and to raise sufficient revenue for them to carry out their objects and responsibilities

This provision appears to confer taxation powers to local authorities and thus fiscal devolution. To properly understand the above provision, it is necessary that one has to consider the issue of constitutional interpretation in Zimbabwe. The starting point in so doing is, in essence, the appreciation of the supremacy of the Constitution.

1.3 Supremacy of the Constitution

A constitution is the supreme law such that any law, conduct, practice or custom that is inconsistent with the constitution is invalid to the extent of the inconsistency.[12] The constitution is the *grundnorm* that any legislation, conduct, practice or custom has to be

[10] Section 3(2)(j) of the Constitution.
[11] Drummond and Mansoor (n 9 above) 4.
[12] Section 2(1) of the Constitution.

measured against. Any law that is inconsistent with the constitution is invalid to the extent of the inconsistency[13].

The constitution importantly imposes obligations on various persons and bodies within the state and such obligations are binding on every person, whether same is a natural or juristic person.[14] These include the state and all executive, legislative and judicial institutions and agencies of government at every level.[15] These persons are required and obliged to fulfill the obligations imposed by the constitution.[16] The constitution uses imperative language, '*must*', in the imposition of obligations on the persons indicated therein. In this regard, duties imposed by the chapter 14 provisions should be understood within the context of this particular part of the constitution.

The constitution provides for a Declaration of Rights in Chapter 4. Part 1 thereof provides for the application and interpretation of the Chapter 4 provisions.[17] Section 46 sets out the interpretation mechanism that has to be adopted in interpreting the bill of rights. Section 331 of the constitution states that s 46 shall apply to the interpretation of the rest of the constitution with necessary modifications.

In understanding the fiscal devolution provision above one will have to consider different approaches to constitutional interpretation in general. This is important so that one understands the Chapter 14 constitutional provisions. The provisions are key to devolution as they are bedrock of the same. In Zimbabwe the local courts have used the interpretation styles from other jurisdictions to ascribe meaning to provisions of either the constitution or ordinary legislation.[18]

1.4 Approaches to Constitutional Interpretation in General

Constitutional interpretation is a contested territory. There are so many varying approaches to constitutional interpretation. According to Randall Kelso there are basically four approaches to constitutional interpretation; natural law, formalism, Holmesian and

[13] (n 12 above).
[14] Section 2(2) of the Constitution.
[15] (n 14 above).
[16] (n 14 above).
[17] Section 46 of the Constitution.
[18] 1989(2) ZLR 61 (SC).

instrumentalism and these occurred during different eras of American legal history.[19] At the present moment, there is a combination of these approaches.[20] According to Grimm, some courts prefer a literal interpretation which can be termed legal positivism wherein the interpreter sees a 'legal norm as consisting of its text and nothing else'.[21]

Others prefer originalism. According to Grimm, originalism (a crude literal understanding), or the historical method, is the right way to ascertain the meaning of a legal provision in a constitution which is a way of ascertaining the intention of the framers only[22]. Others, according to Grimm, prefer the purposive approach which looks at the constitutional provision as an expression of the values and principles that the society wanted to establish at the highest order.[23] These may change with changing social milieu.[24] According to Currie & de Waal, constitutional interpretation is the process of determining the meaning of a constitutional provision[25].

There are several approaches to constitutional interpretation which will be discussed below. This is important in seeking to understand the meaning of section 276(2)(b) of the constitution; the fiscal devolution provision.

1.5 Different Approaches to Constitutional Interpretation

One of the approaches to constitutional interpretation is the literal interpretation. This requires one to have regard to the words used as the starting point. Literal interpretation is where one has regard to the text used be it the Bill of Rights or any other part of the constitution[26] and requires that one should use the language used in the constitutional

[19] R Randall Kelso (1994), *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Legal History 121,* available on http://scholar.valpo.edu/cgi/viewcontent.cgi?article=1924&context=vulr, (accessed 10 May 2016), *see also* M Stokes (1994) *Meaning, Theory and the Interpretation of Constitutional Grants of Power 319, available on* http://www.austlii.edu.au/au/journals/MonashULawRw/2013/12.pdf, (accessed 10 May 2016).

[20] (n 19 above) 123.

[21] D Grimm (2011), *Constitutional Adjudication and Constitutional Interpretation: Between Law and Politics 16, available at* http://nujslawreview.org/wp-content/uploads/2015/02/dieter-grimm.pdf, (accessed on 11 May 2016).

[22]Grimm (n 21 above) 24.

[23] Grimm (n 21 above) 26.

[24] Grimm (n 21 above) 26.

[25] I Currie & J de Waal, *The Bill of Rights Handbook, Fifth Edition (2005) 145, Juta Co Ltd.*

[26] J Kentridge and D Spitz, *Interpretation*, cited in M Chaskalson *et al*, Constitutional Law of South Africa , 11-15, Juta.

provision.[27] See *Mawarire v Mugabe NO & Ors,*[28] *S v Zuma*,[29] and *Minister of Home Affairs v Bickle & Ors*.[30]

The words, however, are not themselves definitive of the meaning of a constitutional provision.[31] One thus cannot end with having regard to the literal meaning of the provision as some provisions of some constitutions are a result of political compromises and are thus left deliberately vague and open ended. This is particularly true of the devolution provisions, which was a contested area.[32] Literal interpretation is not conclusive on its own but rather a starting point, it is acceptable if taken together with the purposive and generous approaches[33] and has to be consistent with these approaches.

The purposive approach in interpretation, on the other hand, entails looking at the purpose of the constitutional provision. One has to consider the mischief that the law sought to deal with or address. In other words, one has to consider the legislative purpose of the particular constitutional provision. The interpreter thus has to determine and give effect to the values of the constitution as expressed in the actual wording of the drafters.[34] This is aimed at giving expression to the core values of the constitution as espoused in sections 3 and 46 of the constitution.

The interpretation of the rest of the constitution is different from the interpretation of the Bill of Rights in degrees rather than in form.[35] The Bill of Rights is worded in a language that allows for a more broad approach to be adopted in its interpretation than the rest of the constitution.[36] In the former, one looks at the scheme of government sought to be created by the constitution.[37] Words used in other parts of the constitution can be used to shed light

[27] S v Zuma 1995 (2) SA 642 (CC).
[28] 2013 (1) ZLR 469 (CC).
[29] (n 26 above).
[30] 1983 (2) ZLR 400 (S).
[31] Kentridge and Spitz (n 26 above) 11-15.
[32] E Masunungure and S Ndoma *The Popular Quest for Devolution In Zimbabwe*, Afrobarometer Briefing Paper no.114 available on http://afrobarometer.org/sites/default/files/publications/Briefing%20paper/afrobriefno114.pdf, (available 30 May 2016), 4.
[33] Kentridge and Spitz (n 26 above) 11-15
[34] Kentridge and Spitz (n 26 above)11-15.
[35] Kentridge and Spitz (n 26 above) 11-15.
[36] Kentridge and Spitz (n 26 above) 11-15.
[37] Kentridge and Spitz (n 26 above) 11-14A.

on the meaning of a particular provision.[38] At the end one has to give effect to the constitutional values as expressed in the constitution.

Another approach is the contextual approach which considers the intrinsic and extrinsic context of a provision in a constitution. These are factors that are inside or outside the constitution as a document. Extrinsic provisions may refer to the political, financial or historical context of the particular provision in a constitution. Intrinsic context refers to the other provisions of the constitution. Contextual interpretation takes into account the general historical setting of the constitution, the idea being to acknowledge the key historical events and a desire to cut ties with the past. The constitution retains that which is defensible (values, customs etc) and rejects an unacceptable past, making a radical break from it.

Background material is however considered to find out the context of a constitutional provision. Such material is usually referred to as the *travaux preparatoires* (documents like reports used during the constitution making process).

The intrinsic context usually deals with competing or contrary constitutional provisions. The rule of interpretation in such a situation is to interpret these together (conjunctively) as opposed to individually (disjunctively). This is sometimes referred to as the harmonization process in which different provisions are read together e.g. linking the right to life to human dignity, environment, food, liberty.

The interpretation philosophy imposed by the Zimbabwean 2013 Constitution in this regard, one will say, is purposive. This is because, in interpreting the Bill of Rights, the central issue is the requirement that the body interpreting the constitution must give full effect to the rights and freedoms in the chapter[39]. Moreover, the interpreter must promote the values that underlie a democratic society[40]. The interpreter must pay regard to the provisions of Chapter 2 (National Objectives)[41] and may consider relevant foreign law[42] as well as

[38] Kentridge and Spitz (n 26 above) 11-15
[39] See s 46(1)(a), (b) and (d) of the Constitution
[40](n 39 above)
[41] See s 46(1)(d) of the Constitution.
[42] See s 46(1)(e) of the Constitution.

consider any other factors that are taken into account in interpreting a constitution[43]. That approach, with necessary modifications, must be adopted in interpreting the other constitutional provisions outside the Bill of Rights.[44]

A constitution therefore can only be interpreted in the manner provided for in s46. It needs to be said that the judiciary is bound by the provisions of s46. This is because section 45(1) provides that the whole of Chapter 4 provisions are binding on the State, and all executive, legislative and judicial institutions and agencies of government at every level. Consequently, the judiciary cannot escape the provisions of the Constitution in any way.

A constitution is a document *sui generis*[45] as indicated in *S v Zuma*[46] wherein the court held that:

> "…But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce's reminder that even a Constitution is a legal instrument, the language of which must be respected…I would say that a Constitution "embodying fundamental principles should as far as its language permits be given a broad construction"

As indicated above, the interpretation criteria imposed by the constitution is clearly spelt out in s46. This approach was adopted by the Garwe JA in *Mawere v Registrar General & Ors.*[47] He stated that the principles of interpretation are those outlined in *Minister of Home Affairs v Bickle & Ors 1984 (2) SA 439(ZS) at 447* where it was said that:

> "The question, then, is one of construction, in the ultimate resort must be determined upon the actual words used, read not in *vacuo* but as occurring in a single complex instrument, in which one part may throw light on another…The true test must always, be the actual language used".

The preferred approach that will be used in interpreting the devolution provisions in the constitution is that which is outlined in the above cases, with necessary modifications as required by the language of section 331 of the Constitution.

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[43] See the paragraph immediately under s 46(1)(e) of the Constitution.
[44] Section 331 of the Constitution.
[45] See the case of *Government of the Republic of Namibia and Another v Culture 2000 and Another 1994 (1) SA 407 (Nm.S), 418 F-H.*
[46] 1995 (2) SA 642 (CC).
[47] CCZ 4/15.

1.6 Interpretation of section 276(2)(b) of the Constitution

Section 276(2)(b) provides as follows;

> (2) An Act of Parliament may confer functions on local authorities, including—
> (*a*) …;
> (*b*) a power to levy rates and taxes and generally to raise sufficient revenue for them to carry out their objects and responsibilities….

A literal interpretation approach will show that the words of the provision are rather straight forward. It is to the effect that parliament will enact legislation that *may* confer on local authorities certain functions that include the power to levy rates and taxes and generally to raise sufficient revenue for them to carry out their objects and responsibilities as provided for in section 264.

Literally, parliament has an *option* whether or not to confer such functions on local authorities and in fact, may rightly decide not to do so. In other words, parliament has discretion whether or not to confer such powers on local authorities. In not conferring such functions on local authorities, parliament will be acting lawfully, acting within its constitutional powers. That is the literal interpretation of the words used in the provision.

However, as already indicated above, the literal meaning is but the starting rather than the end in constitutional interpretation.[48] It is of value when used together with the other approaches, especially the purposive or contextual approach. The role of constitutional interpretation is to give effect to the values of the constitution.[49] Chapter 3 provides the Founding Provisions of the constitution of Zimbabwe. These are provisions on which the state is anchored. Among these is the principle of supremacy of the constitution, the founding values and principles. Among the founding values and principles are devolution and decentralisation of governmental power and functions. Chapter 14 then sets out the role of devolved government and its structures.

It is within this *context* that one has to interpret the provisions of section 276(2)(b) so as to understand its import. One of the underlying values in the constitution is the creation of a devolved and decentralized government where both its powers and functions are devolved and decentralized to lower tiers of the state or the subnational levels. Devolution and

[48] Kentridge and Spitz (n 26 above) 11-15.
[49] Kentridge and Spitz (n 26 above) 11-16.

decentralisation of central government powers and functions is one of the values of the constitution of Zimbabwe. Central government has a number of powers and functions including those of a fiscal nature; revenue collection, spending and borrowing.

It is apparent that one of the values underpinning the state of Zimbabwe as expressed by the constitution is the creation of a devolved state. The constitution has thus proceeded to set out the objects of a devolved state and in fact outlined the nature of devolved government in Chapter 14. It is apparent that in order to carry out their functions and responsibilities, local authorities should be able to levy rates and taxes and generally to raise sufficient revenue to enable them to carry out their functions and responsibilities.

Local authorities perform a mammoth number of functions as outlined in the Urban Councils Act (Chapter 29:15) and the Rural District Councils Act (Chapter 29:13). These functions are partly outlined in section 276(2) of the constitution, requiring an Act of Parliament to provide for these and already provided for in two Acts referred to already. In a nutshell, the rural district councils as well as the urban local authorities have various competencies which they have to undertake on behalf of their constituents.

Jonga says urban local authorities have a duty to provide goods and services to the urban communities in a democratic manner.[50] Jonga further notes that the Zimbabwe Electoral Support Network (in its 2008 report) observed that in Zimbabwe there was breakdown of service delivery by local authorities resulting in the failure to collect refuse, burst sewers, erratic water supplies and roads filled with potholes thus nightmarish to the motoring public.[51] Urban local authorities used to provide electricity to the urban communities.[52] This

[50] W Jonga, *Local Government System in Zimbabwe and the Associated Challenges: Synthesis and Antithesis*, Archives of Business Research, 2(1), 75-98 Society for Science and Education, United Kingdom available at http://scholarpublishing.org/index.php/ABR/article/view/89/68, (2014) 79, (accessed on the 31 August 2016).

[51] Jonga (n 50 above) 82, it must be pointed out that the function of providing water in the bulk of the towns was taken away from the purview of local authorities through a ministerial directive in 2005, and given to the Zimbabwe National Water Authority (ZINWA). The consequence is that this revenue source was lost to such authorities. In 2008 central government through the Minister of local government again issued another directive handing back the said function to some councils but maintained such control in other authorities like Gwanda, Beitbridge etc. see a detailed discussion of the issue in Jonga, note 119 pages 82-84 which also discusses the issue of removal of electricity management from urban local authorities by central government. See a full discussion of the issue of revenue of service provision by B Coutinho, *Sources of Local Government Financing*, cited De Visser *et al* eds, *Local Government Reform, A Policy Dialogue* available at http://repository.uwc.ac.za/xmlui/bitstream/handle/10566/208/DeVisserLocalGovtZimbabwe2010.pdf?sequence=, 4. 74.

[52] See section 216 of the Urban Councils Act.

power was however taken away in 1989 and given to the Zimbabwe Electricity Supply Authority (ZESA) and thus starved urban authorities of a revenue generation stream.[53]

It is not a secret that local authorities face a number of challenges; demand for health services due to the HIV-Aids pandemic that is exacerbated by poor services in the surrounding farms and rural areas which are poorly resourced.[54] Indeed, it has been stated that every local authority is required to 'take lawful and necessary procedures for the prevention of occurrence or for dealing with the outbreak or prevalence of any infectious, communicable or contagious disease'.[55] A duty is imposed on the local authorities that covers water provision, sanitation, prevention of pollution of water, land, air, control of communicable diseases and food hygiene or environment health services.[56]

Evidently, duties of local authorities are multifold. It is self evident, therefore, that in order to perform their functions and responsibilities, the local authorities need revenue. The local authorities in seeking to raise revenue have to levy rates and taxes and have other means generally, to raise further revenue to carry out their functions and responsibilities. In other words, the local authority's very lifeblood is premised on the ability to possess a power to levy rates and taxes and a power to raise further revenue outside levying rates and taxes. A local authority without such a power will not be able to provide services required by residents and other consumers within a local authority. It is therefore within this context that the term "*may*" used in section 276(2)(b) has to be understood. One thus has to understand the *context* and *purpose* of the fiscal devolution provision espoused in section 276(2)(b).

In as much as the term that is used in section 276(2) of the constitution in relation to conferment of functions on local authorities is the word "*may*", it is clear that within the context of the values and constitutional scheme of arrangement of government, such

[53] Jonga (n 50 above) 82. This power for councils to own and operate a public electricity supply undertaking and carry on any activity incidental or connected thereto is in terms of section 216 of the Urban Councils Act. This entitlement is, however, subject to the Electricity Act (Chapter 13:05) .

[54] *Urban Local Government Financing and Health, Report of A Workshop*, Mutare, Zimbabwe 5-6 February 2001, 3, available at http://www.tarsc.org/publications/documents/URBAN%20FINHEALTH%20MTG%20REP%202001.pdf, (accessed on 31 August 2016).

[55] (n 54 above) 3.

[56] (n 54 above) 3.

conferment is a must or mandatory.[57] This accords with a purposive interpretation of the provision as its purpose was to ensure that power cascades to the lower tiers of the state created under another value established by the constitution in section 5. This provision should be read together with sections 3(2)(l), 264 and 276(2)(b) of the constitution and understood within the context of the whole scheme of devolved government set out in Chapter 14 of the constitution.

It is apparent that in seeking to understand the meaning of section 276(2)(b) of the constitution of Zimbabwe, from a purposive perspective of fulfilling the constitutional requirements on devolution of power and functions, the section *actually* requires parliament to enact legislation that will confer a power on local authorities to levy rates and taxes and generally a power to raise sufficient revenue to carry out their functions and responsibilities as outlined in the constitution.

That interpretation will be in conformity with the values of the constitution as well as the compromise and consensus of including devolution in the constitution by the political players in the constitutional making process and taking into account the fact that seven (7) out of ten (10) provinces in Zimbabwe supported the inclusion of devolution in the constitution.[58] The inclusion of devolution was to ensure that power is devolved to the lower tiers of the state so that these lower tiers carry out such powers and functions.

It is thus apparent that the constitution indeed provides for fiscal devolution of power to the local authorities and none to the provinces. This is because the constitution provides in section 265(1)(b) that a lower tier in the government can only assume a power that has been allocated to it. The fiscal power is accordingly allocated to a local authority and not any provincial tiers of the state. Local authorities have the power to levy rates and taxes and raise sufficient revenue for the purpose of being able to carry out their functions and

[57] This should be contrasted with the whole of section 167(2) of the Constitution gives the impression, by the use of the word "*may",* that the Constitutional Court has a discretional jurisdiction to entertain certain matters when it is apparent that it is the only court with such jurisdiction, to the exclusion of all others. For example in respect of a petition to challenge results of a presidential election, section 93 of the Constitution, it is clear that it is the Constitutional Court which determines such dispute.

[58] See the (Copac) National Statistical Report, Version 2, presented at the Second All Stakeholders Conference in October 2012 in Harare; pages 268-276 of the report. See also E Masunungure and S Ndoma *The Popular Quest for Devolution In Zimbabwe*, Afrobarometer Briefing Paper no.114 available on http://afrobarometer.org/sites/default/files/publications/Briefing%20paper/afrobriefno114.pdf, (available 30 May 2016), 4

responsibilities. Parliament is *obliged* to enact such a law and its failure to do so is in fact a contravention of the constitution which rightly triggers a determination by the Constitutional Court if Parliament has failed to fulfill a constitutional obligation in terms of section 167(2)(d) of the constitution.

1.7 The Nature, Content and Extent of Fiscal Devolution in the Constitution

As argued above, the constitution of Zimbabwe provides for fiscal devolution in section 276(2)(b). Only local authorities are conferred fiscal devolution. The nature of fiscal devolution as expressed in the said section is unclear. It is the extent of such fiscal devolution that appears to be capable of determination only. It confers power on local authorities to levy rates and taxes and also allows them *to raise (further) revenue that is sufficient to enable them to carry out their objects and responsibilities*. In this regard, local authorities can levy rates and impose taxes. The extent of such rates and taxes as well as further revenue should be such as to be *sufficient* for the local authorities to carry out their objects and responsibilities. As such, it appears that it is up to the local authorities to determine such objects and responsibilities that they have to meet and as a corollary, the rates and taxes and further revenue heads to be imposed.

The nature of fiscal devolution remains clearly and fully not outlined in the constitution. This is because the rates and taxes to be levied are not outlined in the Constitution. The constitution defers the issue of determining the nature and content of the rates and taxes and other revenue heads to be imposed/levied to legislation. (There is presently no legislation to provide for fiscal devolution). It will be appropriate, therefore, to conclude that it is Parliament that is vested with power to decide the content and nature of the rates to be imposed or levied by the local authorities to meet their needs.

However, it seems most appropriate to conclude also that besides taking into account the fact that same have to be sufficient for the local authorities to carry out their objects and responsibilities, they will have to take into account the allocations local authorities will receive from central government. These are allocations made by central government in terms of section 301(1)(a) and (b) as read together with section 301(3) which requires that such allocations should not be less than 5% of national revenues raised in any financial year.

1.8 Conclusion

The constitution has provided for fiscal devolution in Zimbabwe in respect of local sphere only and not provincial sphere (provincial authorities can only qualify for allocations in terms of section 301(1)(a)and(b)). The constitution has provided that fiscal devolution has to be given effect to by enactment of the legislation to that effect. The scope of fiscal devolution as provided for in the Zimbabwe constitution is however unclear hence unknown. It is however apparent that having regard to constitutional interpretation, the conferment of fiscal powers on local authorities is peremptory and not optional per se on the part of parliament. The constitution on the other hand has set out the framework for the extent of the fiscal devolution as spelt out in section 276(2)(b).

Compulsory acquisition and deprivation of property rights under Zimbabwe's 2013 Constitution: Dissecting the interpretive problems

James Tsabora[1]

1.1 Introduction

The acquisition and deprivation of property rights within a state mirrors the respect and value accorded to private property rights in a particular state. Such respect and value is usually echoed in constitutional documents, or the basic law of the state, and given effect to in ordinary legislation. Section 71 of the 2013 Constitution of Zimbabwe[2] establishes a framework not only for the recognition, protection and regulation of property rights in the legal system, but also for the compulsory acquisition and deprivation of same rights by the state. Ordinarily, this constitutional property clause reflects the tensions and conflicts inherent in a constitutional property rights system shaped by colonial legacies and common law principles.[3] Indeed, that the constitutional provisions on compulsory acquisition and deprivation of property rights arouse debates and controversy owes much to this context.

Since 1980, the jurisprudence of constitutional property law has significantly developed, consequently leaving very few grey areas. This development has led to a largely settled position, thanks to judicial interpretation, regarding the meaning, application and scope of the terms compulsory acquisition and deprivation.[4] Indeed, both the legislature and the executive have largely followed the interpretation of the courts regarding the meaning of these terms. Quite unsurprisingly, the legislature and the executive have practically enacted and implemented legislation whose application gave effect to the meaning extended to acquisition and deprivation by the courts.

However, the 2013 Constitution clearly introduces a very different position in relation to compulsory acquisition and deprivation of property rights. The property rights regime that is entrenched in section 71 resurrects debates long interred. This contribution examines the

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[2] Published as Constitution of Zimbabwe Amendment Act No. 20 of 2013.
[3] See J Tsabora 'Reflections on the constitutional regulation of property and land rights under the 2013 Zimbabwean Constitution' 2016 *Journal of African Law* 1.
[4] See *Hewlett v Minister of Finance, Nyambirai v NSSA*, *ZIMTA v Ministry of Public Service, Labour and Social Welfare*, *Davies v Minister of Lands, Water and Agriculture*

general interpretive problems and controversies introduced by the clause, and the implications of the various interpretive approaches to the property rights regime entrenched in section 71 of the 2013 Constitution.

1.2 Distinction: Deprivation and Acquisition

Zimbabwe's constitutional property law has largely observed and maintained a distinction in definition, scope and meaning between the terms 'deprivation' and 'acquisition'. A number of decisions from the superior courts[5] seem to have clearly delineated the meaning, scope and interpretation of these two terms. Resultantly, the 1980 Lancaster House constitutional framework had buried any jurisprudential debates around these terms, thanks to the interpretive role of the judiciary. To buttress this, a descriptive analysis of the 1980 constitutional framework is apposite.

The constitutional property rights regime established by the 1980 Constitution was clear and uncontroversial. The 1980 Constitution contained section 16 which was entitled 'Protection from deprivation of property'. Apart from this heading, there was nowhere else under section 16 where the word 'deprivation' was adopted, defined or used; indeed the section was exclusively dedicated to the compulsory acquisition of property.[6] This notwithstanding, it is significant to note that in the interpretation of section 16, the courts did not ignore the existence of 'deprivations' in the jurisprudence of constitutional property

[5] For instance, *Hewlett v Minister of Finance and Another* 1982 (1) SA 490 (ZS) (1981 ZLR 571; *Davies v Minister of Lands, Agriculture and Water Development* 1994 (2) ZLR 294 (H) and 1997 (1) SA 228 (ZS).

[6] At the time of the *Hewlett* case in 1982, the constitutional property clause of the Lancaster House Constitution, 1980 provided that property may not be compulsorily acquired except under the authority of a law that:

'(a) requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any other interest or right therein that would be affected by such acquisition;

(b) requires that the acquisition is reasonably in the interests of defence, public safety, public order, public morality, public health, town and country planning, the utilisation of that or any other property for a purpose beneficial to the public generally or to any section thereof or, in the case of land that is under-utilised, the settlement of land for agricultural purposes;

(c) requires the acquiring authority to pay promptly adequate compensation for the acquisition;

(d) requires the acquiring authority, if the acquisition is contested, to apply to the General Division or some other court before, or not later than 30 days after, the acquisition for an order confirming the acquisition; and

(e) enables any claimant for compensation to apply to the General Division or some other court for the prompt return of the property if the court does not confirm the acquisition and for the determination of any question relating to compensation, and to appeal to the Appellate Division.'

law[7]. Three important decisions of the superior courts illustrated this, and should be discussed here.

The *Hewlett*[8] case revolved around legislation that took away the right of persons to claim compensation for loss of property. The contention was that such right to compensation is a right to property and if the state needed to take away such right, it had to comply with section 16 of the Constitution that required compensation for all acquisitions. In his judgment, Fieldsend CJ declared that;

> "This is clear recognition that there is a distinction between deprivation and acquisition, and also an indication that not every deprivation of property must carry compensation with it."

The *Davies* decisions, in both the High Court and Supreme Court, provided very clear interpretation of the meaning and place of the terms deprivation and compulsory acquisition in Zimbabwe's constitutional property law. In the High Court, the main argument was that designation of commercial farms under the Land Acquisition Act amounted to uncompensated compulsory acquisition of property, hence was unconstitutional. Of course this was in light of section 16 of the Lancaster House Constitution demanding that all compulsory acquisitions of property be compensated. After an examination of pertinent cases, Chidyausiku J (as he then was) made the following important conclusions:

(i) In terms of Roman –Dutch law, which is the common law of Zimbabwe, the State is vested with 'dominium eminens' over the property of its subjects and this power entitles it to compulsorily acquire private property in the public interest, albeit subject to the Constitution.

(ii) Under the same common law, the State is vested with police powers or the power to control the use of private property in the public interest.

(iii) Compulsory acquisition requires the payment of compensation whereas the exercise of police or control powers does not necessarily demand compensation.

[7] Supra.
[8] 1982 (1) SA 490 (ZS) (1981 ZLR 571.

When the matter was taken to the Supreme Court, the main question remained whether the act of *designation* under the Land Acquisition Act amounted to uncompensated compulsory acquisition of property, hence unconstitutional since the constitution required payment of compensation for all acquisitions. The major findings of the Supreme Court were as follows:

(i) The act of compulsory acquisition was different from an act of deprivation in common law. Compulsory acquisitions transferred rights to the acquiring authority and the State can do so under its power of '*eminens* domain' which it always enjoyed.

(ii) To the contrary, deprivation does not transfer rights to the State. In essence, a compulsory deprivation is more of an attenuation or negative restriction of some rights that come with private ownership. Compulsory acquisition thus leads to the extinguishing of property rights altogether, unlike compulsory deprivation which is uncompensated, and results in negative restrictions.

These cases demonstrate that despite the absence of the term 'deprivation' in section 16, the courts did not ignore its existence and significance in constitutional property law. Equating deprivations with 'loss or restrictions arising from the exercise of police or control powers'[9] by the state, Chidyausiku J,[10] noted that;

> "In Zimbabwe, the Constitution provides for compensation for the acquisition of property or interest or right in a property. The Constitution does not provide specifically for *loss or restrictions arising from the exercise of control powers* by the state."

The High Court further hinted that the absence of a constitutional regulatory framework for compulsory deprivations suggested that they could only be carried out in terms of ordinary legislation.[11]

[9] It should be observed that in the *Davies* case, Chidyausiku J did not use, adopt or employ the term 'deprivation' anywhere. The learned judge preferred to stick to the description of restrictions passed due to the State's exercise of 'police' or 'control powers'. However, it is clear that this is the actual definition of deprivations, and indeed, Gubbay CJ refers to such restrictions as 'deprivations'.

[10] *Davies*, supra at 301.

[11] For instance Chidyausiku J (as he then was) makes the following point in the Davies case: "For instance, there are numerous enactments in our statute books that provide for control, but do not provide for compensation for any loss or restriction arising from those measures of control. This, to some extent, gives a

In the Supreme Court, Gubbay CJ reasoned that section 16 of the Lancaster House Constitution essentially protected property by establishing procedures and requirements to be complied with in cases of compulsory acquisition of property.[12] Most importantly, the learned Chief Justice observed, in relation to the acquisition of property, that there was…

> "… no additional protection (of property) to that expressed in s 16(1). In particular, it (section 16) does not afford protection against deprivation of property by the State where the act of deprivation falls short of compulsory acquisition or expropriation. No compensation is thus required for such deprivation of rights in property."

Essentially, the legal position derived from judicial interpretation is that under the 1980 constitutional framework, property rights were subject to both compulsory acquisition and compulsory deprivation. However, the State had to comply with requirements of section 16 only in cases where it desired to compulsorily acquire the property. Compulsory deprivations, though known, were not to be protected or regulated under the constitutional property clause, and were thus, for instance, uncompensated.

2. The 2013 Constitutional Framework

2.1 Section 71 of the Constitution

Section 71 opens by a definition of property, as "property of any description and any right or interest in property." This rather abstract definition implies that property encompasses and encapsulates a very broad range of things, and the definition is difficult to circumscribe.[13] The courts have seemed neither particularly willing to further develop this understanding of

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clear indication that by and large measures of control can be enacted without provision for compensation. The following are examples of statutory provisions providing for control without compensation. Section 40 of the Regional Country and Town Planning Act 27 of 1976 prohibits the subdivision of property without the permission of the Minister. There is no provision for compensation for the diminution of the right of ownership to all land owners who are affected by this provision. The same section also prohibits the leasing of a portion of any undivided land for a period in excess of 10 years without permission. It is interesting to note that the restrictions imposed on land owners by s 40 of the Regional, Country and Town Planning Act are very similar to the restrictions imposed on owners of designated land by Part IV of the Act under consideration"

[12] Supra, at 232.

[13] See *Hewlett v Minister of Finance* supra, at 497- 499. The learned Chief Justice observed (at 497) that the definition of property "seems to embrace the widest possible range of property and to include at least any money debt due including such a debt due by the State. It would require very strong indications, particularly having regard to the principles of interpretation which have to be applied to a provision of this nature, to limit these very wide words."

property, nor to comprehensively flesh the definition so that the content and scope of constitutional property is clear.[14]

In addition, section 71 (2) recognises and affirms the individual right of every person "…to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others."[15] Clearly, these explicit entitlements derive from a common law definition of ownership;[16]hence it can be observed that the constitutional property clause develops from a common law foundation. Further, it is also significant to note that section 71 (2) is phrased in positive terms. The positive formulation explicitly guarantees private property rights in the constitutional system, meaning that such rights are entrenched, and cannot be taken away without constitutionally permissible process.

2.2 Deprivation and Acquisition in the 2013 Constitution

The Constitution makes provision for the compulsory '*deprivation'* of property rights in section 71 (3). The section is phrased in a rather curious manner, particularly in relation to the use and timing of the use of the terms 'deprivation' and 'acquisition'. Section 71 (3) provides thus:

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

(a) the *deprivation* is in terms of a law of general application;

(b) the *deprivation* is necessary for any of the following reasons—

(i) in the interests of defence, public safety, public order, public morality, public health or town and country planning; or

[14] Compare with South African jurisprudence on their property clause in section 25. In the FNB/Wesbank case (p44), Ackermann J stated that "At this stage of our constitutional jurisprudence it is, for the reasons given above, practically impossible to furnish – and judicially unwise to attempt – a comprehensive definition of property"

[15] Section 71(2).

[16] These entitlements include includes the entitlement to use the thing *(ius utendi),* to possess the thing *(ius possidendi),* to enjoy the fruits or income from the thing (ius fruendi), to dispose the thing (*ius disponendi),* to resist unlawful invasion *(ius negandi),* to destroy the thing (ius abutendi) and to claim the thing from an unlawful possessor *(ius vindicandi).* See Badenhorst P *et al*, *Silberberg and Schoeman's The Law of Property*, 4th ed, Lexis Nexis Butterworths, 94.

(ii) in order to develop or use that or any other property for a purpose beneficial to the community;

(c) the law requires the acquiring authority—

(i) to give reasonable notice of the intention to acquire the property to everyone

whose interest or right in the property would be affected by the *acquisition*

(ii) to pay fair and adequate compensation for the *acquisition* before acquiring the property or within a reasonable time after the *acquisition*; and

(iii) if the *acquisition* is contested, to apply to a competent court before acquiring the property, or not later than thirty days after the *acquisition*, for an order confirming the *acquisition*;

(d) the law entitles any person whose property has been acquired to apply to a competent court for the prompt return of the property if the court does not confirm the *acquisition*; and

(e) the law entitles any claimant for compensation to apply to a competent court for the determination of —

(i) the existence, nature and value of their interest in the property concerned;

(ii) the legality of the deprivation; and

(iii) the amount of compensation to which they are entitled; and to apply to the court for an order directing the prompt payment of any compensation.

A number of observations can be made in an analysis of section 71. Firstly, it is easy to overlook that section 71 (3) is essentially a prohibition against compulsory *deprivation* of property. This directly suggests that it is wholly and exclusively concerned with compulsory *deprivation*, not compulsory *acquisition*. Quite strangely however, the section proceeds to interchangeably use and refer to both compulsory acquisition and compulsory deprivation in a sense that appears to suggest these two concepts bear the same meaning. Hence, section 71 (3) (a) broadly refers to compulsory deprivation, sections 71 (3) (c) and (d) make reference to compulsory acquisition, and finally section 71 (3) (e) reverts to compulsory deprivation.

Indeed, there appears an intention to destroy the traditional distinction between deprivations and acquisitions; these two words are used interchangeably, and both processes are accompanied by compensation. Secondly, it is very clear that unlike in the 1980 Constitution, both deprivations and acquisitions are now constitutional processes, and

constitutionally regulated. Indeed, compulsory deprivation can only proceed in terms of a law of general application, and such deprivation must be necessary in the public interest (i.e "in the interests of defence, public safety, public order, public morality, public health, town and country planning or in the development or use of that property or another for a purpose that benefits the community).

In practise, the understanding of 'law of general application' is that there should be a law that sanctions the limitation, and that lays down the conditions which would have to be satisfied, prior to the right being limited.[17] Such a law has to be rational and there must be a rational link between the law and the attainment or achievement of a legitimate societal objective. Further, the law sanctioning the limitation must be of general application and not directed at specific individuals or group, and it must be reasonably certain.[18] People must know with a reasonable degree of certainty the conduct that is proscribed and the conduct that is permitted.[19]

What then to make of the interchangeable use of two terms that have borne a very different meaning in Zimbabwe's constitutional history? A number of questions remain to be answered. For instance, has the Constitution, it may be asked, now done away with the age-old common law distinction between these terms, and the dual regimes of acquisition and deprivation, recognized and respected by Zimbabwe's superior courts? If it can be argued that this is now the case, it means, for instance, that compensation has to be paid for both acquisitions and deprivations. This line of reasoning is preferred by Professor Magaisa, and, because his views are pertinent, they are presented *verbatim*.[20] His reasoning is as follows:

> "Nevertheless, the way in which Clause 4.28 (section 71 (3)) is worded seems to blur this distinction (between deprivation and acquisition). The clause refers to both "compulsory deprivation" and the "acquiring authority" as if deprivation and acquisition refer to the same legal concept. Indeed, it refers to "compulsory deprivation", a term hitherto unused in the

[17] See for instance limitations in the Land Acquisition Act, Chapter 20:10
[18] AJ van der Walt *Property and the Constitution* PULP, University of Pretoria (2012) 28.
[19] S Woolman and H Botha 'Limitations' in S Woolman *et al* (eds) *Constitutional law of South Africa* vol 2 (2nd ed OS 2006) 48 – 49.
[20] A Magaisa '*Property Rights in the draft Constitution'* available at *archive.kubatana.net/docs/demgg/crisis_zimbabwe_briefing_issue_86_120808.pdf accessed on 11 March 2017.*

> constitution. Significantly, the way the conditions for "compulsory deprivation" are stated suggests that deprivation attracts compensation and the traditional distinction between deprivation and acquisition will be consigned to the archives. As far as the rights of persons are concerned, this is not a bad thing as it safeguards the rights against deprivation in the same way as rights against acquisition. The need to develop a doctrine of constructive acquisition, through so-called deprivation will no longer be necessary. Whether a person is deprived of his or her property or that property is acquired, he or she will be entitled to "reasonable notice", "fair and adequate" compensation and more importantly, to challenge the deprivation/acquisition in a court of law."

The interpretation and conclusions by Professor Magaisa are based on a literal or grammatical reading of the text, and consequently produce a very safe result. For instance, his analysis does not 'dare' imagine the implications of the state having to compensate for even the smallest kind of deprivations such as servitude. Certainly, however, his reasoning is difficult to fault. The problems lies not with the clear, literal and grammatical meaning of the words, but with the absurdity that seems to accompany the grammatical approach. For instance, if there now exists a single regime for deprivations and acquisitions, as Professor Magaisa claims, does it mean that all deprivations are now compensable under the Constitution, a position in stark contrast to the hitherto jurisprudence of Zimbabwe's constitutional property law? Further, is there authority in the jurisprudence of constitutional law and interpretation that the use of two terms in a single clause interchangeably means that such words bear the same meaning? Finally, if the framers of the Constitution desired to abolish the traditional distinction, would they have done so in this less than explicit manner? In essence, there is no escaping the fact that section 71(3) is incapable of one interpretation, and the interpretation proffered by Professor Magaisa is merely one of the various interpretations of the clause.

2.3 An alternative interpretation of section 71

A different reading of section 71 is however possible, with the consequent interpretation of the clause suggesting that whilst the Constitution now regulates both acquisitions and deprivations, the regime for these protections still differs. The basis for this argument is derived from a practical understanding of the term 'deprivations' and 'acquisitions' from

domestic and comparative constitutional property law jurisprudence, and also a careful reading of section 71. Both these grounds have to be explored.

The first ground for supporting an interpretation that favours two distinct regimes derives from a practical understanding of 'deprivations' from Zimbabwe's constitutional history. Having said this, it becomes inevitable to examine the property rights clauses of constitutional documents that are part of in Zimbabwe's constitutional history since 1980. In this vein, as demonstrated above, there was nowhere in the Lancaster House Constitution, 1980, where the word 'deprivation' was adopted or used. The constitutional property clause was exclusively dedicated to the compulsory acquisition of property, and made no mention of deprivations.

Another reference point is the constitutional property clause of the rejected constitutional draft of 2000. Section 56 embodied the constitutional property clause, and it was as clear as it was direct, providing that;

> "(t)he State or an authority authorised by an Act of Parliament may acquire property compulsorily for public purposes or in the public interest".

Throughout the clause, there is no mention of deprivation, meaning that the clause would have to be interpreted in the same manner as section 16 of the Lancaster House Constitution, 1980. Another interesting constitutional document was the Kariba Draft Constitution, whose (coincidentally) section 56 makes no mention of deprivation.[21]

Yet another constitutional draft document is the one presented for discussion by the National Constitutional Assembly ('NCA'), under the leadership of Professor Madhuku, a constitutional law scholar. The pertinent provisions read as follows:

> 2. No person may be compulsorily deprived of property or any interest in or rights over property except that:
>
> (a) …

[21] There are however a number of instances where property could be limited in the public interest but where such limitations do not effectively amount to a compulsory acquisition. It can be argued that the Kariba Draft Constitution intended to recognize deprivations as regulatory controls that should be permissible, but that should not be regarded as acquisitions since they were merely regulatory' in nature. For this, see the reasoning of Chidyausiku J in the Davies case (HC), where the learned judge carefully examined American property rights jurisprudence.

(b) the state is entitled to compulsorily acquire land or other natural resources to achieve an equitable land ownership pattern or resource redistribution either to redress past racial discrimination or for the benefit of the people of Zimbabwe, provided the acquisition is done in terms of a law prescribed for that purpose and fair and equitable compensation determined by an independent court is paid within a reasonable time"

It is not difficult to observe that the property rights clause in this NCA document suffer from curiously similar interpretive problems as those ones inherent in the 2013 Constitution. It seems that the NCA draft prohibited compulsory deprivation, but recognised the state's entitlement to compulsorily acquire land and other natural resources. In essence, compulsory acquisition of property by the state is made an exception to the general prohibition against compulsory deprivation. It is also clear that the clause cannot be read as establishing a framework for compulsory acquisition or deprivation of property; indeed the clause permitted compulsory acquisition of land and other natural resources only. It did not create procedures or requirements for the deprivation or acquisition of property other than land and natural resources because such acquisition or deprivation was explicitly prohibited.

2.4 Legislative jurisprudence

Another basis for supporting an interpretation that distinguishes 'acquisition and 'deprivation' of property regimes can be inferred from the jurisprudence of constitutional property law in Zimbabwe since 1980. Such an understanding, as is clear from notable cases, suggests that 'deprivations' are ordinarily uncompensated, unless the statute authorizing specific deprivations say otherwise. The reason for not compensating 'deprivations', which, in the *Davies* case, Chidyausiku J calls 'restrictions' arising out of the proper exercise of the State's police powers, is that it might be impractical for a State to decide to pay compensation for all sorts of control measures that could be encapsulated in the definition of 'deprivations'. In the *Davies* case, Chidyausiku J gives an example of 'designation' under the Land Acquisition Act. Since such 'designation' was later in the judgment, and also in the Supreme Court held to be a mere 'deprivation', it would be 'impractical' and 'ridiculous' to expect the State to pay compensation to all affected commercial white farmers for such a measure.

This point can be stretched even further, using the reasoning of Chidyausiku J in the same *Davies* case. According to the learned judge, there are numerous statutes that recognise

and authorize 'deprivations' or 'control measures' but do not require the State to pay compensation.[22] Such control measures are critical for various reasons including public health, public morality, public safety, among other grounds.[23] In the *Hewlett*[24] case, Fieldsend CJ clearly agreed with the necessity for such legislation, declaring that:

> "Indeed government could be made virtually impossible if every deprivation of property required compensation. A liquor licence, for example, is a valuable asset and may be regarded as property. If legislation were to provide for the compulsory transfer of such a licence to another without compensation it would almost certainly be unconstitutional. But if a government decided to introduce prohibition and to withdraw all liquor licences it could not be said that by its mere extinction a licencee's licence had been acquired."

There is no doubt that both the High Court and the Supreme Court, in the *Davies* case, clearly agreed with Fieldsend CJ's approach. It would seem that a state cannot survive without ordinary deprivations, small or large scale and that a small would find it impossible to compensate for all and every kind of deprivation authorized by law. A plethora of statutes, for instance, in environmental management and conservation, defence and security, telecommunications, regional, town and country planning and mining and mineral resource development permit the state to impose restrictions on the use, enjoyment of property.

To exemplify, section 113 of the Environmental Management Act[25] clothes the Minister of Environment with power to 'declare any wetland to be an ecologically sensitive area and may impose limitations on development in or around such area.' The provision proceeds to prohibit any owner of land harbouring a wetland from, (a) reclaiming or draining wetlands; (b) disturbing any wetland by drilling or tunnelling in a manner that has or is likely to have an adverse impact on any wetland or adversely affect any animal or plant life therein; and (c) introducing any exotic animal or plant species into the wetland. All these measures are restrictions over property and easily fall under deprivations. These deprivations are not compensated, and even the Environmental Management Act does not recognize any need

[22] An example is the Regional Country and Town Planning Act.
[23] The reasons are expressed in section 71 (3) (b) of the Constitution.
[24] Supra at 502.
[25] Chapter 20:27

for their compensation. Indeed, any action in contravention of section 113 constitutes a serious criminal offence that attracts a fine or imprisonment of up to two years.[26]

An analysis of approaches in other jurisdictions might strengthen the argument against compensation for all sorts of deprivations. For the United States, the case of *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) 413, reasoned that:

> "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone. One fact for consideration in determining such limits is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts. The greatest weight is given to the judgment of the legislature but it always is open to interested parties to contend that the legislature has gone beyond its constitutional power."

An eminent American scholar echoed this position, and succinctly illustrated the US position in the following terms:[27]

> "If the government wants to convert a private house into a post office, or run a new highway through a farm, or build a dam which will flood nearby land, it is going to have to compensate the losses sustained as a result of these activities. In such cases courts uniformly hold that property has been taken by the government, thus bringing into operation the constitutional mandate that private property may not be taken for public use without just compensation. But if government prohibits the continuance of a business which has been established for a long time, or outlaws certain businesses altogether, or prohibits the use of land for any of the purposes which give it substantial economic value, it may not have to pay a penny. In cases of this type, where the government is engaged in zoning, nuisance abatement, conservation, business regulation, or a host of other functions, courts will usually decide that the economic loss suffered by the private citizen was a mere incident of the lawful exercise of the "police power," and thus not compensable.'

[26] Section 113 (3) of Environmental Management Act.
[27] JL Sax 'Takings and the Police Power' 74 (1964) *Yale Law Journal* 36.

This reasoning clearly supports the views of both Fieldsend CJ in the *Hewlett* case, and Chidyausiku J in the *Davies* case, and thus, most certainly, has been echoed in Zimbabwe's jurisprudence of constitutional property law in the last thirty years.

The Constitutional Court of South Africa had a moment to ponder various positions of various legal systems in relation to deprivations in general. The conclusions of Ackermann J in the *FNB*/W*esbank*[28] case are opposite:

> "Comparative law cannot, by simplistic transference, determine the proper approach to our property clause that has its own context, formulation and history. Yet the comparative perspective does demonstrate at least two important principles. The first is that there are appropriate circumstances where it is permissible for legislation, in the broader public interest, to deprive persons of property without payment of compensation. … The second is that for the validity of such deprivation, there must be an appropriate relationship between means and ends, between the sacrifice the individual is asked to make and the public purpose this is intended to serve."

Again, this analysis clearly highlights a common, though generally rough approach regarding deprivations. Indeed there is a rough consensus that not all deprivations are compensable. On the basis of this comparative framework, it would be quite strange to interpret section 71 in a manner that drastically departs from positions which the constitutional property law regime has always followed and respected. It is even more difficult to imagine that our constitutional system now requires us, unlike major and most jurisdictions across the world, to pay for all kinds of 'deprivations'.

2.5 Argument *Ex Facie* section 71(3)

Yet another argument supporting distinct regimes of acquisition and deprivation derives from the fact that the use and specific location of these two terms in section 71(3) appears very deliberate, not random. The term 'acquisition' is carefully employed around procedures commonly associated with compulsory acquisitions, and the same can be said of the term 'deprivation'. A closer analysis of the provisions would therefore seem to suggest

[28] *First National Bank of SA Pvt Ltd t/a Wesbank v Commissioner of the South African Revenue Service & Anor; First National Bank Pvt Ltd t/a Wesbank v Minister of Finance* CCT19/01.

that section 71 (3) (a) and (b) apply to both acquisition and deprivation, in spite of the insistence on the word 'deprivation'; section 71 (3) (c) and (d) applies to compulsory acquisitions only, and section 71 (3) (e) applies to compulsory deprivations only.

The reasoning behind this conclusion is as follows. Compulsory acquisitions requires the acquiring authority to give reasonable notice of intention to acquire the property to affected persons, to pay fair and adequate compensation for the '*acquisition'* before the *acquisition*, or within a reasonable time after the '*acquisition'*. In cases where the *acquisition* is contested, the acquiring authority is required to apply to court 'before *acquiring* the property, or not later than thirty days after the *acquisition*, for an order confirming the *acquisition*'. The law gives a right to any person whose property has been acquired to apply to a competent court for the prompt return of the property if the court does not confirm the acquisition.

Further there are two clear regimes for compensation, namely section 71 (3) (c) and section 71 (3) (e). These compensation regimes are clearly distinct. For instance, in terms of section 71 (3) (c), fair and adequate compensation has to be paid prior to the acquisition, or within a reasonable time after acquisition. In addition, a court has to confirm the acquisition if it is contested. In contrast, section 71 (3) (e) appears to be restricted to deprivations only. The first basis for this is that, unlike section 71 (3) (d) that is based on acquisition of property, section 71 (3) (e) appears focused on compensation for the deprivation of an 'interest' in property. Further, it seems that under this section, courts can determine the legality of the 'deprivation', unlike under section 71 (3) (d) where courts are not expressly given such powers. Finally, compensation has to be applied for after the deprivation, and there is no indication that it should be fair or adequate. Only that the courts have power to determine the existence, nature and value of the interest in property (not the value of the property as a whole) in the application for compensation. Significantly, there is no remedy for a return of property, and this is not uncommon in deprivations.

If an interpretation that recognises a single compensation regime for both deprivations and acquisitions is preferred, then the implications are 'earth shattering'. For instance, a lot of statutes, such as those identified above, would need amending to bring them in line with section 71. Otherwise, government would have to find the funds to pay compensation for all

deprivations of property, or of rights and interests in property. On the other hand, preferring an interpretation that distinguishes the compensation regime for acquisitions from that for deprivations would retain the old position. It is not clear whether such retention of the age-old position would do justice to section 71. This is because, while it can be argued that the provisions demonstrate a probable intention to depart from the common law distinction between acquisition and deprivation, section 71 does not do this in very clear terms. Consequently, if an interpretation that favours the old approach is preferred, then the reason is that the framing of section 71 is incapable of one interpretation.

3. Conclusion

The true nature, scope and extent of constitutional provisions can only be understood from the meaning attached to such provisions through their interpretation by courts and scholars of jurisprudence. In particular, the interpretation of fundamental rights and freedoms in the Declaration of Rights should be alive to the need to protect rights and ensure their practical protection and implementation. Apart from ensuring that this objective is met, constitutional interpretation should acknowledge state interests in the protection, realization and enforcement of such rights. In essence, the enforcement and implementation of these rights and freedoms is not done in a manner that is oblivious of the tension inherent in rights discourse.

For the past three decades, Zimbabwe's constitutional property law has clearly echoed and reflected national dialogue and debates on the scope, nature and meaning of property rights in the legal system. Significantly, the constitutional property regime has not sought to adopt, embrace or encourage approaches that are fundamentally different to property rights regimes in other jurisdictions across the globe. As demonstrated above, the manner in which the legal regime has entrenched and constricted property rights is not diametrically opposed to the general understanding on these issues in other jurisdictions. The importance of this position is that the constitutional regulation of property rights, and the interpretation of such rights cannot be understood separately from either historical or contemporary influences implicit in such rights. Indeed, the constitutional regulation of constitutional

property, and the conflicts and tension that are accommodated in the property rights framework should be understood in the context of these influences.

Accordingly, the interpretation of section 71 (3) preferred in this paper is one that recognizes two distinct regimes of compulsory deprivation and compulsory acquisition. This preference has been justified above, both from practical and strictly legalist interpretive approaches. It is strongly argued that this interpretation is the only practical interpretation that can be made regarding deprivation and acquisition of property rights. The fact that this preferred interpretation approach might be regarded as controversial is not to be ruled out, but should be accepted in view of the controversial manner in which section 71(3) itself is phrased; the section is capable of more than one interpretation. Inevitably though, this contribution is made in the hope that with time, and through judicial and legislative development as well as academic commentary, the true meaning and interpretation of the constitutional property clause in the 2013 Constitution will be found.