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Registration and Enforcement of Arbitral Awards Made under Compulsory Arbitration

T G Kasuso[1]

1. Introduction

The Labour Act [Chapter 28:01] ("the LA") makes provision for an elaborate dispute resolution system which seeks to resolve disputes in a speedy and cost effective manner. One such dispute resolution mechanism established in section 98 of the LA is compulsory arbitration. This form of dispute resolution only arises after the failure of conciliation and concomitant issuance of a certificate of no settlement.[2]

In addition to section 98 of the LA, compulsory arbitration is also regulated by the Arbitration Act [Chapter 7:15] ("the AA"). Section 98 (2) of the LA specifically provides that;

> "Subject to this section, the Arbitration Act [Chapter 7:15] shall apply to a dispute referred to compulsory arbitration"

It therefore follows that any matter not covered by section 98 of the LA is governed by the AA. In respect of all other labour issues, the LA by virtue of section 2 (3) prevails over any other enactment inconsistent with it. Section 5 (2) of the AA acknowledges that the provisions of an enactment providing for determination of any matter by arbitration shall prevail to the extent that they are inconsistent with the AA.

The main reasons for the establishment of compulsory arbitration include the need for expeditious, efficient and affordable procedures and easily accessible, specialist but informal institutions as envisaged in section 2A (1) (f) of the LA. Underlying this specialist dispute resolution mechanism is the social justice perspective of labour relations ruminated in International Labour Organisation (ILO) conventions,[3] section 65 of the Constitution, section 2A and Part XII of the LA.

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[2] The procedure for conciliation is beyond the scope of this article however it is covered in Section 93 of the LA. It must also be noted that this article was prepared prior to enactment of the Labour Amendment Act 5 of 2015 which inserted subsections 5, 5a and 5b in the LA.

[3] Relevant ILO Conventions on this aspect include, the Freedom of Association and Protection of the Right to Organise No. 87, Right to Organise and Collective Bargaining No. 98, Labour Relations (Public Service) No. 151,

Despite the legislature creating specialised labour dispute resolution mechanisms such as arbitration and a fully-fledged Labour Court, it deprived the Labour Court and arbitrators powers to enforce their own awards, orders, judgments or decisions. As a result of this, a party that successfully obtains an arbitral award has to approach either the High Court or Magistrates Court depending with jurisdictional limits, and register the award as an order of a competent court. On this aspect section 98 (14) of the LA provides as follows:

> "Any party to whom an arbitral award relates may submit for registration the copy of it furnished to him in terms of subsection (13) to the court of any magistrate which would have had jurisdiction to make an order corresponding to the award had the matter been determined by it, or, if the arbitral award exceeds the jurisdiction of any magistrates Court, the High Court."

Currently the monetary jurisdiction of the Magistrates Court in terms of the Magistrates Court (Civil Jurisdiction) (Monetary Limits) Rules, 2012 is set at US$10 000,00. It follows that any award which is in excess of this amount must be registered in the High Court.

Importantly, the LA and the AA are silent on the procedure one has to adopt in registering an arbitral award with the High Court or Magistrates Court. As such, the question which immediately comes to the fore is how does one register an award with the High Court or Magistrates Court? This would inescapably raise other questions relating to the registration and enforcement of awards. Specifically, what is the purpose of registering an award? What documents should be submitted when registering an arbitral award? What are the requirements for registering an award? What are the recognised grounds of opposing the registration an award? Who registers an award? Is there any recourse against the registration of an award, including any interlocutory relief?

These questions have been considered on a number of occasions in the Labour Court, High Court and Supreme Court. Regrettably, it has emerged that there is no settled position regarding some of the above questions. This divergence of views has resulted in the development of an incoherent jurisprudence on the issue of registration and enforcement of arbitral awards made under

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Promoting Collective Bargaining No. 154, The Voluntary Conciliation and Arbitration Recommendation No. 92 and The Examination of Grievances Recommendation No. 130.

compulsory arbitration. In the absence of Supreme Court clarity on this matter, the article will attempt to unpack the current legislative framework regulating the registration and enforcement of arbitral awards. In doing so, it will seek to answer some the problematic questions raised hereinabove. Ultimately, the article will proffer recommendations before making concluding remarks on the jurisdictional tension that exists between the Labour Court and civil courts.[4]

1.2 Purpose of Registering on Award

In Zimbabwe arbitrators cannot enforce their own orders or issue writs of execution. Only civil courts of inherent jurisdiction can issue such writs. Consequently, in recognition of this *lacuna* section 98 (15) of the LA provides as follows:

> "(15) Where an arbitral award has been registered in terms of subsection (14) it shall have the effect, for purposes of enforcement, of a civil judgment of the appropriate court."

From a reading of section 98 (15) it is clear that the purpose of submitting arbitral awards to the High Court or Magistrate Court is to enable one to enforce or execute the award and nothing else[5]. An arbitral award which is a creature of unenforceable private proceedings is converted into a fully enforceable civil judgment to ensure its observance. It is only on this basis that the High Court or Magistrates Court is empowered to deal with the award. Though it is settled law that registration of an award is for purposes of enforcement, what remains murky is the effect of registration of such an award. The question which usually arises is whether the arbitral award and anything attendant to it is transformed into a High Court order, or it remains an arbitral award for purposes of the LA despite the registration. There is a divergence of legal authority on this aspect and this issue will be canvassed hereunder.

1.3 Procedure for Registering an Award

The High Court Rules, 1971 and the Magistrates Court (Civil) Rules makes provision for two main procedures which a litigant can utilise in approaching the court, namely action procedure and application procedure. Action procedure is also referred to as trial procedure and is adopted where there are material disputes of facts and the parties have to lead *viva voce* evidence. On the other hand, application procedure is adopted where there are no material disputes of facts. Madhuku[6]

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[4] The term civil courts refers to the Magistrates Court, High Court and Supreme Court.
[5] See *UZ-UCSF Collaborative Research Programme v Husaiwevhu* HH 260/14, *Trust Me Security Organisation v Mararike HH* 325/14, *Mandiringa v NSSA* 2005 (2) ZLR 329 (H) and *Muneka v Manica Bus Company* HH 30/13.
[6] L. Madhuku, *An Introduction to Zimbabwean Law, Weaver Press*, 2010 at 108.

states that in application proceedings issues are only restricted to disputes of law and facts are addressed by way of affidavit, with the court resolving the dispute on the papers filed or record.

In most instances the law provides the procedure applicable in a given scenario. In respect of registering arbitral awards, the LA and the AA are both silent on the procedure which should be taken. However, it must be noted that section 98 (14) of the LA provides that *"any party to whom an arbitral award relates may submit for registration …"* Does this mean that the mere submission of an award to a court suffices for it to be registered and to whom is the award submitted to? The word *"submit"* can be interchanged with present or put forward and it means refer for judgment or consideration. Since the LA and the AA are silent on the procedure one has to assume in registering an award, it would seem the submission can either be through action procedure or application procedure. In *Muneka and Others v Manica Bus Company supra*, Mtshiya J noted that the practice to register an award in the High Court has always been through application procedure, in terms of which the application has to be served on the other party. This is the correct position since registration of arbitral awards does not raise any material disputes of fact but disputes of law. Order 32 Rule 226 of the High Court Rules provides two forms of applications, namely court application and chamber application. Since the relief sought in an application for registration of an award is procedural, it is best to proceed by way of a chamber application.[7]

In respect of the procedure to be adopted in the Magistrates Court, Mangota J in *Trust Me Security Organisation v Mararike and Others supra* held that an award could not be registered by merely submitting it to a clerk of court. The court noted that just as in the High Court where an application must be placed before a Judge who registers the award, an application for registration of the award in the Magistrate Court must be brought before a Magistrate who is enjoined to entertain the application and register the award. Registration of an award is not an event but a process and in dismissing the procedure of registering an award by merely submitting such award and a draft warrant of execution to the Clerk of Court, the court stated as follows:

[7] See Order 32 Rule 226 (2) (c) of the High Court of Zimbabwe Rules. In terms of Order 32 Rule 229 adopting a court application when one should have proceeded by way of chamber application or vice versa is not a ground for dismissing the application unless the other party is likely to suffer prejudice and such prejudice cannot be remedied by directions of the court.

> "The directive which the fifth respondent issued and displayed at his court does, with respect, set a dangerous precedent which cannot be allowed to stand. The directive gives the distinct impression that courts allow parties who approach them in search of justice to ambush each other like persons who are playing a game of cards are, more often than not, inclined to do. It runs contrary to some long established principles of natural justice and rules of courts of all levels and it, in the process, places the due administration of justice into very serious disrepute."

It is submitted that this position augurs well with the constitutional right to fair labour practices and administrative justice in sections 65 and 68 of the Constitution. Since labour legislation must be interpreted in terms of the Constitution fairness demands that employment related disputes be determined in accordance with the *audi alteram paterm* rule. It is important to be mindful of the fact that even justice administered under a palm tree demands that a man be heard before any decision affecting his interest or expectations is made. In the event that one intends to oppose such registration, he can only exercise his right if he has been served with the relevant court processes and given an opportunity to address the court.[8] Thus, registration of an award is by application procedure, on notice and such registration can only be done by a Judge Magistrate and not by the Registrar of the High Court or Clerk of Court. By *"submitting"* the award for registration one is referring it for judgment or consideration by a Judge or Magistrate. Only a Judge or Magistrate can decide issues or questions submitted before a court and enter judgment.

1.4 Requirements for Registering an Award

Section 98 (14) of the LA which provides for registration of arbitral awards does not indicate the requirements which must be satisfied by an Applicant in an application for registration of an arbitral award. As such reliance must be placed on the prerequisites' developed by courts. This is particularly true in Zimbabwe where labour law is as much about the courts as it is about the law. In an application for registration of an arbitral award the court does not inquire into the merits or otherwise of the matter. This is the province of the Labour Court which determines appeals against

[8] This position also finds support in Order 22 of the Magistrates Court (Civil) Rules.

arbitral awards in terms of section 98 (10) of the LA. It is on this basis that any relief beyond registration is not competent in terms of sections 98 (14) and (15) of the LA.[9]

In order to qualify for registration an arbitral award must be sound in money either in the main or in the alternative. Makarau J (as she then was) in *Mandiringa v National Social Security Authority*[10] remarked that the wording of section 98 (14) of the LA fortifies this position. By referring to the jurisdiction of the High Court and the Magistrates Court it signifies that only an award sounding in money can be registered. As indicated earlier on jurisdiction of the Magistrate court is currently pegged at US$10 000.00. Thus, an award can only exceed jurisdiction of the Magistrate Court if it is sound in money. Makarau J then succinctly summarised the position of the law as follows:

> "An award that orders reinstatement of the applicant without awarding a specified amount of damages in lieu of reinstatement is incomplete and consequently, incompetent and cannot be registered in terms of Section 98 (14) of the Act as an order of this court."[11]

Furthermore, since the purpose of registering an award is to enable one to execute an award through the issuance of a writ of execution by a competent court, such an award must sound in money.[12]

In addition to the requirement that an award must be sound in money, there are other requirements which must be satisfied. In *Innocent Nehowa v Barep Investments (Pvt) Ltd*[13], it was held that an applicant must satisfy the court that:

(a) he is a party to the arbitral proceedings

(b) the award relates to him and

[9] See *Muronzerei v Petroltrade (Pvt) Ltd* HH 95/14, *Samudzimu v Dairiboard Holdings Ltd* 2010 (2) ZLR 357, *Treviglo Services t/a Tada Teak Iron v Gwatidzo* HH 272/14 and *Kingdom Bank Workers Committee v Kingdom Bank Financial Holdings* HH 302/11.

[10] 2005 (2) ZLR 329 (S).

[11] *Supra* at pg 33-34 paragraph H

[12] Fn 6 at 335. A writ can only be sued out by a holder of a judgment or order in terms of which it has been ordered, the payment of money, the delivery of goods or premises or for ejectment only. It is for this reason why an award must be sound in money, otherwise it cannot be executed.

[13] HH 357/12. See also *Vasco Olympic v Shomet Industrial Development* HH 191/12, *Precious Mukwenga v GMB* HH 193/12, *Mvududu v ARDA* 2011 (2) ZLR 440 (H) and *Tamuka Giya v Ribi Tiger Trading t/a Trianle Tyre* HH 57/14.

(c) that the copy he is presenting for registration has been certified by the Arbitrator in terms of Section 98 (13) of the LA.[14]

The focus of the court is on whether or not the award is lawful, sound in money, still valid and competent. If the award meets these requirements, there is nothing that militates against its registration. The court has no discretion but to register the award. In other words, an Applicant is entitled, as of right, to register an arbitral award as an order of a court.

1.5. Grounds on which registration may be declined

Section 98 (14) of the LA which provides for registration of arbitral awards does not indicate the grounds upon which registration may be opposed or declined. As such guidance must be sought from the grounds developed by the courts as well as the common law grounds for refusing the recognition or enforcement of arbitral awards which are codified in Article 36 of the Model law in the first schedule to the AA.

Firstly, if the requirements which must be satisfied in an application for registration of an award are not met an award cannot be registered. Thus, a Respondent can oppose the registration of an award on the basis that it does not satisfy the requirements for registration (that is, the award is not sound in money, the applicant is not party to the proceedings or the copy presented for registration is not certified by the arbitrator who handed down the award). Under these circumstances a court must decline registration. While an Applicant has to satisfy the requirements for registration, the onus shifts to the Respondent to prove any of the recognised grounds in opposition of the application. Put differently, there is a presumption of regularity of awards if an Applicant proves the requirements for registration. If the Respondent fails to prove any of the recognised grounds for opposing the registration, it is accepted that the award is regular both in form and substance and will be registered.

[14] The certificate is in Form LR9 to the schedule to the Labour (Settlement of Disputes) Regulations, 2003.

Moreover, the registration of an arbitral award may be declined on the limited grounds prescribed in Article 36 in the first schedule to the AA.[15]" Article 36 is titled, *"Grounds for refusing recognition or enforcement"* and provides as follows:

> "(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only –
>
> (a) At the request of the party against whom it is invoked, if that party furnishes to the court where recognition or enforcement is sought proof that –
>
> i) a party to the arbitration agreement referred to in article 7 was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or
>
> ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case, or
>
> iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognised and enforced, or
>
> iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place
>
> v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made, or
>
> (b) If the court finds that;

[15] See *Tapera v Field Spark Investments (Pvt) Ltd* HH 102/13, *Greenland v Zimbabwe Community Health Intervention Research Project (Zichre)* HH 93/13, *Gaylord Baudi v Kenmark Builders (Pvt) Ltd* HH 4/12, *Madzikwa v Twenty Third Century Systems (Pvt) Ltd* HH 29/14 and *Pilime v Midriver Enterprises (Pvt) Ltd* HH 367/14.

i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Zimbabwe, or

ii) the recognition or enforcement of the award would be contrary to the public policy of Zimbabwe.

(2) ……

(3) For the avoidance of doubt and without limiting the generality of paragraph (1) (b) (ii) of this article, it is declared that the recognition or enforcement of an award would be contrary to the public policy of Zimbabwe if -

(a) the making of the award was induced or effected by fraud or corruption, or

(b) a breach of the rules of natural justice occurred in connection with the making of the award."[16]

It must be emphasised that Article 36 is only applicable to arbitral awards brought up for registration in terms of section 98 (14) of the LA. Article 34 of the Model law to the AA deals with the setting aside of awards and is not applicable to registration of arbitration awards. Even in appeals brought to the Labour Court against arbitral awards in terms of section 98 (10), the grounds prescribed in Articles 34 and 36 of the Model law to the AA are not applicable.[17] Article 36 is only applicable in applications for registration of awards and the grounds listed therein are some of the limited grounds on which a court may refuse registration of an award.

However one aspect which has been considered by the courts is whether the noting of an appeal against an award suspends the award and therefore a valid ground for declining registration of the award. Section 98 (10) of the LA provides as follows:

"(10) An appeal on a question of law shall lie to the Labour Court from any decision of an arbitrator appointed in terms of this section."

[16] For a commentary on the grounds see *Arbitration Sourcebook – Commentary on the 1996 Arbitration Act* at 5-41 to 42 and R. Matsikidze, *Alternative Dispute Resolution in Zimbabwe – A practical approach to Arbitration, Mediation and Negotiation* 1st Ed, 2013.

[17] See *Net One Cellular (Pvt) Ltd v Communications and Allied Services Workers Union of Zimbabwe* SC 89/05, *Mbisva v Rainbow Tourism Group Ltd* 2009 (2) ZLR 33 (S) and *Samudzimu v Dairboard Holdings Ltd* 2010 (2) 357 (H).

Though the Labour Court has the jurisdiction to entertain appeals against arbitral awards in terms of section 98 (10), it was stripped of the ability to enforce these awards. The question then is, does it follow that if a party notes an appeal against an award in the Labour Court such an appeal would automatically suspend the registration of the award in the High Court or Magistrate Court? There is an unhappy divergence of opinion amongst learned judges of the High Court, Labour Court and Supreme Court on this issue as reflected in several judgements. In essence it has emerged that there are two schools of thought regarding this issue.

The first school of thought is inspired by the decision of Gowora J in *Dhlodhlo v Deputy Sheriff for Marondera*[18]. In this matter the court held that whereas section 92E of the LA provides that the noting of an appeal against an award does not suspend the decision or determination, there is no such provision in relation to an appeal against an award. The court then relied on the cardinal rule of interpretation and came to the conclusion that in such circumstances, there is a presumption that Parliament does not intend to change the common law, unless it expresses its intention with irresistible clearness, or, it follows by necessary implication from the language of the statute in question, that it intended to effect such alteration in common law. Thus, the court ruled that by operation of law once an appeal is noted the award is automatically suspended. This would in turn mean that registration of the award as an order of the High Court is suspended.[19] Another judgment subscribing to this school of thought is the judgment of Mutema J in *Chikomba Rural District Council v Mundopa.*[20] In this case the learned Judge held that;

> "… what matters at this juncture is simply that the arbitral award has been appealed against and since S98 (10) of the LA, in contradistinction to S92E does not provide for the suspension of an arbitral award, the moment it is appealed against, the common law principle of suspending the operation of a judgment appealed against comes into play."

[18] HH 76/11.
[19] This line of reasoning was also followed by in *The Heritage School v Monica Seka* HH 6/12; *Zimbabwe Cricket Union v Andrew Muzamhindo* LC/H/315/13, *Railways Association of Enginemen (RAE) v NRZ* HB 12/13 and *Mvududu v ARDA* 2011 (2) ZLR 40 (H).
[20] HH 73/12.

Under such circumstances registration of an award would be premature and will only arise after determination of the appeal.[21]

The other school of thought is the most popular one, ascribed to by several judges of the High Court and Labour Court. The view is to the effect that the noting of an appeal does not suspend the arbitral award being appealed against and its registration. Therefore, the noting of an appeal is not one of the recognised grounds of resisting registration of an award. The first is the judgment in *DHL International Ltd v Clive Madzikanda*.[22] In this decision Makarau JP (as she then was) stated as follows;

> "In my view the amendment to the law in 2005 to provide that appeals to the Labour Court would not suspend the decision appealed against was clearly meant to vary the common law position that was prevailing prior to the amendment."

This was followed by the decision of Patel J in *Kingdom Bank Workers Committee v Kingdom Bank Financial Holdings*[23] to the following effect;

> "The common law presumption against the operation and enforceability of judgment appealed against has been explicitly ousted by Section 92E in the case of arbitral awards rendered under Section 98."

This position was confirmed in *Gaylord Baudi v Kenmark Builders (Pvt) Ltd supra* which was a response to the *Dhlodhlo v Deputy Sheriff* case. Mafusire J in *Sande Dhlomo Bhala v Lowveld Rhino Trust*[24] went a step further and aptly stated the position as follows:

> "…… it seems plain that decisions in Dhlodhlo and Mvududu were with all due respect incorrect on the question of the effect of an appeal to the Labour Court from the decision of the arbitrator vis-à-vis the provisions of S92E of the Act. I think it was incorrect to say that whereas S92E of the Labour Act provides that the noting of an appeal does not suspend the decision or determination appealed against, there is no such provision in

[21] This view is also apparent in the following cases *Net One Cellular (Pvt) Ltd v 56 Net One Employees* SC 40/05, *ZOU v Magaramombe* SC 20/12 and *RTG v Kabasa* SC 52/14. Unfortunately these cases by the Supreme Court were determined by a single judge and there is no decision of the full Supreme Court bench on this issue thus causing more confusion and uncertainty.
[22] HH 51/10.
[23] HH 302/11.
[24] HH 263/13.

relation to an appeal against an award by an Arbitrator. There is such a provision. Section 92E is an omnibus provision regarding all appeals made in terms of the Labour Act."

Recent decisions of both the Labour Court and High Court have also moved away from the *Dhlodhlo* case.[25] What is even surprising is that before the *Dhlodhlo* case Gowora J also subscribed to this school of thought and in *Husaiwevhu and Others v UZ-USF Collaborative Research*[26] she stated that section 92E (2) of the LA was clear, unambiguous and did not require interpretation or amplification that the noting of an appeal against an arbitral award does not suspend the operation of the award. The question which then arises is which school of thought is jurisprudentially correct?

The starting point to any meaningful discussion of principles of labour law is the common law. It is trite at common law that in all civil cases the noting of an appeal automatically suspends the execution of any judgment or order granted by a court of first instance. The judgment or order can only be executed upon after leave to execute has been granted.[27] The purpose of this rule as held in *South Cape Corp v Engineering Management Services*[28] is to prevent irreparable damage from being occasioned on the intending appellant who will be left remediless if judgment is executed. However, this rule of practice is only applicable to superior courts of inherent jurisdiction and not tribunals. In respect of tribunals such as arbitral tribunals, Gillepsie J in *Vengesai and Others v Zimbabwe Glass Industries Ltd*[29] held that the accepted common law rule of practice whereby the execution of a judgment is automatically suspended by the noting of an appeal does not apply to any court, tribunal or authority other than a superior court of inherent jurisdiction. Thus, at common law an arbitral award being the equivalent to an award by a tribunal or an inferior court cannot be suspended by the noting of an appeal for the simple reason that at common law, only

[25] See *Trish Kabubi v Zimrock International (Pvt) Ltd* HH 4/12, *Masvingo City Council Workers Committee and Another v Masvingo City Council* HH 390/12, *Njilisi and Others v Tambudzai Enterprises (Pvt) Ltd t/a Hilton Kwikspar* LC/H/32/14, *City of Harare v Gift Mubaiwa* LC/H/35/13, *Joseph Tapera v Field Spark Investments (Pvt) Ltd* HH 102/13, *MDC-T v Mavhangira* LC/H/31/14 and *Tamuka Giya v Ribi Tiger Trading t/a Triangle Tyre* HH 57/14.
[26] 2010 (1) ZLR 448 (H). See also *Air Zimbabwe Holdings (Pvt) Ltd v National Airways Workers Union* LC/H/147/10, *Zimbabwe Mining Development Corporation v African Consolidated PLC* SC 1/10, *Brian Muneka v Manica Bus Company* HH 30/13 and *Net One Cellular (Pvt) Ltd v Net One Employees & Anor* 2005 (1) ZLR 275 (S).
[27] See *Econet V Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H), *Net One Cellular (Pvt) Ltd v Net One Employees* 2005 (1) ZLR 275 (S) and *Varaidzo Mateko v Zenus Banda* HH 30/12.
[28] 1977 (3) SA 534 (A).
[29] 1998 (2) ZLR 593 (H).

decisions of superior courts with inherent jurisdiction are automatically suspended by the noting of an appeal.[30] In *Phiri and Others v Industrial Steel Pipe (Pvt) Ltd*[31] it was accepted that the common law applies unless changed by legislation and there is a presumption that Parliament does not intend to change the common law. The common law position in respect of arbitral award was codified by statute in section 92E (1) and (2) of the Labour Act which states as follows:

> "(1) An appeal in terms of this Act may address the merits of the determination or decision appealed against.
>
> (2)An appeal in terms of subsection (1) shall not have the effect of suspending the determination or decision appealed against."

The title of section 92E clearly indicates that the appeals covered by this provision are *"appeals to the Labour Court generally".* It is an all-encompassing provision which also covers appeals noted in terms of Section 98 (10) of the Labour Act as these are appeals in terms of the Act. To borrow the words of Gowora J in *Husaiwevhu and Others v UZ-USF Collaborative Research supra*,

> "Section 92E is unambiguous and unequivocal in its scope and does not require interpretation".

On this aspect, the correct position of the law is the one stated by Patel J in *Kingdom Bank Workers Committee v Kingdom Bank Financial Holdings supra* that;

> "The golden rule of statutory interpretation dictates that the words of a statute must be given their ordinary grammatical meaning unless to do so would lead to an absurdity. I see no absurdity whatsoever in construing section 92E to embrace appeals against arbitral awards under Section 98 (10)".

It is further submitted that the simplicity of this argument is appealing and in line with the purpose of the Labour Act in section 2A (1) f). The main principle underlying arbitration is the need for the expeditious, efficient and affordable procedures in settling labour disputes. Parliament applied its mind to the delays inherent in the appeal process and considered the policy implications of

[30] This position was reaffirmed in *Tamuka Giya v Ribi Tiger Trading t/a Tiranle Tyre* HH 57/14 and *Founders Building Society v Mazuka* 2000 (1) ZLR 528 (H).
[31] 1996 (1) ZLR 45. See also PTC *v Mahachi* 1997 (2) ZLR 71.

adopting the general common law. It thus codified the common law position to the effect that the noting of an appeal against a decision of a tribunal such as an arbitral tribunal does not suspend the decision appealed against. The approach adopted by other learned judges of the Superior courts frustrates and defeats not only the clear intention of parliament but also the purpose of the Labour Act.[32]

Since the noting of an appeal does not suspend the decision appealed against a party must take advantage of section 92E (3) which creates a medley of interlocutory relief and apply for stay of execution of the arbitral award in the Labour Court.[33] Notwithstanding, it must be noted that there is a divergence of views again in respect of the forum one has to mount an application for stay of execution. This issue will be discussed herein below.

1.6. Effect of Registering an Award

The jurisdictional tension that exists between the civil courts and the Labour Court is apparent on the question of the effect of registration of awards as orders of civil courts. There has been confusion and uncertainty on the exclusivity and concurrency of the jurisdiction of the Labour Court and civil courts. The genesis of this controversy and uncertainty is the Supreme Court decision of *Net One Cellular (Pvt) Ltd v Net One Employees*[34] in which Chidyausiku CJ held that the effect of registering an arbitral award with the High Court would be to convert the award into a High Court judgment. In other words the award acquires the same status as a High Court order. The immediate implication of this pronouncement is that a High Court judgment in respect of which an appeal has been noted is not executable unless leave to execute is granted by the court. Since execution of judgment is a process of the court which issued that judgment and that court has power to control its own processes subject to the rules of the court, any interim relief must be

[32] C. Mucheche, *Law and Practice at the Labour Court of Zimbabwe – Commentary on the Labour Court Rules of Zimbabwe*, 2nd Ed, 2014 at 29 also criticizes the restrictive approach adopted by Gowora J in the *Dhlodhlo* case and submits that the correct position of the law is the one expounded by Patel J *in Gaylord Baudi v Kenmark Builders (Pvt) Ltd* HH 4/12. R. T. Mutero, *"Reflections on the Labour Court Powers in Light of the Obligations under the Labour Act: A functional approach to Labour Dispute Resolution in Zimbabwe; Unpublished LLBS Dissertation MSU 2014* provides a jurisprudential basis for supporting this position.

[33] This section must be read with Rule 34 of the Labour Court Rules and for an Interpretation of this rule see C. Mucheche supra at 28. See also *MDC-T v Mavhangira and 13 others* LC/H/31/14 and *Gaylord Baudi v Kenmark Builders (Pvt) Ltd* HH 4/12.

[34] SC 40/05.

obtained from that court.[35] This position was followed in *Zimbabwe Cricket Union v Andrew Muzamhindo*.[36] In declining jurisdiction in an application for stay of execution of an arbitral award that had been registered in the High Court pending appeal, the court reasoned that;

> "Once an award is registered with the High Court or Magistrate Court it becomes an order of that court. Consequently the power to stay that order rests on the court which registered the award in question and the Labour Court has no jurisdiction to stay execution."

With respect, it is submitted that the position of the law as set out in the above cases is incorrect. The decisions are very unfortunate and have led to the perpetuation of the controversy and uncertainty regarding parallel jurisdiction of the Labour Court and civil courts. The jurisprudential basis of these decisions is unclear and premised on a loose and ill-defined ground. The wording of section 98 (15) of the LA is very clear that where an arbitral award has been registered, it shall have the effect, for purposes of enforcement, of a civil judgment of the appropriate court. The purpose of section 98 (14) is clear that registration of an arbitration award is for purposes of enforcement only. An award which cannot be enforced is converted into a civil judgment to ensure its observance or obedience. There is nothing in the LA which indicates that the award upon registration is converted into an order of the High Court or Magistrate Court for all other purposes. The essence of compulsory arbitration as evinced in section 2A (1) of the LA is that disputes should be resolved speedily and cheaply without further processes which negate the objectives of the LA. In light of this, the LA created the Labour Court, which must be a one stop shop for all employment related matters. Since appeals against arbitral awards are determined in the Labour Court it would be absurd to hold that such an award when registered becomes an order of a civil court for all intends and purposes. It would follow that even the appeal which would be pending in the Labour Court would be subject for determination by the High Court or Magistrate Court once the award is registered despite the fact that it is a labour matter regulated by provisions of section 98.

The position is the same with Labour Court orders which are also registered for enforcement purposes with the civil courts in terms of section 92B of the LA. On being registered they are not

[35]. This position was also adopted in *Dhlodhlo v The Deputy Sheriff, Marondera* HH 78/11, *UZ v Jirira* SC 6/13 *Mvududu vs ARDA* 2011 (2) ZLR 440 (H), and *RTG v Kabasa* SC 52/14.
[36] LC/H/315/13.

converted into orders of the civil courts subject to all the processes and rules of such courts. They still remain Labour Court orders which are to be managed and controlled in terms of the Labour Act. Commenting on this aspect Mtshiya J in *Muneka v Manica Bus Company*[37] correctly summarised the law as follows:

> "In terms of the Labour Act, the registration of an arbitration award envisaged in S98 (14) of the Act is for purposes of enforcement only. (See S98 (15) quoted at p3). The same applies to a decision, determination or order of the Labour Court registered with this Court in terms of S92 B of the Labour Act. The award or order, in my view, remains an award/order of the Labour Court and is to be managed and controlled in terms of the Labour Act. That is why the Labour Court can vary or amend such an order even after it has been registered with this court. The award is only registered with this court simply because the Labour Court has no enforcement mechanisms for its orders...
>
> The above, in my view, applies to all arbitral awards obtained through compulsory arbitration in terms of the Labour Act. This is so because S98 (9) of the Labour Act gives the Arbitrator the same powers as the Labour Court in determining a labour dispute. The relevant section (i.e. S98 (9) provides as follows:-
> '(9) In hearing and determining any dispute an arbitrator shall have the same powers as the Labour Court'
> Clearly the above provision of the law places an arbitral award obtained in terms of the Labour Act at the same level with an order of the Labour Court."

It must also be noted that despite registration of an arbitral award with the civil courts, the correction and interpretation of the award including the issuing of an additional award in terms of Article 33 of the Model Law to the AA is still done by the arbitral tribunal and not the court which registered the award. If such issues attendant to an award still remain the domain of the arbitral tribunal and not the High Court or Magistrates Court it logically follows that the award is not converted into an order of the civil court for all other purposes.

[37] HH 30/13.

This brings us to the question of whether or not the Labour Court has jurisdiction to grant interim relief in respect of arbitral awards registered in the civil courts but pending appeal before the Labour Court in terms of section 98 (10) of the LA. Despite the registration of the award with the civil courts, the Labour Court has jurisdiction in terms of section 92 (E) (3) of the LA to entertain any interim determinations such as applications for stay of execution pending appeal. In *Sanele Dhlomo Bhala v Lowveld Rhino Trust*[38] Mafusire J held that the noting of an appeal does not suspend the decision appealed against and a party must take advantage of section 92E (3) to apply for interim relief for stay of execution of an arbitral award pending the determination of the appeal. Authorities, despite the controversy stirred in the *Dhlodhlo* and *Net One* cases, the LA is clear that a party who finds himself faced with a registered arbitral award pending appeal must take advantage of the pressure valve created by section 92 (E) which empowers the Labour Court to make an interim determination for the stay or suspension of an arbitral award.[39] This position finds favour with Rule 34 of the Labour Court Rules, 2006, which provides that;

> "(34) Where a decision, order or determination has been registered in terms of S92B (3) of the Act, the court or President sitting in chambers, may upon application, order a stay of execution of the decision, order or determination."

Rule 34 applies to orders, decisions and judgments of the Labour Court registered in terms of section 92B (3) and does not preclude a litigant from seeking interim relief such as stay of execution in the Labour Court by reason of the order or determination in respect of which such relief is sought having been registered with the civil courts.[40] In terms of section 98 (9) arbitral awards are executed in the same manner as orders of the Labour Court and in hearing and determining disputes arbitrators have the same powers as the Labour Court. As such arbitral awards cannot be excluded from the ambit of Rule 34 of the Labour Court Rules. Therefore an application for stay of execution relating to an award registered in the High Court or Magistrates Court for purposes of enforcement can only be made in the Labour Court. This position is also

[38] HH 263/13.
[39] See *Gaylord Baudi v Kenmark Builders (Pvt) Ltd* HH 4/12, *Greenland v ZICHRE* HH 93/13, *Zimphosphate v Matora* SC 44/05, *ZOU v Gideon Magaramombe* SC 20/12, *Windsor Technology (Pvt) Ltd v Mabuyawa* HH 377/14 and *Tamuka Giya v Ribi Tiger Trading* HH 57/14.
[40] *MDC –T v Mavhangira* LC/H/31/14.

supported by Mucheche[41] who suggests that the legislature must amend Rule 34 of the Labour Court Rules so that its scope explicitly covers arbitral awards registered in terms of section 98 (14) of the LA. Despite this alleged *lacuna*, the Labour Court and not the High Court or Magistrate Court has jurisdiction to entertain applications for interim relief.

The Labour Court is a creature of statute, which is now a superior court established in terms of Section 172 of the Constitution of Zimbabwe. Though it lacks inherent jurisdiction it would be preposterous for its orders to be stayed by an inferior court like the Magistrate Court in the event of registration of its awards or orders in the Magistrate Court.[42] Furthermore, it must be noted that in applications for stay of execution pending appeal, courts are enjoined to consider issues such as the prejudice to be suffered by either of the parties in the event of success or failure, the prospects of success on appeal and the balance of convenience.[43] In dealing with prospects of success, a court will inevitably deal with the merits of the matter. Arbitral awards are the product of labour matters which are for the exclusive jurisdiction of the Labour Court in terms of section 89 (6) of the LA. Labour matters usually involve issues of justice and equity. The only court which is endowed with jurisdiction to apply principles of equity in determination of labour matters is the Labour Court. The Labour Court's jurisdiction to determine labour disputes on the basis, *inter alia*, of equity can be gleaned from the import of section 2A of the LA.[44] The Labour Court enjoys full authority to look into issues of equity and it is a court created to dispense simple and cheap industrial justice. It is not formalistic and legalistic in its approach and does not concern itself with technicalities like other civil courts.[45] The High Court and Magistrates courts are therefore inappropriate courts and lack the requisite jurisdiction to entertain applications for stay of execution as these would call into question issues of equity. It is only a specialist institution such

[41] C. Mucheche, *"Law and Practice at the Labour Court of Zimbabwe: Commentary on the Labour Court Rules of Zimbabwe*, 2nd Ed, 2014 at 28-29.
[42] It is for this reason it is submitted that the decision in *Delta Beverages (Pvt) Ltd v Chimuriwo* HH 600/14 is wrong.
[43] For these considerations see *Varaidzo Mateko v Zenus Banda* HH 30/12, *Net One Cellular (Pvt) Ltd v Net One Employees* 2005 (1) ZLR 275 (S), *Econet v Telecel Zimbabwe (Pvt) Ltd* 1998 (1) ZLR 149 (H), *U-Tow Trailers (Pvt) Ltd v City of Harare* HH 5/11 and *Mazhavidza v Mushayakarara* HH 16/11.
[44] See the sentiments by Gwaunza JA in Madhatter Mining Co. v Marvellous Tapfuma SC 51/14 and *Flexmail (Pvt) Ltd v Gift Bob Samanyau and 38 Others* SC 21/14.
[45] *Hubert Davies v Mutsindiri* SC 96/04, *Zakeo v Ashanti Godlfields* LC/H/233/04, *City of Harare v Sithole* LC/H/260/13 and *Jackson Muzivi v First Mutual Life Assurance* LC/H/04/15.

as the Labour Court which has exclusive jurisdiction to develop uniform and coherent labour principles. This approach would prevent multiplicity of actions and forum shopping.[46]

It is further submitted that an application for stay of execution can also be made pending review of an arbitral award in the Labour Court. In terms of ection 89 (1) (d1) of the LA, the Labour Court shall exercise the same powers of review as would be exercisable by the High Court in respect of labour matters. Though section 92E (3) provides that pending the determination of an appeal the Labour Court may make such interim determination or decision in the matter as justice of the case requires, the term *"appeal"* must not be interpreted restrictively. The noting of a review does not suspend the decision being the subject of the review. There is need for a party to make an application for stay of execution. Thus, the term "appeal" must be interpreted broadly, to include circumstances where a compulsory arbitration award is the subject of review proceedings. A litigant can still utilise section 92E (3) of the LA and make an application for stay of execution pending review in the Labour Court.[47] To avoid any doubts section 92E (3) must be amended to specifically incorporate reviews.

1.8 Recourse against registration of Awards

A party aggrieved by an improper registration of an arbitral award in the Magistrates Court, on the basis of the adoption of the wrong procedure must approach the High Court with an application for review in terms of Sections 26 and 27 of the High Court Act. In *Delta Beverages (Pvt) Ltd v Chimuriwo and Others*[48] Chigumba J held that the High Court had no jurisdiction to review the registration of an award by the Magistrate Court for the reason that it was a labour matter for the domain of the Labour Court. With due respect, this decision is premised on an incorrect interpretation of the law. The High Court is a superior court with inherent jurisdiction[49]. There is a presumption against the ouster of its jurisdiction unless this is clearly expressed by statute.

[46] M. Mathiba, *"The Jurisdictional Conflict between Labour and Civil Courts in labour matters: A critical discussion on the position of forum shopping,"* Unpublished LLM Thesis, UNISA, 2012 at 6 defines forum shopping as the tendency amongst litigants of exhausting different remedies or approaching different courts in respect of same cause of action. Forum shopping is used by litigants to avoid specialized courts such as the Labour Court.
[47] See *MDC-T v Mavhangira and 13 Others* LC/H/31/14.
[48] HH 600/14.
[49] *Derdale Investments (Pvt) Ltd v Econet Wireless (Pvt) Ltd* HH 656/14.

The exclusive jurisdiction conferred on the Labour Court by section 89(6) of the LA relates only to hearing and determining in the first instance, any applications, appeals or matters referred to in subsection (1). Thus, the right of an individual to approach the High Court seeking relief, other than that specifically set out in section 89(1) of the LA has not been abrogated[50]. Nothing in section 89(1) and (6) takes away the High Court right to review proceedings of inferior courts such as the Magistrate Court in terms of section 26 of the High Court Act. Nor is there any provision in section 89 of the LA authorising the Labour Court to deal with an application for review of proceedings of the Magistrates Court. Such an application falls squarely within the province of the High Court. Any review powers exercised by the Labour Court in terms of section 89(1) (d1) are only limited to issues specifically provided by the LA or any other enactment. However, it must be noted that, in terms of section 89(1) (d1) the Labour Court has powers to review the conduct of compulsory arbitration proceedings by an arbitrator. This power is not extended to reviewing registration of an arbitral award by the Magistrate Court despite the fact that it is a labour matter.

In terms of section 40 (2) of the Magistrates Court Act [Chapter 7:10] any party aggrieved by a decision of the Magistrate Court registering an award can lodge an appeal against such decision with High Court. However, in terms of section 40 (1) of the Magistrates Court Act no appeal shall lie from the decision of the Magistrate Court if, before the hearing is commenced, the parties lodge with the court an agreement in writing that the decision of the court shall be final. On appeal the High Court will exercise its appellate jurisdiction in terms of section 30 and 31 of the High Court Act [Chapter 7:06]. On the other hand, a party aggrieved by a decision of the High Court relating to registration of an arbitral award can in terms of section 43 of the High Court Act note an appeal to the Supreme Court. This right of appeal is available whether the High Court was exercising its original or appellate jurisdiction. On appeal powers of the Supreme Court in terms of the Supreme Court Act [Chapter 7:13] are wide and include confirming, varying, amending, setting aside judgment or remitting the matter back. It also has powers to grant interlocutory relief pending determination of the appeal.

The noting of an appeal from the Magistrates Court to the High Court and from the High Court to the Supreme Court invokes the common law principle that execution of a judgment is suspended

[50] Nyahora v CFI Holdings (Pvt) Ltd SC 81/14.

upon the noting of an appeal.[51] Thus, once registration of an award is challenged on appeal the arbitral award is by operation of law suspended. Since the noting of an appeal suspends the decision appealed against, a party can approach the court which registered the award and make an application for leave to execute judgment pending appeal.[52] Unfortunately this application is not made in the Labour Court. The Labour Court is a creature of statute and it was not vested with powers to entertain such applications. At the end of the day a litigant would find himself in an invidious position where there is an appeal pending before the civil courts relating to the registration of the award and another appeal against the merits of the award in terms of section 98 (10) of the LA pending before the Labour Court.

An appeal in terms of section 98 (10) of the LA is not final. In terms of section 92F of the LA a party aggrieved by a decision of the Labour Court can also appeal on questions of law and with leave from the Judge of the Labour Court against the decision to the Supreme Court. In *Kingdom Bank Workers Committee v Kingdom Bank Financial Holdings*[53] Patel J held that,

> "An appeal under Section 92F of the LA is not in terms of the LA for purposes of Section 92E. Consequently an appeal from a decision of the Labour Court to the Supreme Court would, in accordance with the general common law rule, operate to suspend the decision, subject to the right of the successful party to apply for execution pending appeal."

In the circumstances the registration of an award would be suspended or premature if there is an appeal against the award pending in the Supreme Court from the Labour Court. One has to await the outcome of the Supreme Court matter. The position as indicated earlier on is different with circumstances where there is an appeal pending in the Labour Court from a decision of an arbitrator.

1.9 Conclusion

The LA recognises in section 2A the need for establishing dispute resolution mechanisms in which employees and employers would be able to regulate conflict and resolve disputes expeditiously.

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[51] Herbstein and Van Winsen, *"The Civil Practice of the Superior Courts in South Africa,"* 3rd Ed at 643.
[52] See *Founders Building Society v Mazuka* 2000 (1) ZLR 528 (H) and *Vengesai v Zimbabwe Glass Industries* 1998 (2) ZLR 593 (H). As for requirements of such an application see *Net One Cellular (Pvt) Ltd v Net One Employees and Another* 2005 (1) 275 (S) and *Varaidzo Mateko v Zenus Banda* HH 30/12.
[53] HH 302/11.

Arbitration serves this need by establishing a simple, non-technical and non-jurisdictional approach to dispute resolution. It is a cost effective process which avoids lengthy delays inherent in the processes of the civil courts.[54] Its accessibility is facilitated by the absence of formal and technical arguments and simplified procedures. The system is also manned by specialists in labour relations who are capable of developing a uniform and coherent labour jurisprudence. Unfortunately all this is undermined by the current legislative framework which encourages overlapping and competing jurisdiction and is protracted.

Without doubt, the registration and enforcement of arbitral awards is arduous, cumbersome and complicated. The existing statutory framework is not user friendly and successful navigation through it requires a sophistication and expertise beyond the reach of ordinary employees. Merits of the dispute are often lost in a thicket of procedural technicalities. The requirement of having arbitral awards registered for enforcement purposes is a fertile ground for multiplicity of proceedings and forum shopping. The situation is exacerbated by a specialist Labour Court which has no exclusive jurisdiction and is positioned outside the hierarchy of the judiciary. The fact that the High Court also has jurisdiction in labour disputes often results in an intricate web of litigation. Divergent opinions by the Honourable Judges of the Labour Court and civil courts on fundamental issues relating to registration and enforcement of arbitral awards have also intensified the jurisdictional turf war. The approach by the courts has subverted the theme and purpose of the LA by complicating arbitration and making it less employee friendly. Madhuku[55] also notes that the requirement of registration undermines alternative dispute resolution in diverting the dispute to the ordinary courts as the latter may open issues should the registering court choose to question the validity of the award. The registration process itself is not final, it is open to abuse by litigants who can challenge it on appeal on frivolous and vexatious grounds.

The best way to address these anomalies is to amend the LA and ensure that not only arbitral awards but also judgments of the Labour Court are automatically enforceable. A comparative

[54] See Van Eck, *"The Constitutionalisation of Labour Law: No place for a superior Labour Appeal Court in Labour matters (Part 1): Background to South African Labour Courts and the Constitution (2005) 26 and Du Toit D et al, "The Labour Relations Act of 1995: A Comprehensive Guide*, 2nd Ed (1998) at 306.
[55] L. Madhuku, *"The alternative labour dispute resolution system in Zimbabwe: Some comparative perspectives; University of Botswana Law Journal, June* 2012 at 41.

analysis with South Africa,[56] Botswana[57] and Malawi[58] confirms that this is a viable solution. A robust approach, within the law, is required to enable the Labour Court and arbitrators enforce their own orders or awards. Such an approach would entail that the inherent jurisdiction of the High Court in labour matters is ousted. On this basis Gwisai postulates that the legislature must clearly express its intention of adorning the Labour Court with exclusive jurisdiction in all labour matters with the broad objective of achieving social justice and democracy in the workplace.[59] Failure to do so will continue to encourage parallel litigation to the detriment of litigants. The result of this unclear situation is the denial of social justice and democracy in the workplace as ideated by the LA. It is therefore submitted that most of the deficiencies in the current system of registration of arbitral awards can easily be addressed if Zimbabwe adopts the position in other Southern African countries. Ensuring that the Labour Court and arbitrators enforce their own orders and awards is the panacea to the current confusing state of affairs. There is also need by the legislature to provide statutory requirements for registration of arbitral awards and grounds for declining such registration rather than to leave everything to the courts, which have, until now created an incoherent jurisprudence on these issues.

[56] In terms of sections 143 and 163 of the Labour Relation Act, 1995 of South Africa the decisions of the Labour Court and awards by arbitrators are executable as if they were orders of the High Court.
[57] In Botswana sections 9 (12), 25 (2) of the Trade Disputes Act, arbitral awards and decisions of the Labour Court are enforceable like any ordinary order of a civil court.
[58] Section 75 of the Labour Relations Act, 1996 of Malawi provides that, *"any decision or order of the Industrial Relations Court shall have the same force and effect as any other decision or order of a competent court and shall be enforceable accordingly".*
[59] M Gwisai, *"Jursidiction of the Labour Court and Superior Courts: Chikara Kununa kudya chimwe …. Judicial Subversion under the Cloak of Legality*, Part 2 at 23.

Merger Regulation in Zimbabwe: A critical assessment of the effectiveness of the merger regulatory institutions

Ignatious Nzero[1]

1. Introduction

The effectiveness of institutions tasked with merger regulation is vital for the attainment of an effective competition system. Merger regulators must be effective in order to promote whatever intentions the legislator might have had in enacting competition statutes. In considering the effectiveness of institutions established to regulate competition related aspects of the economy, there are two main assumptions that come to mind. These are (a) an institution that is able to meet its statutory objectives is effective [2] and, (b) regulatory institutions in developing countries are generally ineffective as they are plagued by problems of lack of independence from the political establishment, poorly funded, inadequately resourced and generally inexperienced.[3]This contribution seeks to assess the effectiveness of the Zimbabwean merger regulatory authority, the Competition and Tariff Commission (CTC) as the principal merger regulating institution in Zimbabwe against these assumptions.

The article will highlight through a critical analysis of the statutory functions, current structure and issues relating to the independence of the CTC, some concerns on the effectiveness of the current Zimbabwean merger regulating institutions. The article will further propose ways in

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[2] See AJ Kububa 'Criteria for evaluating the effectiveness of competition authorities' (2007), presentation by the Zimbabwean Competition and Tariff Commission Executive Director at the *Intergovernmental Group of Experts on Competition Law and Policy*, (Geneva 17-19 July 2007).

[3]See generally V Zogbhi'Strategic Priorities of Competition and Regulatory Agencies in Developing Countries' in Mehta PS and Evenett SJ (eds.,) *Politics Triumphs Economics? Political Economy and the Implementation of Competition Law and Economic Regulation in Developing Countries* (2009)89 and 96. See also Organisation for Economic Co-operation and Development (OECD) 'Challenges and Obstacles faced by competition authorities in achieving greater economic development through the promotion of competition' (2004) Contribution from Fair Trading Commission of Jamaica, Session 11 *OECD Global Forum on Competition* (2004).

which the current institutional arrangement can be improve to enhance not only merger regulation but the effectiveness of the entire competition system.

In order to advance the above thesis, that is, the current merger regulator institutions in Zimbabwe are not adequately suited for effective merger regulation; Part II will discuss the functions, structure and independence of the CTC with the aim of exposing some of the inherent shortcomings of the institution. Part III will then focus on the role of the Administrative Court as a de facto arm of the merger regulatory institution mandated with hearing appeals from the CTC. Here it will be argued that the Administrative Court as it stands, is not in a better position to advance effective merger regulation in Zimbabwe hence the need to either revise the statutory provisions giving effect to its appeal mandate or to create within the CTC, an appellate body. Lastly, Part IV will suggest and propose a tailor made institutional arrangement for effective merger regulation in Zimbabwe.

2. The CTC: functions, structure, and independence

2.1. Functions of the CTC

The long Title to the Act provides that the Act aims to promote and maintain competition in the economy of the country through, *inter alia*, providing for merger regulation and establishing an enforcement authority in form of the CTC. Although this provision refers to the institution as the Industry and Trade Competition Commission (ITCC), the 2001 amendment introduced the CTC[4] which replaced the ITCC and these changes are reflected elsewhere in the statute.[5] It is however submitted that the Long Title must be amended to clearly reflect the changes.

The objective above, as stated in the Long Title, is further given effect by Part II which establishes the CTC,[6] constitutes it [7] and provides for its functions.[8] Part IV further provides for the powers of the CTC as *inter alia*, to conduct investigations into certain practices

[4]Section 4 of the Competition Amendment Act [Chapter 14:28].

[5] See for instance, section 4 of Part II of the Competition Act.

[6]Section 4 as amended by section 4 of the Competition Amendment Act 29 of 2001.

[7]Section 6 of the Competition Act.

[8]Section 5 of the Competition Act.

specified under the Act,[9] prohibit the furtherance of such practices pending the investigations;[10] negotiate settlements with concerned parties if deemed necessary [11] and make relevant orders.[12] However, as will be shown below, these provisions are not in themselves adequate to create an effective merger regulating institution.

The CTC is the supreme merger regulatory institution.[13] This means that it enjoys supremacy over sectoral regulators established under various statutes that governs those sectors. [14] This is true given that the Act requires even sectoral regulators to apply for authorisation of mergers that fall within their jurisdictions if they have an effect on competition in Zimbabwe.[15] However, section 3(3) provides that the sectoral regulator 'shall, unless the enactment establishing it expressly provides otherwise, apply to the Commission' as required under the Act. This proviso claws back the supremacy of the CTC by allowing other statutes to have provisions that might require sectoral regulators to have final decisions on mergers within their sectors. The recent enactment of the Indigenisation and Economic Empowerment Act *[Chapter 14:33]* is a case in point. This Act provides in section 3(1)(b) that no mergers and acquisitions requiring notification under the Competition Act shall be approved without complying with the provisions of the Indigenisation Act. This simply means that the authority of the CTC is subjected to that of the institutions created under the Indigenisation Act. Furthermore, despite the Act not expressly excluding the conduct of sectoral regulators from its application,[16]it is clear that the legislator intended the CTC to cooperate

[9]Section 28 of the Competition Act.

[10]Section 29.

[11]Section 30.

[12]Section 31.

[13] Section 3(3) provides that any sectorial regulator established under any other enactment authorizes a merger; it must make an application for final authorization from the CTC.

[14]Ibid.

[15]Section 3(3) of the Competition Act.

[16]Prior to 2000, the South African Competition Act of 1998 in section 3(1) ousted the Competition statute's jurisdiction in bank mergers that were governed by the Banks Act 94 of 1996. See *Standard Bank Investment Corporation Ltd v Competition Commission and Others; Liberty Life Association of Africa Ltd v Competition Commission and Others* 2000(2) SA 797 (SCA). However, section 3(1) (a) and (d) were deleted by section 2(a) of the Competition Second Amendment Act of 2000 and paragraph (d) has since been deleted by section 2(a) of the amending statute. The amending statute added into the 1998 Act section 3(1A)(a) which confers concurrent

where necessary with these regulators. Section 5(2) provides that for effective execution of its statutory functions including its regulatory mandate, ' the Commission shall have power to do or cause to be done,[…]all or any things *under the Act* either solely or jointly with others.'[17] Cooperation is essential as it enables the CTC to acquire relevant information as well as ensuring that objectives of other statutes are not sacrificed under the guise of promoting and maintaining competition in the economy. This realisation is true given that other statutes might also not be concerned with the promotion and maintenance of competition within the sectors under their jurisdictions.

Section 5(1)(i) provides in addition to all the stated functions of the CTC that it also has 'to perform any other functions that may be conferred or imposed on it by this Act or any other enactments.'[18] This provision was introduced by the amendment Act 29 of 2001. It may be asked what implications it has on the effectiveness of the CTC as the principal merger regulator. It is submitted that the phrase 'imposed by any other enactments' implies that the CTC is not only expected to perform its competition enforcement mandate but also any other mandate that might be imposed by other statutes, even those that are not concerned with competition or related issues. Even though this construction might be considered as being over negatively speculative, it is submitted that it is a reality for one cannot discount it given the formulation of the provision. The term 'imposed' means that the CTC does not necessarily have a say in what tasks to perform even if required to go beyond its mandate as a competition law enforcement authority. Whereas one can point to the inclusive nature of the competition policy that underlies the Act, surely this does not justify such a vague provision. It is submitted that the fact that the CTC is a creature of statute does not mean any other statute can impose upon it. The CTC's mandate must be limited to the enabling statute

jurisdiction between the competition authorities and sectorial regulators. See also section 21 (1)(h) which provides that the Competition Commission have to negotiate agreements with any sectorial regulators. Section 82 provides for relations between the completion authority and other agencies. See also *South African Raisings (Pty) Ltd and Another v SAD Holdings Ltd and Another* 2001 (2) SA 877 (SCA) where the South African Supreme Court ruled that the Marketing of Agricultural Products Act 47 of 1996 does not oust the competition authorities' jurisdiction in matters relating to prohibited practices as regulated under section 44 of the Competition Act of 1998.

[17] Section 5 (2) of the Competition Act. Italics added.

[18]Section 5(1).

and not to 'any other' as this potentially duplicate roles with other institutions as well as hampers the effectiveness of the CTC as a competition enforcement authority and a merger regulator.

The above observation can be illustrated by a similar provision that requires the CTC to perform price monitoring, cost and profits as directed by the Minister.[19] This proviso was also inserted into the Act by Amendment Act 29 of 2001. Although the CTC never actually performed price monitoring functions,[20] the fact that it is provided as one of its statutory functions is reason enough to sound alarm bells. There is in fact, nothing that can stop the Minister from triggering the provision. If the Minister feels like doing so, then the CTC will find itself doing more than competition enforcement. It is submitted that one can point to the fact that price monitoring and control is linked to studying costs and profits on a particular market or industry which are, to an extent competition elements. However, these aspects although might point to an anti-competitive market structure, they are not indicative of anti-competitive practices. As such, the function remains hugely misplaced.

The price monitoring function that the legislator imposed upon the CTC is also duplicated in the National Incomes and Prices Commission Act [21] which creates a statutory institution to, *inter alia*, monitor prices.[22] The fact that the CTC is expected, when directed, to perform similar functions, is a potential source of conflict with the Price Monitoring Commission and raises a number of issues primarily whether the CTC needs to do the price monitoring functions that can be done by another institution. If the answer is in the affirmative, then it may be further asked yes, then

[19] Section 5(1)(h). Again this provision was introduced into the Act by section 5(h) of the Competition Amendment Act 29 of 2001.

[20]AJ Kububa 'Overview of Competition Law and Policy in Zimbabwe' (2009)*The 3rd Annual Competition Commission , Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa (Pretoria)* 19.

[21] National Incomes and Prices Commission Act *[Chapter 14:32]*

[22]The National Incomes and Prices Commission.The Act in its long title expressly provides as its objective the establishment of the National Incomes and Prices Commission as mandated with the 'developing of pricing models for goods and services produced in the country with the view to balancing the viability of the producers and welfare of the people of Zimbabwe.'

whether price control is the appropriate form of market intervention that competition law envisages in order to address the evils of market failures.

The question arises whether the Price Monitoring Commission is not sufficient to perform price controls? Does Zimbabwe need the competition enforcement authority to do the same function? It appears there is nothing to justify two statutory bodies doing a single function. This lack of justification is an indication that the Act should not provide price control as one of the CTC's functions. This merely places a burden for the institution that also has to perform tariff regulation functions.[23]

The issue of price control function not only raises the relevance of such a mechanism in the context of competition regulation but also exposes what has been described as the smuggling of some interests that were meant to be replaced by competition law and policy.[24] Prior to the economic reforms, price controls were used as a mechanism to control the power of big private businesses that were perceived as a threat to the new government.[25] This was regarded as necessary given the role that those private big businesses played in sustaining the erstwhile colonial regime [26] hence the post-independent government's sceptical approach.[27] These businesses were largely responsible for perpetrating an anti-competitive market structure through unregulated monopolies. Competition law and policy was thus mooted as a potential tool for reforming the market structure. This was through, *inter alia*, targeting the anti-competitive behaviour of big businesses through a host of market based reforms. These reforms were centred on promoting competition that was believed to be able to force businesses to behave competitively in order to attract customers [28]

[23] Section 5(1)(g) read with Part IV B of the Act.

[24] See W Lachman'The Development Dimension of Competition Law and Policy' in*UNCTAD Series on Issues in Competition Law and Policy* (1999) 16.

[25]Kububa (n20 above) 1.

[26] See AJ Kububa 'Zimbabwe' in United Nations Conference on Trade and Development (UNCTAD) *Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Countries: Thailand, Lao, Kenya, Zambia and Zimbabwe* (2005) 279.

[27]See J Herbst 'The Consequences of Ideology in Zimbabwe' in Baynom S (ed.,*) Zimbabwe in Transition* (1992) 54.

[28]R Whish *Competition Law* (2009) 3 (competition forces business to behave competitively in order to attract customers); RAPosner *Economic Analysis of Law* (2011) 359.

without necessarily having their arms being twisted by the government through such mechanisms as price controls. Competition thus became an incentive to behave competitively and competition law became the intervention mechanism for enforcing it.[29] However, it is submitted that the resurfacing of price controls can only be explained in two ways. First, that the government is not sure of the ability of competition law to enforce competition and regulate market failures. Secondly, the adoption of competition law as part of market based reforms was a half-hearted effort as the government still has faith in its pre-reform mechanisms.[30]

Whatever the motive behind resurfacing of price controls, justified or otherwise, it is submitted that such a motive defies economics and unnecessarily imposes an additional burden upon the CTC. It is common cause that after the price controls were triggered, the situation in Zimbabwe did not improve much as companies responded by withholding their products that they were being 'forced' to sell below the hyperinflationary cost of production.[31] The reality of the situation is that the price control function, whose effectiveness is questionable, should not be performed by the CTC as they is another institution better positioned to perform them.

2.2. The independence of the CTC

Crucially, the Act provides that 'subject to this Act, in the lawful exercise of its functions under this Act, the Commission shall not be subject to the direction or control of any other person or authority.'[32] It is also provides that the Commission is a body corporate capable of suing and being sued.[33] Whereas there is nothing special about the CTC's being a body corporate, surely the legislature made a very bold and significant statement in section 5(3). This statement which

[29]D Lewis 'South African Competition Law: Origins, Content and Impact' in V Dhall (ed) *Competition Law Today: Concepts, Issues, and the Law in Practice* (2007) 350.

[30] A convincing argument is given for the reintroduction of price controls as Government's response to control the sinister motives behind a spate of unjustified price increases of basic commodities in the wake of general elections in 2000. These developments were regarded as being motivated by political factors rather than any economic considerations. See Kububa (note 26 above) 303.

[31] See generally M Wines, 'Zimbabwe's Price Controls Causes Chaos' *New York Times,* 3 July 2007.

[32] Section 5(3) of the Competition Act.

[33]Section 4.

underpins the independence of the CTC as the regulatory institution is significant for the effectiveness of the entire competition system and merger regulation.[34]

It is submitted that an independent regulator can be the missing link between a structurally deficient statute and an effective merger regulatory framework. It ensures that competition concerns are given adequate consideration [35] and at the same time is vital for giving the entire regulatory system much needed credibility.[36] Thus the legislature's intention to create an independent competition enforcement institution and merger regulatory authority is applauded. However, it may be asked whether in the CTC, the legislature actually created an independent institution.

In order to assess whether the legislature created an independent merger regulator that is capable of ensuring an effective merger regulatory framework, it is important that the question as to what constitutes an independent institution is considered. It is commonly assumed, and rightfully so, that a regulatory authority is one that is free of external influence, particularly political in nature.[37] However, this is not necessarily a true reflection of the extent to which such an authority is independent. Whereas no competition authority can claim to be absolutely independent of either political or other influences,[38] an effective regulatory authority must at least 'have a sufficient degree of implementing policies without the interference of political agents or private sector interest.'[39] An independent authority must be seen to be both independent and to conduct itself in a manner consistent with such status. Accordingly, an independent authority is one that is capable

[34] See generally on institutional independence, G Oliviera,EL Machado&Novaes LM 'Aspects of the Independence of Regulatory Agencies and Competition Advocacy' in Mehta PS and Evenett SJ (eds.,) *Politics Triumphs Economics? Political Economy and Implementation of Competition Law and Economic Regulation in Developing Countries* (2009) 285.

[35] Ibid, 285-326, 285.

[36]Ibid, 287.

[37] Oliveira, Machado &Novaes (n34above) 291.

[38]Mehta PS and Evenett SJ (eds.,) *Politics Triumphs Economics?Political Economy and Implementation of Competition Law and Economic Regulation in Developing Countries* (2009) 27.

[39] See Zoghbi V 'Strategic Priorities of Competition and Regulatory Agencies in Developing Countries'(2009) in Mehta et al (eds.,) (note 38 above) 108.

of applying and enforcing legal rules without being subjected to any external influences [40] and without fear of political reprisals.[41]

In assessing whether or not the Zimbabwean legislature created an independent and effective CTC, two vintage points can be used, (a) the structure of the CTC and (b) the supporting provisions of the Act. By supporting provisions is meant other provisions that are relevant to merger regulation.

(a) Structure of the CTC

The regulatory authority is split into two arms: the Board of Commissioners (referred in the statute as the Commission) headed by a Chairperson [42] and the Competition Directorate headed by a Directorate appointed by the Commission.[43] The statutory functions of the Commission are provided as *inter alia*, (a) competition advocacy and [44] (b) studying and investigating merger trends with a view to preventing them from creating monopoly situations that are contrary to public interest.[45] The Directorate is merely portrayed as an administrative arm of the Commission.[46]

The President appoints members of the Commission from a list selected by the Minister.[47] This provision confirms the point that regulatory authorities can never be absolutely independent. It is submitted that if politicians play a role in determining senior appointments, it is also possible that they can exert their influence through those appointees. Another worrisome issue relates to the structure described above. In merger regulation, the Directorate though presented merely as an administrative arm, performs some investigative function as may be delegated by the Commission

[40] Ibid.

[41] See L Pedersen &and E Sorensen 'Transfer and Transformation in Processes of Europeanization' (2004) *European Group of Public Administration Annual Conference*, Ljubliana, Slovenia (September 2004) 8.

[42]Section 6 of the Competition Act.

[43]Section 17 (1).

[44]Section 5(1)(a).

[45] Section 5(1)(d).

[46]Section 17(1).

[47] Section 6(1) read with (2).

in terms of sections 17(1) and 14 (1) of the Competition Act.[48] It can then makes findings and refer the matter to the Board of Commissioners who has the final say. This position at least deprives the Commission of both the investigative and adjudicative powers for harbouring both these functions in a single entity and contradicts good governance principles in particular, the doctrine of separation of powers.[49] However, this position is not reflected in the statute and the Commission can at any time take away the delegated powers.[50] At present, the statute confers upon the Commission both the investigative and adjunctive functions making it the police, prosecutor and adjudicator.

Given that the Commission must be constituted by members representing a cross-section of the society, that is various interests,[51] bestowing upon the Commission both investigative and adjudicative powers, even in principle, is not advisable. It is difficult to envisage a Commission that is independent of these vested interests if they are an integral component thereof. As such the Commission's independence might be greatly compromised by its internal composition. It is accordingly suggested that the practical situation where the Directorate conduct investigations and the Commission act as an adjudicator be reflected in the Act.

The structure of the South African competition authority is a clear example of an independent competition authority. The South African Competition Act establishes a three-tiered competition authority.[52] This authority consists of (a) the Competition Commission as an independent arm tasked primarily with the promotion of competition through, *inter alia*, conducting and making

[48] Kububa (26 above) 355. Section 14 (1) empowers the Commission to set up various committees in order to execute its mandate effectively. Section 17(1) provides that the Director can perform nay mandate assigned to him by the Commission.

[49] The doctrine of separation of powers though not absolute, provides that the State functions are divided into three but distinct organs. These are the executive who formulate policies, and enforces the legal rules; the legislature which makes amends and repeals laws in accordance with the policies formulated by the executive; and the judiciary which interprets and applies the legal rules. The maintenance of these distinctions is not only a good governance practice but also ensures the efficient operation of the State through promoting the independence of the functionaries. See on the doctrine of separation of powers, CL Montesquieu *The Spirit of the Law* (1748) VIII, 2.

[50] Ibid.

[51] Section 6(2) of the Competition Act.

[52]Chapter 4 of the South African Competition Act.

determinations into prohibited practices,[53] (b) the Competition Tribunal as an adjudicative arm with some appellate powers from decisions of the Competition Commission [54] and (c) the Competition Appeals Court as a review and appellate court.[55] This structure promotes internal checks and balances within the system that not only guarantees effectiveness and transparency in merger regulation, but has been effectively employed within the context of public interest to ensure proper application of the concept.[56] The three-tiered competition authority provides a buffer against possible misdirection and misapplication of the public interest concept. The significance of such a structure in merger regulation can only be appreciated within the context of how the concept of public interests has been dealt with in merger regulation. This will be discussed below as an aspect of how supporting provisions in merger regulating legislation can strengthen or weaken the merger regulatory institutions.

(b) The supporting provisions

The concept of public interest features prominently within the Competition Act. The concept features as a substantive requirement for merger assessment. However, the Act does not provide a

[53] Part A of Chapter 4 read with ss19 (1), 20(1)(a), (b) and 21 of the South African Competition Act of 1998.

[54] Section 26 (1) read with ss27 (1)(a) and (c) of the South African Competition Act of 1998.

[55] Section 36 (1) in Part C of Chapter 4 read with ss37 (a) and (b) of the South African Competition Act of 1998.

[56] In *Shell South Africa (Pty)Ltd/ TepcoPetroleum (Pty)Ltd* 66/LM/Oct01, the Tribunal though concurring with the Competition Commission that the merger involving a firm owned by previously disadvantaged person attracts some serious public interest concerns, found that the merger did not raise any competition concerns (paras. 36 and 39). However, the Tribunal cautioned the Commission's approach in advancing its public interest mandate. It cautioned the effectiveness and usefulness of the conditions that the Commission had proposed (par 49). It further reiterated that although the Commission's role is to both promote and protect competition and specified public interest (par 51), such should not be used to produce results that do not only amount to unacceptable commercial interference but also serve no public interest thereby making a mockery of the entire system. In *Sasol Oil (Pty) Ltd v Nationwide Poles CC* 49/CAC/Apr05 the Competition Appeal Court in overturning the Tribunal's decision in a matter involving alleged anti-competitive behaviour, similarly rejected the Tribunal's approach of introducing policy favouring small sized business enterprises.

satisfactory definition of the public interest concept.[57] The result is that this important concept remains largely undefined.[58] This raises the question as to what relevance this has on the role of the CTC as a merger regulator and in particular its independence? The importance of public interest considerations in merger regulation is that they provide the ultimate test for merger assessment.[59] However despite this crucial role, the concept remains largely undefined. This *status quo* has been perpetrated mainly by a combination of lack of litigation in merger cases and subsequent lack of judicial clarification.[60] The undefined concept of public interest makes its application seemingly endless and subjects it to a host of interpretations. Political forces can hide behind public interest claims to frustrate corporate transactions even when they clearly pose no serious threats to competition. The reality of this can be illustrated by the recent developments in South Africa in the much publicised *Wal-Mart/ Massmart* large merger case.[61]

The South African Competition Appeals Court (CAC) dismissed relentless efforts by several Government Ministers to block the proposed merger between, Wal-Mart, the world's largest retailer incorporated in the United States of America (USA) and the local Massmart Holdings.[62] The challenge was premised mainly on what the Government ministers claimed as 'the protection of public interests.'[63]

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[57]See I Nzero 'Is there a gap in the definition of corporate mergers in Zimbabwe's Competition Act? Revisiting the *Caledonia Holdings (Africa) Limited/Blanket Mine (1983) (Private) Limited* merger' (2015) 78 *THRH* 6.

[58]UNCTAD 'Zimbabwe' in *Voluntary Peer Review of Competition Law and Policy: A Tripartite Report on the United Republic of Tanzania-Zambia-Zimbabwe* (2012) UNCTAD/DITC/CLP/2012/1, 184.

[59]Section 32(1) of the Competition Act.

[60] UNCTAD *A Tripartite Report*(n58above) 176.

[61]*South African Commercial Catering and Allied Workers Union (SACCAWU), The Minister of Economic Development, The Minister of Trade and Industry and The Minister of Agriculture and Fisheries v The CompetitionCommission, The Competition Tribunal of South Africa,/Wal-Mart Stores Inc. and Massmart Holdings Limited*110/CAC/Jul 11 and 111/CAC/Jul1.

[62]Ibid. The Minsters are; Minster of Economic Development; Minister of Trade and Industry and Minister of Agriculture and Fisheries brought a combined appeals and review against earlier decisions by the Competition Tribunal to approve the large merger between Wal-Mart and Massmart.

[63]See for instance *GlaxcoWellcome plc./Smithkline Beecham plc.v The Competition Commission* 58/AM/May01 pars.20 and 26 where the Tribunal in unconditionally approving an intermediate merger between two pharmaceutical firms, though expressed sympathy with the Treatment Action Campaign (TAC), dismissed the TAC's request to have

On a number of occasions, the South African authorities had successfully and rightfully so, managed to fend off numerous attempts to smuggle into merger regulation, private interests disguised as public interests.[64] This success can be attributed to two main factors, namely a clearly defined concept of public interest and the structure of the competition authority that guarantees its independence.

The South African Competition Act provides a clearly defined concept of public interest in merger regulation. Section 12(1) (a) (ii) and (b) provides that when assessing whether or not a merger is likely to substantially lessen or prevent competition, the authorities must consider whether it [merger] can or cannot be justified under substantial public interest grounds. Section 12A(3) goes on to lay down a closed list of substantial public interest grounds as the effect of the merger on (a) a particular industrial sector or region,[65] (b) employment[66] (c) the ability of small–sized business or firms previously owned or controlled by historically disadvantaged groups to compete,[67] and (d) ability of national industries to compete internationally.[68] The closed list[69] is a tool that the

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the merger approved on conditions that the merging firms 'allow serious competition for all medicines needed for the treatment of opportunistic infections in HIV/AIDS and anti-retroviral for HIV.' The Tribunal held that there was no legal basis to prohibit the merger or impose any conditions for approval in the absence of a showing that the merger would substantially lessen or prevent competition. See also *Standard BankInvestment Corporation Ltd. v Competition Commission* 2000 (2) SA 797 (SCA).

[64]*Gold Fields Ltd/Harmony Gold Mining Co. Ltd* 43/CAC/Nov04 (an attempt to wildly interpret the public interest requirement to the effect that merging parties need to show that a merger brings significant public interest benefits even if raises no competition concerns was dismissed);

[65]Section 12A (3)(a) of the South African Competition Act.See also *NasionalePers Ltd/Education Investment Corporation Ltd* 24/lm/May03 par.23 (effects of the merger on the education sector); *PSG Investment Bank Holdings Ltd/Real Africa Durolink Holdings Ltd* 31/LM/May01 (effect on bank exit on the banking sector).

[66] Section 12A (3)(b) of the South African Competition Act of 1998.

[67] Section 12A (3)(c) of the South African Competition Act of 1998.

[68] Section 12A (3)(d) of the South African Competition Act of 1998.

[69] See *Industrial Development of South Africa Ltd v Anglo-American Holdings Ltd in the large merger between Anglo-American Holdings Ltd/Kumba Resources Ltd v Anglo-South Africa Capital (Pty) Ltd/Anglo-Vaal Mining Ltd* 45/LM/Jan02 and 46/LM/Jun02 par 35.

competition authorities can and have used to guard against any attempt to wonder off the set perimeters.

In addition to the substantive assessment test, provision is made for parties showing substantial interests to intervene in merger proceedings.[70] However, this participation is also restricted to the grounds provided in section 12A (3) and mentioned above and to the extent that the merger impacts upon them. Crucially, the three-tiered competition authority established under the South African Competition Act provides a buffer against possible misdirection in the application of the public interest concept.

The recent *Wal-Mart/ Massmart* merger decision demonstrates the importance of an independent regulatory structure and confirms the significance of the three-tiered regulatory authority. After finding that the merger raised no serious competition concerns since Wal-Mart was not an active participant on the local market, the Commission recommend that the Tribunal conditionally approve the merger in order to address some public interest concerns raised therein.[71] The Tribunal approved the merger.[72] However, this decision was challenged by several South African Government Ministers,[73] a challenge that was subsequently thrown out by the Competition Appeals Court.[74] The CAC's decision to approve the merger under such pressure vindicates the independence of the South African merger regulatory authorities.

In the case of Zimbabwe, the undefined public interest concept makes it difficult for one to image how the CTC can manage to withstand similar pressure as that exerted upon its South African counterparts in the *Wal-Mart/ Massmart* case. This situation is aggravated by the internal structure of the competition authority. The fact that there has never been cases of such influence can only

[70]Section 18 of the South African Competition Act. The Minister (defined as of Trade and Industry in s1(1)(xvi)) can participate in merger proceedings on public interests grounds. However see *Wal-Mart/ Massmart* merger (n56 above) and note 57 where other ministers participated as well.

[71]*Wal-Mart Stores Inc.,/MassmartHoldings Limited* 73/LM/Nov10 par.22 referring to page 4 of the Commission's report to the Tribunal.

[72]*Wal-Mart/Massmart merger* (note 61 above).

[73]See note 62 above.

[74]*Wal-Mart/Massmart merger* (note 61 above).

provide solace but to a limited extent. It is not guaranteed that the *status quo* will remain neither is it guaranteed that the current composition of the CTC will remain. Change is a reality and one can thus not predict with certainty as to whether the relative calm will prevail for-ever. As such it is always advisable to be on the safe side. This safe side can only be provided by ensuring that the CTC is not only independent in principle, but is supported by a statute that guarantees its independence. It is only a truly independent CTC that will be able to promote beneficial corporate restructuring transactions without sacrificing the principles aimed at maintaining a competitive market structure. In other words, only through a well-structured and well supported institution can a right balance be achieved.

3. The Administrative Court and the right to appeal

The Act provides for a right to appeal Commission decisions to the Administrative Court.[75] The Administrative Court is a specialised institution established by the Administrative Court Act [76] whose jurisdiction depends on conferment by a specific statute.[77] The Administrative Court acts as a court of appeal for decisions of administrative tribunals such as the Competition Commission.[78]

The Competition Act is one of the many statutes that confers appellate jurisdiction upon the Administrative Court.[79] The right of appeal against the Competition Commission's decisions is subject to the Administrative Court's rules.[80] Although provision is made for the Administrative Court to be specially constituted for purposes of hearing competition appeals,[81] the Act subjects competition litigants to any shortfalls within the court's practices. There is no provision regarding urgent competition matters. It is suggested that the right to appeal provided in the Act be revised to include a right to speedy resolution of urgent matters. This provision will be in line with the

[75]Section 40 of Part VI.

[76]Administrative Court Act *[Chapter 7:01].*

[77]G Feltoe *AGuide to the Administrative and Local Government Law in Zimbabwean* 4thed (2006) 25.

[78] Ibid.

[79] Section 40 (1) of the Competition Act provides that any party that is aggrieved by a decision of the Competition Commission may appeal to the Administrative Court.

[80] Section 40(2) .

[81]Section 41.

High Court rules relating to urgent applications where litigants will be required to establish the urgency of their matter in addition to the merits thereof.[82] This requirement is especially needed when dealing with cases involving failing firms where time is of essence.

The size of the economy and number of cases that the Commission handles to a larger extent justifies the prevailing appeal process. In larger economies such as South Africa, this arrangement might be unsuitable given the number of cases that are handled by competition authorities. The need to have an independent institution as the appellate body also justifies the use of the Administrative Court for that purpose. However, there is a need to tailor-make the procedure so that it becomes more accommodative to urgent competition cases.

Section 40 provides that 'any person who is aggrieved by a decision of the Commission […] may appeal against it to the Administrative Court.'[83] 'Person' is not defined in the Act hence shall be ascribed its ordinary legal meaning to mean any entity capable of acquiring legal rights and obligations, be it a natural or artificial entity.[84] Thus an entity which has the capacity to sue in the Administrative Court is contemplated by the provision. However, the issue relates to the prefixing of that entity with 'any' in the context of the provision. Does this confer the right of appeal upon any entity regardless of whether they participated in the Commission proceedings or not? Is the right restricted to only those who have participated in the Commission proceedings leading to the decision that become subject of appeal?

It is submitted that the term 'any' as used here implies wider consideration beyond whatever might be specified. Accordingly, the right of appeal is also conferred upon persons who were non-parties to the initial Commission decision. It is submitted that such a construction ensures the participation of broader interest in merger proceedings, a situation that carries both merits and demerits. On the positive side, this enables any party who can prove substantial interest in the matter to get involved

[82] See Rule 244 of the High Court of Zimbabwe Rules of 1977 governing urgent applications governs urgent applications. See generally *Progressive Teachers' Union of Zimbabwe and Others v Zimbabwe Congress of Trade Unions and Others* HC173-11, 3 ('a matter is urgent, if at the time the need to act arises, it cannot wait.')

[83]Section 40(1) of the Act.

[84]Section 3(3) of the Interpretation Act *[Chapter 1:01]* defines a person as including a party.

therein. This can work to protect the competition process through pulling of resources in class actions. However, this is also a leeway that can be exploited by vested interests to get involved in the proceedings solely for the protection of their interests even if such interests have nothing to do with the protection of the competition process. Furthermore, such a vaguely formulated provision can result in endless proceedings as 'any' person can simply partake in the proceedings once having proved an interest (the interest being the protection of the competition process as part of the undefined public interest concept).

It is not certain whether the legislature intended the right to appeal to be conferred exclusively upon parties who might have participated in the initial decision making proceedings. If this was the intention, then one would envisage a situation where the provision simply refers to 'any party' rather than 'any person.'

Another problematic area is that the provision makes reference to a right to appeal but not a right to review. Although provision is made for review to the High Court,[85] it is not practical to expect parties who require an appeal to go the review way just because the High Court provides for an urgent application procedure for the two procedures are materially different.[86] Does this mean the two are similar or the review proceedings are immaterial in merger proceedings? There appears no justification to either treat an appeal as a review or denying the right to a review. Strictly speaking, an appeal is not an equivalent of a review for the two denotes different procedural aspects. It is thus submitted the provision should be amended to reflect that is also encompasses reviews.

The Act confers upon the CTC the powers to investigate, *inter alia*, mergers under section 28(1)(b)(i). However, the Act expressly deprives the CTC of the power to detain any person who might have contravened the provision including engaging in restrictive practices. Although the CTC is allowed to negotiate settlements with offenders, the fact that it does not have prosecutorial powers in contrasts to other authorities such thereby relying on other institutions that performs

[85]Section 33 (3) (a) of the Competition Act.

[86]For the difference between an appeal and review in legal proceedings, see generally *Commercial FarmersUnion v Minister of Lands and Others* 2000 (2) ZRL 469 (S) (proceedings are different) and further Garner B (ED) *Black's Law Dictionary* (2004) 105 and 864 respectively.

such tasks. It is argued that by relying on other institution such as the Prosecutor-General's office, the CTC is susceptible to inheriting any shortcomings in these institutions.

4. The ideal institutional structure for effective merger regulation

The Act establishes and constitutes the CTC as the principal merger regulatory authority.[87] This authority is constituted by the Board of Commissioners who are referred to as the Commission [88] and the Directorate headed by a Director appointed by the Commission.[89] The Act provides that the Commission is responsible for conducting investigations, prosecuting and adjudicating transactions that might be contrary to competition.[90] The Commission is thus the investigator, prosecutor and adjudicator. Provision is made for the Directorate as a mere administrative arm of the competition authority.[91] In addition to this set up, provision is made for appeals from the decisions of the Commission to the Administrative Court.[92]

The effect of the above structure is that it primarily provides for an authority with investigative, prosecutorial and adjudicative powers. This is contrary to the generally accepted principles of good corporate governance as contained in the doctrine of separation of powers.[93] This doctrine provides that the distinct separation of the law making, prosecuting and adjudicative powers of the state vest in distinct institutions. The current structure is thus untenable.

[87] See section 4 establishing the CTC, section 5 provides for the general functions of the CTC.

[88]The Act in section 2 defines the Commission as the Competition and Tariff Commission. Part II makes reference to members of the said Commission implying the Board of the Commission.

[89] See section 17.

[90] See sections 5(1)(d) (investigation as a function of the CTC);28 (CTC's powers to investigate); 31(adjudicating through making orders); 35 (adjudication through determining applications for authorisations).

[91] Section 17 (1) provides that the Commission shall appoint a Director who shall be responsible for administering the Commission's affairs, funds and property and performing any other activities as conferred upon him by the Commission..

[92]Section 40.

[93]See note 87 above.

Although the statute provides for a Directorate as a mere administrative arm of the Commission, in practice the Directorate exercises wider functions including conducting investigations.[94] These functions are exercised under the powers delegated to the Directorate by the Commission.[95] However, this practical position is not reflected in the statute. The effect of such an anomaly is that the CTC can take away the delegated functions as it may please. The fact that there are no reported incidents of such must not be construed as a basis for justifying the *status quo*. Surely one cannot guarantee the continued existence of the composition of the current authority hence there is a need to statutorily reflect all the operational structures of the CTC. Accordingly, it is suggested and recommended that the legislature make necessary amendments to reflect the practical set-up of the authority so that it conforms to the doctrine of separation of powers.

The Act provides that appeals from decisions of the Commission lie to the Administrative Court.[96] The provision only makes reference to an appeal. It is not clear whether the term appeal also covers review. The two are distinct legal proceedings despite both aiming at overturning the decisions of a court or tribunal.[97] An appeal relates to proceedings aimed at attacking the merits of a decision on either incorrect or inaccurate legal principle or misapplication of facts.[98] A review relates to proceedings aimed at attacking the proceedings giving rise to the decision in question.[99] It is thus necessary to reflect this distinction.

The Act only confers appeal jurisdiction upon the Administrative Court. Although provision is made to constitute the said court for purposes of hearing appeals, the Act subject competition matters to the rules and procedures of the Administrative Court.[100] This means that competition

[94]Ibid.

[95] See section 17 (1) provides that the Commission can confer upon the Director any functions implying that it can delegate to him to do any of the acts beyond administration.

[96]Section 40.

[97]For the difference between an appeal and review in legal proceedings, *Commercial Farmers Union v Minister of Lands and Others* 2000 (2) ZLR 469 (S) (proceedings are different) and generally Garner B (ED) *Black's Law Dictionary* (2004) 105 and 864 respectively

[98] See note 57 above.

[99]See note 58 above.

[100]Section 40(2).

matters inherit any deficiencies within the Administrative Court proceedings such as the absence of urgency applications. This is particularly detrimental to the effective of the merger regulatory framework as time taken to determine the fate of a transaction is of essence especially in mergers involving failing firm or failing division claims.[101] Although the use of the Administrative Court is not harmful to the regulatory system, it is suggested that the provision relating to appeals be amended to provide for the rules governing such proceedings.

It is recommended that the legislature alter the structure of the merger regulatory authority by providing as follows;[102]

(1)The primary authority to regulate mergers lies in the Merger Directorate, the Competition Commission and the Administrative Court.

(a) The Merger Directorate will have the powers to conduct investigations on cases of market concentrations and to make preliminary determinations on applications for authorisation of merger made in terms of section 35.

(b)The Merger Directorate will make recommendations to the Competition Commission in relation to the making of final determinations.

(c)The Competition Commission is the principal authority in determining merger determinations referred to it by the Merger Directorate. It is an independent tribunal with adjudicative powers.

(d) Finally, the Administrative Court established in terms of the Administrative Court Act [Chapter 7:10] shall have the powers to hear both appeals and reviews from the Competition Commission.

(e)For purposes of hearing appeals and reviews referred to above, the Administrative Court shall be guided by rules provided under this Act.

[101] See generally V Weiss & M Mayer 'Identifying Filing Obligations And Beyond: Merger Control in Cross-Border Transactions' in Parr R and Sander R (eds.,) *The International Comparative Legal Guide to: Merger Control 2013* (2013) 15-20.

[102]See I Nzero *Corporate Restructurings in Zimbabwe: A Legal Analysis of the Regulation of Corporate Mergers and Acquisitions in Zimbabwe* Unpublished LLD Thesis, University of Pretoria (2013) 253.

The proposed structure will provide much needed clarity and keep in line with the general judiciary system in Zimbabwe. It will clearly provide for both appeals and reviews in merger proceedings. In addition, the merger regulatory authority will be shared by the three distinct but related institutions. This structure not only reflects general best practices in good corporate governance but also the practical situation currently obtaining in Zimbabwe. The 'Merger Directorate' will be merely an arm of the CTC tasked with investigating and making preliminary determinations on mergers as well as recommending to the Competition Commission for final determinations. This task is currently carried out by the Directorate but is not reflected in the statute.

Perhaps the most important aspect of the proposed regulatory structure is the retention of the Administrative Court as the reviewing and appellate arm. This is in line with the country's judiciary system in which the Administrative Court is provided as a specialised court whose jurisdiction is conferred by other statutes.[103] As such, the proposals will keep in line with this tradition albeit modifications. The first modification relates to the need to amend the current provisions in which competition appeals are subjected to the rules of the Administrative Court and procedures.[104] Given that the Administrative Court does not have original jurisdiction, it makes sense that in addition to constituting it for purposes of hearing competition matters, the Competition Act must also provide in form of delegated legislation, rules for hearing appeals and reviews from mainstream competition tribunals. This is not alien to Zimbabwe for currently the High Court provides for separate rules for hearing bail proceedings despite the fact that there are already general High Court rules.[105] It is thus submitted that the proposed structural provisions will only strengthen the merger regulatory framework without altering the current judicial system.

The second modification relates to the creation of the 'Merger Directorate' within the CTC. This does not mean that a new entity has to be formed but rather that the current internal structure has

[103] The Administrative Court is established by the Administrative Court Act as a specialized court whose jurisdiction is bestowed by other statutes such as the Competition Act. See generally, Feltoe (n78 above) 24 and L Madhuku*An Introduction to Zimbabwean Law* (2010)75.

[104]Section 40(2).

[105] See High Court Rules of 1977 in Statutory Instrument 1047/1971 and High Court of Zimbabwe (Bail) Rules, 1991 in Statutory Instrument 109/1991.

to be reflected in the statute. As already pointed out in relation to the retention of the Administrative Court, creating new institutions must not be an option for the following reasons. Firstly, although merger cases might constitute by far the highest number of competition cases,[106] the low rate of litigation in these matters [107] implies that any new institutions outside the current structure might serve no meaningful purpose. As such, it is advisable that the identified institutional deficiencies be dealt with through strengthening the current establishment. It is through an effective regulatory structural framework that effective merger regulation can be achieved.

5. Conclusion

The CTC is a critical component of the competition system in Zimbabwe. As the competition authority, the CTC is statutorily mandated to perform the duties of the principal merger regulator. Given the significance of effective merger regulation in ensuring the effectiveness of the entire competition system, it is crucial that the CTC be adequately equipped to discharge its statutory mandate. However, in order to do as such, there are a number of factors that need to be in place chief amongst them, that the empowering statute, that is, the Competition Act clearly provides for the functions of the CTC; creates an institutional structure that enables the regulatory institution to discharge of its statutory mandate independently and effectively and ensures that the supporting provisions are clear and flexible to enable the CTC to carry out its mandate.

The current structure of the CTC is not suited to promote effective merger regulation. In addition, the Competition Act does not provide clear and effective supporting provisions for instance, the public interest concept that is supposed to be used by the CTC as the yardstick for substantive merger assessment is undefined and the provisions relating to appeals against decisions of the CTC to the Administrative Court are not clear on whether the appeal contemplated therein also extends to a review. It is thus imperative that the legislature amends the relevant provisions of the

[106]See Kububa (n26 above)277(between 1999 and 2005, of the 200 competition cases handled by the CTC, restrictive and unfair trade practices combined constituted 60% and mergers and acquisitions constituted 40% of the total); Kububa (n20 above) 30(between 2006 and 2011, mergers cases totaled to 416 compared to 358 restrictive business practices cases.)

[107]UNCTAD *A Tripartite Report* (n53 above) 176.

Competition Act to provide clarity on these issues and by so doing, enhance the effectiveness of the Zimbabwean merger regulatory institutions and by extension, the effectiveness of the competition system.

Diversion of Children in Conflict with the Law: A case for full implementation of the programme in Zimbabwe.

Blessing Mushohwe[1]

1.1 Introduction

Children are indeed among the most vulnerable in society, especially given that their mental and physical maturity limitations require adults to nurture, protect and mentor them in a manner that guides them into becoming law abiding citizens who can play a constructive developmental role in society. Nelson Mandela once said "There can be no keener revelation of a society's soul than the way in which it treats its children."[2] Unfortunately and sadly so, society has become so morally rotten and corrupted that the love, care and protection that is owed to children has disappeared. Consequently, the prevailing negative socio-economic climate, has forced children to resort to crime, some merely so that they can meet their basic needs such as food, shelter and clothing. Others who commit more serious crimes have been exposed to adverse circumstances in their early childhood, including various forms of abuse and violence by adults which in turn initiate them into criminal behaviour. As if not enough, instead of striving to solve the causal factors of children committing crimes and trying to rehabilitate them back into society, they are taken into the formal criminal justice system. According to Advocate Mukwevho,[3] the criminal justice system by its very nature has never been intended to be a child-friendly system. Furthermore, the Criminal Law curriculum and training was and is still not formulated with children in mind. The criminal justice system uses the degrading, painful and inhuman pre-trial detention, imprisonment and chastisement meant for adults unfortunately to punish children in conflict with the law.

This article argues that children need care, guidance and protection; none of which are found in detention, imprisonment or the practice of chastisement as a form of punishment. It advocates for the use of rehabilitative, educational and reform-oriented alternatives to deal with children in

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[2] Speech by the late former South African President Nelson Mandela at the launch of the Nelson Mandela Children's Fund, Monday, May 08, 1995 at Mahlamba Ndlopfu, Pretoria, South Africa, available at http://db.nelsonmandela.org/speeches/pub_view.asp?ItemID=NMS250&txtstr=Mahlamba&pg=item.

[3] H Mukwevho 'The role of prosecutors in enabling diversion' (2001) *Article 40, Vol 3, Issue 3*, p1.

conflict with the law. One of the more pronounced and effective alternative for children is diversion. In exploring diversion as a better alternative, the paper briefly discusses the current status of juvenile justice in Zimbabwe and the various forms of punishing children who are in conflict with the law as practiced in Zimbabwe and their negative effects on children. The second part details diversion as the most viable and appropriate alternative to detention, imprisonment and chastisement of children. The paper further provides an analysis of the various forms of diversion programmes available for children as practised in other jurisdictions and explores the benefits of diversion both to the individual child and to the community at large. Lastly, the paper provides recommendations for improved full implementation of diversion in Zimbabwe as a progressive alternative to detention, imprisonment and chastisement.

1.2 Background to Diversion in Zimbabwe

The Zimbabwean criminal justice system currently does not have fully functional alternatives for children in conflict with the law despite various efforts having been made in that direction. As early as 1995, discussions and programming on an alternative juvenile justice delivery system for children had started where programmes such as community service, open prison and communal court systems were introduced for children in conflict with the law. Due to various reasons such financial and lack of capacity, these have not been effectively implemented. One of these alternatives is Diversion which is defined as the practise of referring children away from the usual court procedures or prison, with or without conditions and at any stage of the criminal justice process to a programme that is educational, rehabilitative and that reintegrates the child back into the community.[4] The concept of diversion came into existence in Zimbabwe in 2009 after the Government of Zimbabwe accepted the implementation of a pilot pre-trial diversion for children below the age 21 years. In this programme, the then Prosecutor General or his representative would use his powers in terms of Section 9 of the Criminal Procedure and Evidence Act (CPEA),[5] to decline to prosecute any matter if it meets the following requirements:

- The accused is below the age of 21 years;

[4] L Davis & M Busby 'Diversion as an option for certain offenders: The view of programme participants diverted during the Hatfield Court Pilot Project', (2006), *Acta Criminologica 19, Vol 1, p102.*
[5] Criminal Procedure and Evidence Act (Chapter 9:07).

- The accused is unequivocally admitting to the crime committed;
- The crime committed would not ordinarily attract a custodial sentence of more than twelve months.

In 2013, the Ministry of Justice, Legal and Parliamentary Affairs formally launched the nationwide pre-trial diversion programme aimed at finding better ways of dealing with cases of juvenile delinquency outside the formal criminal justice system.[6] This also operationalized the Zimbabwe Pre-Trial Diversion Guidelines which were to guide the implementation of the programme.[7] This however is still meeting the same implementation challenges that the other initiatives have met over the years.

1.3 Current Punitive Measures for Children in Conflict with the Law in Zimbabwe

Without a fully functional diversion system, children who offend are taken through the formal trial process which uses the Criminal Law [Codification and Reform] Act.[8] This sometimes and more often may result in pre-trial detention, imprisonment and/or chastisement of children as a sentence at the end of the trial.[9] These punitive measures on children are in contravention of international law, notably the 1989 International Convention on the Rights of the Child (hereafter referred to as the CRC)[10] and the 1999 African Charter on the Rights and Welfare of the Child (hereafter referred to as the ACRWC).[11] Article 37 of the CRC prohibits the treatment of children in a cruel, inhuman or degrading manner, while Article 40 of the same instrument requires state parties to treat children who have committed crimes with dignity and self-worth with a view to reform and reintegrate them back into society. Similar provisions are found in the ACRWC in Articles 16 and 17 respectively. The Committee on the Rights of the Child for the Protection of Children from

[6] Herald Reporter, 'Zimbabwe: Juvenile Pre-Trial Diversion Programme a Step in the Right Direction', Herald 04 June 2013.
[7] Ministry of Justice, Legal and Parliamentary Affairs, 'Zimbabwe Pre-Trial Diversion Programme for Young Persons Consolidated Guidelines', September 2012.
[8] Criminal Law [Codification and Reform] Act (Chapter 9:23).
[9] Chastisement has however recently commendably been declared constitutionally invalid by the High Court of Zimbabwe in the case of *S v Willard Chokuramba* HH-718-14. Justices Muremba and Mawadze declared Section 353(1) of CPEA to be constitutionally invalid in terms of Section 167(3) and 175(1) of the new Constitution. This however is yet to be confirmed by the Constitutional Court in terms of Section 175 (30 of the Constitution.
[10] Ratified by Zimbabwe on the 11th of September 1990.
[11] Ratified by Zimbabwe on the 19th of January 1995.

Corporal Punishment[12] in its entirety emphasises the prohibition of the use of chastisement on children including as a sentence or punishment of child-offenders.

Furthermore, there are a number of other international rules and guidelines which are recommendatory and non-binding but, taken together, constitute a comprehensive framework for the care, protection and treatment of young offenders. These are the United Nations Standard Minimum Rules for the Administration of Juvenile Justice,[13] the United Nations Guideline for the Prevention of Juvenile Delinquency[14] and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty[15] among others.

A cursory examination of these instruments reveal that the practices of pre-trial detention, imprisonment and chastisement are gross infringements on children's rights to dignity, self-worth and development and their rights against torture, cruel and degrading treatment among other rights. In addition, these punitive actions tend to yield no tangible positive results for child-offenders. Instead, according to the Committee on the Rights of the Child,[16] the use of incarceration has very negative consequences for the child's harmonious development and it seriously hampers reintegration into society. The Committee further notes that there is adequate evidence that incarceration of children compromises their basic safety, well-being and their future ability to rehabilitate and remain free of crime. It increases the risk of young offenders being exposed to sexual abuse in police holding cells and prison. Such sexual abuse in cell holdings or prison is in turn a risk factor for continued sexual offending of the child into adulthood.[17]

Incarceration can also reinforce criminal behaviour and child-offenders may come out of jail with new skills of criminal behaviour than when they entered. This is because their interaction with hardened criminals in prison or detention may teach them new tricks of committing crime.

[12] General Comment No 8 of 2006.
[13] Also known as the Beijing Rules. Adopted by the General Assembly Resolution 40/33 of 29 November 1985.
[14] Also known as the Riyadh Guidelines. Adopted and proclaimed by General Assembly Resolution 45/112 of 14 December 1990.
[15] Adopted by the General Assembly Resolution 45/113 of 14 December 1990.
[16] General Comment No 10 of 2007.
[17] Foley, E., & Wakerfield., L (Eds)'Young sex offenders and the Child Justice Bill' (2008), *Article 40, Vol 10, Issue 1,* p11.

Furthermore, apart from some isolated skills development programmes, children usually come out of jail with no positive lessons learnt; having had their education interrupted and with societal stigmatization of being a criminal from prison, which again can lead children to relapse back to crime. Chastisement on the other hand can leave children with serious damage to their physical, psychological and social development.[18] Chastisement is violent in nature and can inculcate in children the belief that problems or misbehaviour are solved through violent means, a mentality that can build a culture of violence in society as the children become adults. Chastisement also degrades a child and leaves him/her deprived of any feelings of self-worth and self-esteem. At the very least, both incarceration and chastisement are not remedial measures for the root causes of child crime, without which children can easily reoffend after the punishment. It is precisely because of the above negative effects of incarceration and chastisement that this article proposes the expanded use of diversion as a viable and appropriate alternative to dealing with children in conflict with the law.

2. Diversion as a Viable and Appropriate Alternative to Treat and Reform Child-Offenders

Diversion as defined above, takes place at any stage of the criminal justice process, i.e. prior to arrest, charge, plea, trial or sentencing. According to Skelton, diversion gives communities a bigger stake in justice with a restorative nature.[19] It emphasises the point that because of their lesser culpability, children should not go through the criminal justice route. Instead, they should go through guidance of families, communities and child care professionals who use specific interventions/programmes to make children understand the impact of their crimes on others and ensure that they correct their wrongs where appropriate. Through referring a child to social service programmes, diversion promotes the physical and psychological recovery and social reintegration of a child who in all fairness is also a victim to his/her own offending.

Diversion is an alternative that treats child-offenders in a manner appropriate to their well-being and development needs. This is in addition to addressing their unique circumstances which cause

[18] General Comment No 8 of 2006, para 37.
[19] A Skelton 'Setting standards for diversion' (2001), Foley, E., & Wakerfield, L (Ed), *Article 40, Vol 3, Issue 1,* p8.

them to commit crimes. According to the Committee of the Rights of the Child,[20] diversion should include aspects of care, guidance, supervision, counselling, probation, foster care and educational and skills training programmes. As such, Skelton[21] and Bezuidenhout[22] note that the basic aims of diversion are:

a) To promote the dignity and well-being of the child, the development of his/her sense of self-worth and the ability to contribute positively to society;

b) To impart useful life skills and education thereby promoting the child's development as a right in Article 6 of the CRC;

c) Where appropriate, to encourage restoration, restitution or compensation to the victim, thereby bringing closure to both the victim and the offender;

d) To ensure that the child understands the impact of his/her crime on others including the victim, the respective families and the community;

e) To promote forgiveness of the child for the crimes committed, reconcile the child with the victim and the community and promote and support rehabilitation and reintegration of the child-offender back into the community;

f) To prevent further reoffending by the child through equipping him/her with useful skills in different areas of life;

g) To prevent young offenders from receiving a criminal record early in their lives and being labelled as criminals as this may become a self-fulfilling prophecy.

Diversion has generally been restricted to petty offences committed by children. In Zimbabwe, the guidelines provide for diversion for juveniles who have committed crimes that would not ordinarily attract a custodial sentence of more than twelve months.[23] On the other hand, the Committee of the Rights of the Child[24] argues that diversion should be preferred for all offences

[20] General Comment No 10 of 2007, para 22.
[21] A Skelton (n15 above) 9.
[22] C Bezuidenhout 'Restorative justice with an explicit rehabilitative ethos: Is this the resolve to change criminality?' (2007), *Acta Criminologica 20, Vol 2,* p47.
[23] Zimbabwe Pre-Trial Diversion Consolidated Guidelines of 2012, (n5 above).
[24] General Comment Number 10 of 2007, para 27-28

however serious, and conditions, content and duration of the programme can then be made stricter depending on the gravity of the offence. However, a more preferable approach as proffered by Budenhorst and Conradie[25] is that caution and care must be exercised when considering diversion especially in more serious offences particularly for older children of 17 or 18 years who may have committed serious crimes such as rape, armed robbery or murder. Such older children are usually capable of forming an informed intention to commit such crimes and a jail-term sometimes would be the most appropriate as a deterrent measure and in the interests of community safety. The same would apply to older children of between 17 and 18 who have been diverted before but continue to reoffend.

As already mentioned, diversion should be an option for children in conflict with the law at any stage of the criminal justice process. This is especially so for petty offences such as shoplifting where a Police Officer with the help of a Social Welfare Officer can consider and recommend diversion of the case before it even goes to court. Most commonly, at the pre-trial stage, the Prosecutor, after receiving an initial assessment report from the Social Welfare Officer, can arrange a pre-trial inquiry where he/she can propose diversion of the child. Where a full trial is necessary, notably for more serious offences, the Prosecutor who has proved beyond reasonable doubt that the child committed the offence can still opt for diversion instead of having a conviction for the child. This is done to save the child from having a criminal record which can be a stumbling block for future opportunities for the child. At the last stage where a conviction has been secured, the Prosecution together with the Defence or even the Magistrate can *mero motu* propose diversion as an option for a suspended sentence. It is therefore important to note that it is never too late to opt for diversion for a child and avoid the negative consequences of incarceration or chastisement as punishment.

2.2 Various Types of Diversion Programmes

Diversion has been practised in many jurisdictions, especially in the developed world with success for children of different age groups, circumstances and offences. The closest to Zimbabwe has been in South Africa where diversion has been used through different institutions such as the

[25] C Badenhorst & H Conradie 'Diversion: The present position and proposed future provisions', (2004) *Acta Criminologica 17, Vol 2*, p116-117

National Institute for Crime Prevention and the Reintegration of Offenders (NICRO), Childline SA, Child Justice Project, South African Young Sex Offenders Project, National Youth Development Outreach and the Restorative Justice Centre among other organizations. These institutions have developed various types of successful diversion programmes which can be replicated with improvements in Zimbabwe. Some of the more relevant programmes are explained below.[26]

2.3 Youth Empowerment Scheme (YES)

This is also called the developmental life skills and life centre models.[27] This programme teaches diverted child-offenders different aspects of self-belief, conflict resolution mechanisms, crime and the law, parent-child relationships, child rights, responsible decision-making, planning for the future, personal awareness, communication skills, sexuality, gender sensitivity and leadership development. The programme effectively teaches child-offenders skills on how to live a responsible life, how to interact with others, how to cater for themselves without resorting to crime, how to value themselves and how to be responsible citizens who can positively contribute to society.

2.4 Pre-trial Community Service (PTCS)

This programme diverts children and requires them to complete a certain amount of time in unpaid community work at a community institution while being monitored by a Probation Officer or a designated community member. It is usually used for petty offences that are victimless. Completion of the programme is seen as a symbol of repayment to the community for the wrongs that the child would have committed. In Zimbabwe, community service has been widely and effectively used and has been the only diversion programme to be fully implemented because of resource constrains. This programme has, however, only been used as a sentencing option which leaves the child with a criminal record. A recommendation is therefore made that community service be an option as early as the pre-trial stage as is practiced in South Africa to avoid burdening a child with a criminal record.

[26] C Badenhorst & H Conradie (n20 above) p119.
[27] C Wood 'Diversion in South Africa: A review of policy and practice, 1990–2003', (2003) *Institute of Security Studies Paper, Issue 79,* p12.

2.5 Victim-Offender Mediation (VOM) and Family Group Conferences (FGC)

These two processes are restorative justice interventions with a view to repairing the harm caused to the victim, family and community by the offender. Both programmes facilitate a meeting between the child-offender and the victim and/or with the respective families. The main objective of the meeting would be to try and reach an agreement which may result in compensation or restitution to the victim where possible. The programmes also aim to seek the victim's forgiveness, reconcile the child-offender with the community and put in place measures that prevent reoffending. The mediation effectively makes the child understand the impact of his/her offence on the victim, family and community and promotes accountability for the wrongs done without resorting to imprisonment as punishment.

2.6 The Journey or Wilderness/Adventure Therapy

This programme uses outdoor education which takes mostly high risk or repeat offenders through a therapeutic process that fosters their personal growth. The therapy process is especially relevant for offenders who have behavioural and/or emotional difficulties. The programme content also incorporates life skills training, adventure education and vocational skills training for the child to productively use after the programme instead of committing crimes.

2.7 Young Sex Offender Programme

This is for young children who may have committed non-violent sex offences such as indecent assault, experimental rape or sodomy. In this programme, children are especially taught about sexuality, sex and its meaning, gender respect and responsibility as a citizen. The primary objective of the programme is to teach children about how to respect the opposite sex's sexuality, how to engage in responsible and consensual relationship and to prevent the young sex offenders from carrying this sexual aggressiveness into adulthood.

2.8 Peer/Youth Mentorship

This programme makes use of peers, older youths and adults from the community or school who have undergone training to act as mentors and role models and to give support, guidance and friendship to child-offenders. The mentorship programmes also supports children through the rehabilitation and reintegration process. The mentors' friendly disposition gives child-offenders a sense of acceptance back into society and a feeling that someone loves and cares for them despite their wrongdoing. This is instrumental in rehabilitation of child-offenders.[28]

2.9 Counselling and Therapeutic Programmes

This programme takes aboard children who commit certain crimes because of behavioural and/or emotional problems that require treatment or therapy. The counselling process, which is rehabilitative in nature, is meant to alter the child-offender's motivation to commit crimes by changing his/her attitudes, values, skills and negative personality features.[29]

The Counselling and Therapeutic Programmes are used individually or in combinations of two or more depending on the demands of the offence committed and the response required. Zimbabwe has almost similar types of child-offences with South Africa. However, in South Africa, certain offences such robbery, sexual offences and drug abuse by children are more prevalent and are committed at a more serious level than in Zimbabwe. Subsequently, most of the above discussed interventions can be used with Zimbabwean children and youths since the programmes have been used with success with even more serious offences in South Africa.

3 Role of Professionals in Diversion

Juvenile justice and diversion of children in conflict with the law are areas that draw expertise from a number of disciplines and therefore require a multidisciplinary approach to their implementation. Rules 12 & 22 of The Beijing Rules[30] draws attention to the need for specialized

[28] B Mbambo 'Mentoring: A prevention, diversion, alternative sentencing and reintegration model for the child justice system', (2002), Foley, E., & Wakerfield, L (Ed), *Article 40, Vol 4, Issue 3,* p6-7.
[29] C Bezuidenhout (n18 above) p45.
[30] The Beijing Rules (n11 above). See also Guidelines for Action on Children in the Criminal Justice System, Recommended by Economic and Social Council Resolution 1997/30 of 21 July 1997, para 24. See also Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, Adopted by Economic and Social Council Resolution 2005/20 of 22 July 2005, Clause XV, para 40-43.

training for all practitioners who are involved in the administration of juvenile justice. Some of the professionals involved in diversion include police officers; prosecutors; presiding officers; social welfare officers; and legal practitioners among others. These are briefly discussed below:

3.1. Police Officers

They are usually the first professionals to meet the child in conflict with the law at the point of arrest. They examine and assess first-hand the nature and circumstances surrounding the commission of the crime by the child. They are therefore very well placed to make an immediate initial opinion about what the child really needs and the desirability to divert the child from the formal criminal justice process. In Zimbabwe the Police are closely tied to the Prosecution and as such, a recommendation from the Investigating Officer, based on actual evidence of the circumstances surrounding the commission of the crime would assist in the Prosecutor's decision to divert the case.

3.2. Prosecutors

Prosecutors represent the state in criminal matters and are primarily responsible for ensuring that offenders are held accountable for the crimes they would have committed. After the arrest of an alleged criminal, the Prosecutor is mandated with the task of assessing the case and making a decision on how to proceed. With regards to children in conflict with the law, Prosecutors become the most important professional who play the final decision-making role of whether to withdraw the case, to prosecute it or to divert it and under what conditions.[31] Even after a full trial process, the prosecutors' consent is still required to divert the case before conviction or as a sentence. They therefore need adequate training and knowledge on child rights, juvenile justice and the various alternatives to prosecution and imprisonment such as diversion programmes.

3.3. Presiding Officers

The primary role of presiding officers in criminal matters is to preside over cases including those involving juveniles. They are also mandated to make a determination regarding whether to convict or not and thereafter impose an appropriate sentence. With regards to diversion of children, Presiding Officers play a crucial role at different stages of the justice process. Where the Prosecutor

[31] H Mukwevho (n1 above) p1.

decides to divert the case before trial, a Magistrate is required to chair the pre-trial inquiry and endorse on record the decision to divert and the appropriate conditions and duration of the programme. If the Prosecution proceeds with a full trial, a Presiding Officer can *mero motu* decide not to convict the child but instead divert him/her for rehabilitation and reintegration. During sentencing, the Presiding Officer can decide to impose a suspended sentence on condition that the child goes for diversion programmes. The above shows that Presiding Officers are very crucial to an effective use of diversion for children in conflict with the law. As such they also need adequate training on child rights, juvenile justice and diversion in order that they use it adequately and effectively.[32]

3.4. Social Welfare Officers

Social Welfare Officers are usually social workers employed by the Correctional Services Department to conduct assessments of offenders and report on their circumstances. For child-offenders, they particularly report on the child's living circumstances, the issues surrounding the commission of the crime, eligibility for alternatives to the formal justice process and/or imprisonment. The Social Welfare Officer's initial assessment report is very crucial and plays a more central role in the decision to divert the child by the Prosecution or the Presiding Officer.[33] Where a diversion programme such as VOM or FGC has been chosen for the child, the Social Welfare Officer is mandated again with locating the child's caregivers so that they can attend the programme. If the Social Welfare Officer is supervising the diversion programme, he/she is required to compile a report on whether the child has successfully completed it at the end. As such, just like the other professionals above, Social Welfare Officers also need comprehensive training on juvenile justice, child rights and diversion so that they can recommend greater use of the programme instead of incarceration or chastisement as punishment.

3.5. Legal Practitioners

In criminal matters, legal practitioners are primarily responsible for defending the accused and if convicted, to mitigate for a lighter sentence. Unlike in South Africa where a legal representative

[32] J Sloth-Nielsen 'Training magis for judicial officers on alternative sentencing and youth justice' (2006), Foley, E., & Wakerfield, L (Ed), *Article 40, Vol 8, Issue 2*, p 9.
[33] C Wood (n22 above) p7.

is appointed for every child in conflict with the law,[34] in Zimbabwe, such appointment is unfortunately only made in higher courts like the High Courts or the Supreme Court. A child is only represented in lower courts if the child or his/her caregivers can afford the legal expenses or resort to the country's legal aid system which is largely inoperative.[35] Either way, since the legal practitioners' role is mainly to defend the accused, they play a very important role as well in proposing the use diversion for child-offenders. It is their duty to zealously advocate for the use of diversion on their child-client right from the point of arrest up to the sentencing stage. In order to advocate for diversion, they also need to be trained in different aspects of representing children including communicating with children, available alternatives to the criminal justice process and diversion programmes available.

Other professionals who play a very crucial role in juvenile justice and diversion are the personnel at the different organizations who are administering the day-to-day diversion programmes to children such as teachers, psychologists, sport instructors and counsellors among others. These are very important in that the juvenile justice system relies on them to administer relevant and effective programmes that rehabilitate, reintegrate and prevent further offending by children. They likewise also need adequate training in diversion programmes and its curriculum, the different outcome priorities, how to interact with children, counselling, life skills training, child rights and such like programmes for diverted children.

4. Individual and Societal Benefits of Diversion of Children in Conflict with the Law

Diversion of child-offenders has benefits to the child involved, to the victim and the community at large. It recognises that children are different from adults in both physical and psychological development. Their mental immaturity forms the basis for lesser culpability when they are in conflict with the law and therefore the undesirability of punishing them with incarceration or chastisement. Diversion thus rehabilitates and reintegrates the child-offender back into the community which is a huge step towards prevention of reoffending by the child. It enables the child-offender to assume active responsibility for their actions and work towards becoming a law

[34] Section s 28(1)(h) and s 35 of the Constitution of South Africa Act 108 of 1996.
[35] Sections 50(1)(b)(ii), 69(4), 70(1)(e) and 81(1)(a) of the Constitution of Zimbabwe. See also the Magistrates Court (civil) Rules of 1980, Order 5; the High Court Rules of 1971, Order 4; Sections 7-12 of the Legal Aid Act 18 of 1996.

abiding citizen. Diversion also promotes the dignity and well-being of children which leaves them feeling positive and with high self-esteem, which both promote positive living. The various life skills that children are taught in diversion programmes enables them to at least provide for themselves in the immediate and long-term future, thereby removing them from a life of crime for survival.

Diversion, unlike incarceration, focuses on the root causes of child offending. Its counselling and educational programmes deal with the motivation for the child to offend and attempts to prevent reoffending by equipping the child with life skills to communicate properly with others, to resolve differences amicably, and to live productively without crime. Those who go through the counselling and therapeutic programme usually come out with positive personalities, more confident and with higher self-esteem, all of which contribute to law abiding and positive contribution to society. Where VOM and FGC are used in diversion, the offender is given an opportunity to ask for forgiveness from the victim, their respective families and the community. If given, the forgiveness brings closure to both the offender and the victim and it gives a sense of reconciliation and acceptance of the child-offender, which in turn helps in fostering a crime-free life by the child. The mediation process also allows the child to fully appreciate the gravity of his/her actions and to pay back in some way in the form of restitution or compensation to the victim. This leaves the victim without a sense of loss from the offence and therefore no motivation for revenge. Community involvement in diversion interventions also reinforces the notion that it is still the paramount duty of the community to nurture and raise their children in an environment that keeps them away from crime.[36] Furthermore, community members' involvement prevents further offending as community members can forthwith act as watchdogs and guard against reoffending by the children they would have helped reintegrate back into society.[37]

Some of the offences committed are so petty that it is unnecessary to burden children with criminal records for that. Diversion, in this respect, allows children to account for their crimes without the usual resultant criminal records, which if given, may negatively impact the child in the future when

[36] B.D Mezmur 'It takes a village to raise a child: Diversion in Uganda', (2007), Foley, E., & Wakerfield, L (Ed), *Article 40, Vol 9, Issue 1,* p9.
[37] L. Muntingh 'Minimum standards for diversion programmes', (2005), Foley, E., & Wakerfield, L (Ed), *Article 40, Vol 7, Issue 4,* p2.

searching for opportunities. At the same time, the court process and imprisonment may bring with it stigmatization of the child by community members as a criminal who has been to jail. Such stigma can lead to a child reverting back to crime because he/she may feel not forgiven and without a place in the society. Diversion encourages rehabilitation of the child without the criminal stigma usually attached to such children which goes a long way in reintegrating the child in society. On the other hand, law courts always have huge backlogs of cases awaiting finalization. This is mainly due to huge numbers of criminal cases, staff shortages and sometimes lack of adequate resources to finalize cases quickly, which sometimes results in lack of quality in prosecution. The diversion of children from the formal criminal justice system in a way, though limited, can ease the workload from our courts and in so doing enhancing quality work delivery in our justice system. Holding cells and prisons also have a problem of overcrowding and they lack necessities such as food, blankets and adequate toilet facilities. Removal of children from prisons into diversion may again significantly reduce this problem of overcrowding. More importantly, children are easy to abuse without much resistance while in jail because of their mental and physical immaturity. They are thus more protected and much safer from cases of sexual abuse when they are diverted away from such risky environments.

4.2 Prospects of Diversion as the Future of Zimbabwe's Juvenile Justice System

As already highlighted above, diversion should be part of any progressive justice system in the world. Since its ratification of the CRC, Zimbabwe has tried to initiate pre-trial diversion programmes but up to date, has only successfully applied the community service programme. It is therefore imperative that a more comprehensive diversion programme of action be introduced and implemented in a properly structured juvenile justice system for the benefit of children and the society at large. The following recommendations are thus made:

(i) A starting point in achieving this will be the enactment of a specific separate set of laws/Acts which regulates juvenile justice and diversion only.[38] The Act can take the form of the South African Child Justice Act of 2008 which came into force in 2010. A separate Act will give child justice the value that it deserves by clearly

[38] General Comment Number 10 of 2007, para 91.

defining diversion, the different diversion programmes available, the procedures to be followed in diverting children, the expertise required for professionals working with diverted children and such like related subjects. An Act will also make it easy for professionals working with children to use the various diversion programmes within the confines of the law as regulated by statute.

(ii) For effectiveness in implementing diversion programmes in Zimbabwe as alternatives to incarceration of children, there is also need for the establishment of a properly functional separate independent institution which is mandated with the administration, management and regulation of the diversion implementation process.[39] This institution will primarily be responsible for registration of all organizations, both government and private that administer diversion programmes; developing the appropriate diversion programmes' curriculum; monitoring and evaluation of the various diversion programmes and ensuring adherence to minimum standard requirements; and the relevant ongoing multidisciplinary training of the different practitioners who are involved in diversion of children in conflict with the law for quality outcomes from the programmes. These professionals, as already discussed above include the Police, Prosecutors, Magistrates/Judges, Probation Officers, Legal Practitioners, Social Workers and other staff members in different organizations who are administering the actual diversion programmes to diverted children. The institution could also be useful in advocacy and raising awareness of children's rights, particularly for children in conflict with the law and the different services available to them with emphasis on diversion. It will also be the function of the institution to initiate and oversee development of infrastructure to be used for diversion of children nationwide and to spread the programme to all provinces so that children can easily access the various diversion centres. The institution in partnership with other stakeholders should also be mandated with embarking on a proactive programme of preventing children from committing crimes and ending up in prison. This would involve identifying the major root causes of child offending such as negative socialization and certain difficult economic circumstances. They could then try and deal with or

[39] General Comment Number 10 of 2007, para 92.

solve these causal factors before children resort to committing crime or to reoffending. One useful preventive measure that they can make use of together with community members is to encourage the adult society to nurture and raise its children in an environment that promotes abstinence from crime and positive contribution to society.[40] The envisaged institution may take the form of the National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) which primarily administer diversion in South Africa and has been doing so successfully.

(iii) In addition to the Act and an institution proposed above, it is also imperative that there be developed a set of uniform standards of practise for administration of diversion programmes. This would provide for the minimum standard requirements for all organizations involved in diversion as well as for the different professionals mentioned above. Standards of uniform practice are especially crucial to ensure that there is uniformity and consistence in practice, which in turn gives every child in conflict with the law an equal and fair chance of benefiting from diversion.[41] Standards of practice could regulate infrastructural, administrative and management requirements for organization involved in diversion; knowledge skills requirements for programme operators and facilitators; quality of content or curriculum of diversion programmes and the monitoring and evaluation of indicators for diversion programmes. Standards of practice could also stipulate outcome priorities from programmes relating to life skills, rehabilitation and reintegration of child-offenders.[42]

(iv) Zimbabwe has already designated every Magistrate Court as a Children's Court.[43]There is, however, need to make greater use of these courts to divert children from the formal justice system which is clearly not child-friendly. Every court should have a designated Magistrate, Prosecutor and support staff who are dedicated to handling juvenile justice cases. These professionals should then be

[40] General Comment Number 10 of 2007, para 13.
[41] Foley, E., & Wakerfield, L (Ed), 'Developing minimum standards for diversion' (2003), *Article 40 Vol 5, Issue 4,* p7.
[42] L. Muntingh (n30 above) p3-4.
[43] Section 3 of the Children's Act (Chapter 5: 06).

specially and intensively multidisciplinary trained in child rights as they affect children in conflict with the law, various resources available for children, diversion as an alternative to the formal criminal justice process, communication and interviewing children and how to elicit the participation of children when making decisions that impact on their lives such as diversion.

(v) For the above recommendations to be fully implemented, there is need for government, the private sector and NGOs to work together to try and provide adequate human and material resources for children's diversion programmes. These are especially in infrastructural development and training of professionals involved in diversion of children in conflict with the law.

5. Conclusion

The above discussion highlighted the negative effects of the current punitive measures that are used on children in conflict with the law, such as detention, chastisement and imprisonment. It noted how these measures violate child rights as provided for in international instruments and how they do not contribute to any tangible positive changes to children's criminal behaviour. Instead, more often they lead to children being sexually abused while in holding cells and coming out of jail as even more hardened criminals. The discussion then introduced diversion as a viable and appropriate alternative to incarceration and chastisement of children. It explored the various types of diversion programmes as used in other jurisdictions such as South Africa, which can be replicated in Zimbabwe as well since our juvenile delinquency problems are more or less similar. The individual roles of different professionals who deal with children in juvenile justice and diversion were analyzed next. Emphasis was made on ongoing intensive training of the various professionals on diversion especially because many of them (the legally trained in particular) are not originally trained in dealing with children in conflict with the law, worse still on alternatives such as diversion. This lack of knowledge has been a challenge in Zimbabwe and if it is not addressed by adequate training, it can continue to become an impediment to the rehabilitation, reintegration and reform of child offenders to the prejudice of children and the society at large. The benefits of diversion over incarceration or chastisement were also explored. A conclusion was reached that with such benefits that far outweigh those

of incarceration or chastisement; any society cannot afford not to have diversion in its juvenile justice system and still claim to be progressive.

For effective realisation of justice for children in conflict with the law, it is recommended that a comprehensive and separate statute be enacted to adequately regulate juvenile justice and diversion of children from the formal criminal justice process. An institution should be established to oversee the administration and management of the diversion programmes in Zimbabwe. Standards of uniform practice are recommended as very crucial for consistency and uniformity of practice so that fairness and justice is realized for all children in conflict with the law. With a proper juvenile justice system and diversion, Zimbabwe will be setting itself to be recognised as a progressive society with a future generation/society that is law abiding, that protects and cares for its children, that respect children and human rights and that encourages the use of community services to rehabilitate criminals rather than the punitive and retributive measures of chastisement and imprisonment.

Obligation to Surrender President Bashir to the ICC: A Critique of the ICC Decisions on State Parties' Obligation to Cooperate

Phoebe Oyugi[1]

1. Introduction

Predictably, the visit by President Bashir to South Africa on 14 June 2015 sparked a lot of furore around the world due to the two International Criminal Court (ICC) warrants of arrests pending against him.[2] In view of South African courts' previously demonstrated zeal in fulfilling South Africa's obligations under the Rome Statute,[3] some thought that President Bashir would finally be arrested and surrendered to the ICC.[4] Indeed the South African High Court lived up to its reputation and made an interim order prohibiting President Bashir from leaving the country until an application brought before it by the South African Litigation Center had been decided upon.[5] However, this did not come to pass as Bashir 'mysteriously' left South Africa in the middle of the chaos.[6] The High Court then made a decision stating that the responsible authorities in the South African government were in breach of their duty under the South African Constitution and the Rome Statute by failing to take steps towards arresting and detaining President Bashir.[7]

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[2] *The Prosecutor v Hassan Omar Ahmad Al Bashir,* "Warrant of arrest for Hassan Omar Ahmad Al Bashir", 04-March 2009, ICC-02/05-01/09-1 and *The Prosecutor v Hassan Omar Ahmad Al Bashir*, "Second Warrant of arrest for Hassan Omar Ahmad Al Bashir", 12 March 2010, ICC-02/05-01/09-95.

[3] South Africa was among the first state parties to pass a national legislation implementing the Rome Statute see Implementation of The Rome Statute of The International Criminal Court Act 27 of 2002. See also *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre* (485/2012) [2013] ZASCA 168.

[4] A de Waal "What if South Africa Arrests al Bashir?" African Arguments 14 June 2015 http://africanarguments.org/2015/06/14/what-if-south-africa-arrests-al-bashir-by-alex-de-waal/ (accessed 09 August 2015).

[5] *Southern African Human Rights Litigation Centre v the Minister of Justice and Constitutional Development and others* (27740/2015), 14 June 2015 http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Interim-interdict.pdf (accessed 09 August 2015).

[6] N ONISHIJUNE "Omar al-Bashir, Leaving South Africa, Eludes Arrest Again" *The New York Times* 15 June 2015 http://www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html?_r=0 (accessed 16 August 2015).

[7] *Southern African Human Rights Litigation Centre v the Minister of Justice and Constitutional Development and others* (27740/2015), 21 June 2015 http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2015/06/Judgement-2.pdf (accessed 09 August 2015).

This issue is not unique to South Africa. As is well known President Bashir has visited other African States Parties to the Rome Statute, some repeatedly, since the warrants against him were issued. The reaction of these African States has been almost similar to that of South Africa. The consequence is that six years after the first warrant was issued against President Bashir, he is yet to be arrested and surrendered to the ICC. The ICC has advanced the same argument, almost *verbatim*, in the decisions against the African States Parties to the Rome which have refused to arrest and surrender President Bashir to the ICC: namely Djibouti,[8] Malawi,[9] Kenya,[10] Chad,[11] Congo,[12] and now South Africa.[13] The ICC's position is *inter alia* that:

> "… the immunities granted to Omar Al Bashir under international law and attached to his position as a Head of State have been implicitly waived by the Security Council of the United Nations by Resolution 1593(2005) referring the situation in Darfur, Sudan to the Prosecutor of the Court, and that the Republic of South Africa cannot invoke any other decision, including that of the African Union, providing for any obligation to the contrary" (emphasis added). [14]

This article critiques this position on the basis that a United Nations Security Council (UNSC) Resolution, even when made under Chapter VII, does not suffice to waive the immunity of a sitting head of state *vis-a-vis* other states. This contribution argues that the obligation of a state to respect the immunities of the head of another state is such a fundamental pillar of international law and

[8] "Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to Djibouti", 12 May 2011, ICC-02/05-01/09-129.
[9] "Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with respect to the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir", 12 December 2011, ICC-02/05-01/09-139.
[10] "Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's presence in the territory of the Republic of Kenya", 27 August 2010, ICC-02/05-01/09-107.
[11] "Decision informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's recent visit to the Republic of Chad", 27 August 2010, ICC-02/05-01/09-109; 12 May 2011, ICC-02/05-01/09-129; "Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al-Bashir", 13 December 2011, ICC-02/05-01/09-140-tENG; "Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir", 26 March 2013, ICC-02/05-01/09-151.
[12] "Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir's Arrest and Surrender to the Court", 09 April 2014, ICC-02/05-01/09-195.
[13] "Decision following the Prosecutor's request for an order further clarifying that the Republic of South Africa is under the obligation to immediately arrest and surrender Omar Al Bashir", 13 June 2015, ICC-02/05-01/09-242.
[14] Ibid.

international relations that it cannot be implicitly waived by a UNSC Resolution. Furthermore, this article fronts the argument that article 98 of the Rome Statute requires a state party to the Rome Statute to respect the immunities of the head of a third state such as President Bashir.

The first part of the article contains the introduction. The second part discusses the impact of a UNSC Resolution, made under Chapter VII of the UN Charter, on the immunity of the head of state before the ICC as well as *vis-à-vis* other states. The third part discusses article 98 of the Rome Statute and its implications on the obligation of states to arrest and surrender President Bashir to the ICC. The fourth section deals with conclusions and recommendations.

2. The immunity of President Bashir as the head of a non-party state in view of UNSC Resolution 1593(2005)

The Situation in Darfur, Sudan was referred to the ICC by a UNSC resolution after being qualified as a threat to peace and security.[15] The prosecutor after conducting investigations instituted proceedings against five Sudanese nationals, among them the Sudanese President Omar Al Bashir.[16] The prosecution later applied for a warrant of arrest against President Bashir and three other accused persons.[17] The Court granted the application for a warrant against President Bashir on the ground that it was necessary to ensure that he would appear for trial, that he would not interfere with the on-going investigations and that he would not continue with the commission of crimes alleged.[18]

While issuing the warrant, the Pre-trial Chamber stated that "the current position of Omar Al Bashir as the head of a state, which is not a party to the Statute, has no effect on the Court's jurisdiction over the present case".[19] The Court based this decision on the fact that the Darfur

[15] Resolution 1593 (2005) Adopted by the Security Council at its 5158th meeting on 31 March 2005 S/RES/1593 (2005).
[16] See the Situation in Darfur Sudan case, available at http://www.icccpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx (accessed 18 May 2013).
[17] Ibid.
[18] *The Prosecutor v Hassan Omar Ahmad Al Bashir*, Warrant of arrest for Hassan Omar Ahmad Al Bashir, 04- March 2009, ICC-02/05-01/09-1.
[19] *The Prosecutor v Hassan Omar Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 04 March 2009, ICC-02/05-01/09-3 para 41.

situation had been referred to it by the UNSC under Chapter VII of the UN Charter and on the provisions of Article 27 of the Rome Statute.[20]

2.1 The impact of UNSC Resolutions under Chapter VII of the UN Charter to immunity

Under Chapter VII of the UN Charter, member states of the UN empower the UNSC to take actions necessary in order "to maintain and restore international peace."[21] Although establishing international tribunals is not expressly provided for as a means of attaining this end, it is now generally accepted that it is within the UNSC's discretion to decide what means to employ to this end including the establishment of international tribunals.[22] Due to the binding nature of the UNSC resolutions on member states[23] and the near-universal membership of the UN,[24] tribunals created by the UNSC have jurisdiction over the citizens of almost all states of the world.[25] The UNSC has by resolutions, under chapter VII of the UN Charter, established two international tribunals: the International Criminal Tribunal for the Former Yugoslavia (ICTY)[26] and the International Criminal Tribunal for Rwanda (ICTR).[27] It has been argued that tribunals established by the UNSC under Chapter VII powers, like the ICTY and ICTR, have jurisdiction over all citizens of the UN member states even those who would ordinarily enjoy immunity from prosecution.[28]

However, as is well known, the ICC is not a tribunal established under UNSC Chapter VII powers but through a multilateral treaty - the Rome Statute. Unlike international criminal

[20] Ibid
[21] Articles 39 and 41 of the UN Charter.
[22] Prosecutor v Dusko Tadic Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (2 October 1995) para 31-36 http://www.icty.org/x/cases/tadic/acdec/en/51002.htm (accessed 23 April 2013). See also WA Schabas *The UN International Criminal Tribunals the Former Yugoslavia, Rwanda and Sierra Leone* (2006) at 48-53.
[23] Article 25 of the UN Charter provides that members of the UN agree to accept and carry out the decisions of the UNSC in accordance with the UN charter.
[24] Out of the 196 States of the world, 193 are members of the UN. See http://www.un.org/en/members/index.shtml (accessed 23 April 2013).
[25] D Akande "International Law Immunities And The International Criminal Court" (2004) 98 *AJIL* 417; C C Jalloh "The Contribution of the Special Court for Sierra Leone to the Development of International Law" (2007) 15 *African Journal of International and Comparative law* 165 at 187.
[26] Security Council Resolution on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law and Humanitarian law Committed in the Territory of the Former Yugoslavia http://www.un.org/ga/search/view_doc.asp?symbol=S/RES/827%281993%29 (accessed 22 April 2013).
[27] UNSC Resolution 955 of 1994, available at http://daccess-dds ny.un.org/doc/UNDOC/GEN/N95/140/97/PDF/N9514097.pdf?OpenElement (accessed 22 April 2013).
[28] S Wirth "Immunities Related Problems, and Article98 of the Rome Statute" (2001) 12 *Criminal Law Forum* 442.

tribunals established under Chapter VII powers of the UNSC which bind all members of the UN, those established by way of treaty bind only the states that have expressed their intention to be bound by signing and ratifying the relevant treaty. This is justified by the customary international law principle under which only parties to a treaty are bound by its provisions.[29] It follows, therefore, that as a general rule, article 27 of the Rome Statute which excludes the application of immunities before the ICC, only removes the immunities of the officials of states parties to the Rome Statute. By ratifying the Rome Statute, a state is considered to have waived the immunity of its officials by virtue of article 27.[30]

The position of non-party states is more complicated. As a general rule, the provisions of a treaty do not usually apply to non-party states. In this regard, Akande says:

> "... since only parties to a treaty are bound by its provisions, a treaty establishing an international tribunal cannot remove immunities that international law grants to officials of states that are not party to the treaty. Those immunities are rights belonging to the non-party states and those states may not be deprived of their rights by a treaty to which they are not party."[31]

This informs the unending debate sparked by the indictment of President Bashir at the ICC flowing from a referral by the UNSC under Chapter VII. Scholars are divided on the issue of whether the immunity of President Bashir would apply before the ICC. Some scholars argue that President Bashir's immunity do not apply before the ICC, however, it is noteworthy that these scholars espouse different arguments to arrive at this conclusion.[32] For example, Akande argues that UNSC referral of the Darfur situation to the ICC under Chapter VII of the UN Charter effectively removes the immunities that would otherwise apply to President Bashir as a sitting head of state.[33] While Gaeta argues that the UNSC merely serves to trigger the jurisdiction of the ICC but the immunity of President Bashir is removed by the fact that the

[29] Articles 34-38 of the Vienna Convention on the Law of Treaties, 23 May 1969.
[30] Akande 2004 *AJIL* 417; S Wirth "Immunity for Core Crimes? ICJ's Judgment in the Congo v Belgium Case" (2002) 13 *EJIL* 882; Wirth 2001 *Criminal Law Forum* 429.
[31] Akande 2004 *AJIL* 417.
[32] J Needham "Protection or Prosecution for Omar Al Bashir? The Changing State of Immunity in International Criminal Law"17 (2011) *Auckland University Law Review* 219.
[33] D Akande "The Legal Nature of Security Council Referrals to the ICC and its impact on Al Bashir's Immunities" (2009) 7 *JICJ* 333.

provisions of article 27 of the Rome Statute represent a new position of customary international law that immunities cannot apply in prosecutions before international criminal tribunals.[34]

On the other hand, some scholars argue that President Bashir as the head of a non-party state is immune, despite the UNSC referral, from prosecution at the ICC. Members of this school of thought also present different reasons for arrival at this conclusion. To name a few, Wardle opines that although the UNSC has the power to abrogate immunities under Chapter VII of the UN Charter this cannot be accomplished impliedly by the referral of an entire conflict situation to the ICC and not a particular case.[35] He argues that the removal of immunities must be done in an explicit and unequivocal manner which was not the case during the UNSC referral of the Darfur situation.[36] While Kiyani states that the UNSC referral of a situation to the ICC cannot remove the immunities applicable to the head of a non-party state since "the Security Council itself does not have the authority to revise the rules of public international law in order to negate al-Bashir's immunity".[37]

The ICC agrees with the first school of thought that the immunities of President Bashir are inapplicable before the ICC. This is shown through the issuance of two warrants of arrest against him, cooperation requests to states parties and the judgments against states parties that have refused or failed to comply with the requests referred to in part 1 above. The Pre Trial Chamber (PTC) stated, as mentioned above, that the position of President Bashir as a sitting head of state does not interfere with the jurisdiction of the ICC over him.

As stated above, the ICC, as a tribunal established by way of treaty, does not ordinarily have jurisdiction over citizens and heads of non-party states. However, as an exception, citizens of non-party states to the Rome Statute, who are non the less member states of the United Nations

[34] P Gaeta "Does President Al Bashir Enjoy Immunity from Arrest?" (2009) 7 *JICJ* 315 at 324-325.
[35] P Wardle "The survival of Head of State Immunity at the International Criminal Court" (2011)18 *Australian Journal of International Law* 181 at 196. See also a different argument from D Mainak "Presidential Immunity and the International Criminal Court's 'Exception'- A Critique" (2012) *Juris Gentium Law Review* 19 at 20.
[36] Wardle 2011*Australian Journal of International Law* 196.
[37] A G Kiyani "Al-Bashir & the ICC: The Problem of Head of State Immunity" (2013) 12 *Chinese Journal of International Law* 467.

(UN), may be subjected to the jurisdiction of the ICC following referral by the UNSC, which is provided for by article 13 of the Rome Statute and backed by UNSC Chapter VII. In this author's view, the applicability of immunity before a particular tribunal depends on the manner of establishment of a tribunal and the provisions of its constitutive statute.[38] In this regard, tribunals established by the UNSC under Chapter VII of the UN Charter have jurisdiction to try the heads of UN member states while those established by treaty can only have jurisdiction over heads of states parties. The exception in the latter case can occur by referral of a situation in a non-party state, like Darfur, to the ICC by the UNSC under Chapter VII of the UN Charter. Such referral gives the ICC jurisdiction over all the persons allegedly responsible for the crimes committed including heads of state like President Bashir.

Be that as it may, this author argues for a narrow interpretation of this exception because it limits at least two cardinal principles of public international law. The first is that states are ordinarily not bound by treaties to which they are not party;[39] and second one being that heads of state are ordinarily immune from prosecution except under certain exceptions.[40] The ICC takes note of both points in the decision against Congo, for its refusal to surrender President Bashir, and states as follows:

> "At the outset, the Chamber wishes to make clear that it is not disputed that under international law a sitting Head of State enjoys personal immunities from criminal jurisdiction and inviolability before national courts of foreign States even when suspected of having committed one or more of the crimes that fall within the jurisdiction of the Court. Such personal immunities are ensured under international law for the purpose of the effective performance of the functions of sitting Heads of States."[41]

The second justification for a narrow interpretation of this exception is the composition of the UNSC and the politics that result from it. The fact that the UNSC, a political body, is able to render the immunity of the head of a non-party state inapplicable before the ICC is

[38] See also for example Akande 2004 *AJIL* 417.
[39] Article 34 of the 1969 Vienna Convention on the Law of Treaties.
[40] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo V Belgium)* 2002 3 ICJ paras 19 and 61.
[41] See ICC-02/05-01/09-195 para 25.

disconcerting. This is especially because three out of the five permanent members of the UNSC; China, Russia, and the US, are not parties to the Rome Statute. The UNSC involvement with the proceedings at the ICC has been viewed, by some, as an interference with the independence of the ICC and the dispensation of justice.[42] Furthermore, the UNSC has in the past been accused of abusing its powers with regards to article 16 of the Rome Statute,[43] and a narrow interpretation of article 13 could guard against similar occurrences in future.

From the foregoing, the fact that ICC, as a treaty based international tribunal, has jurisdiction over President Bashir, as the head of a non-party state due to a UNSC referral, should be treated as the exception it is. This informs the author's critique of the ICC decision in which the Court concludes that the fact that the ICC has jurisdiction over president Bashir, implies that immunity that is ordinarily available to a head of state, vis-a-vis other states, is no longer applicable. This kind of extrapolation is unprecedented and lacks the backing of general principles of international law and article 98 of the Rome Statute as discussed below.

2.2 The implications Article 98 (1) of the Rome Statute on states parties' duty to cooperate with the ICC

Article 98 (1) of the Rome Statute requires the ICC to seek the cooperation of a third state, like Sudan, for the waiver of immunity before requesting for the arrest and surrender of a person bearing such immunities. It provides that:

> "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity" (emphasis added).

[42] See the sentiments expressed by the delegate from Sudan at the UNSC's 6887th Meeting on 13 December 2012 "United Nations Meetings and coverage press Releases" http://www.un.org/press/en/2012/sc10855.doc.htm (accessed 16 August 2015). See also discussions in relation article 16 deferral power of the UNSC in WA Schabas *An Introduction to the International Criminal Court* 2ed (2004) 82.

[43] See the letters addressed to the UNSC president over the renewal of Resolution 1422 by countries such as Brazil, Canada, DRC, Argentina, South Africa and the EU as well as non-governmental organizations such as the Coalition for the International Criminal Court (CICC) and Human Rights Watch (HRW) all available at http://www.iccnow.org/?mod=res1422&idudctp=13&show=all#13 (accessed 08 March 2014).

It seems difficult to reconcile the fact that article 98 (1) prohibits the ICC from requesting a state to cooperate by arresting a person if the state, by that arrest and surrender, stands to breach its immunity obligations towards a third state; with the fact that article 27 of the Rome Statute provides that both national and international law immunities are irrelevant to prosecution before the ICC. If article 27 is interpreted to remove all kinds of immunities, both national and international, of officials of both state parties to the Rome Statute and non-parties this would render article 98 (1) redundant; on the other hand if article 98 is interpreted to prohibit the ICC from requesting states to arrest and surrender all persons bearing immunity, the purpose of the Rome Statute would be defeated.[44] This provides some insight as to why there has been so much debate concerning the relationship between articles 27 and 98 of the Rome Statute.

The debate culminated with the ICC's request of state parties to cooperate by arresting and surrendering President Bashir to the ICC. The contentious issue is whether the ICC goes against article 98 by requiring states to arrest and surrender the Sudanese President. As is well known, the African Union (AU)[45] and some Africa states like Chad,[46] Malawi,[47] and Congo[48] have refused cooperation relying on Article 98 (1). Their argument is that arresting and surrendering President Bashir would constitute a violation of international and national law on immunities enjoyed by a sitting head of state. The ICC made decisions against these states holding that they failed to fulfil their obligations and referring their failure to the UNSC as mentioned in part 1 of this article.

3.1 ICC interpretation of Article 98 (1) of the Rome Statute

The ICC has argued that the decision as to whether the article 98 (1) exception would apply to a particular request lies entirely with the ICC and not the requested state.[49] This is based on an

[44] See D Akande "The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities" (2009)7*JICJ*333 at 337-339; Van der Vyver*2011 African Human Rights Law Journal* 691.
[45] See for example "Decision on The Progress Report of the Commission on the Implementation of the Assembly Decisions on the International Criminal Court (ICC)", 29-30 January 2012, Doc. EX.CL/710(XX).
[46] ICC-02/05-01/09-140 paras 13-14.
[47] ICC-02/05-01/09-139 para 13.
[48] ICC-02/05-01/09-195 para 18.
[49] ICC-02/05-01/09-195 para 16. See also Broomhall *International Justice and the International Criminal Court* 145; S Wirth 2001 *Criminal Law Forum* 454.

interpretation of article 97 of the Rome Statute which precedes the controversial article 98. Article 97 provides that:

> "Where a State Party receives a request under this Part in relation to which it identifies problems which may impede or prevent the execution of the request, that State shall consult with the Court without delay in order to resolve the matter."

Similarly, Rule 195 of the Rules of Procedure and Evidence provide that:

> "When a requested State notifies the Court that a request for surrender or assistance raises a problem of execution in respect of article 98, the requested State shall provide any information relevant to assist the Court in the application of article 98. Any concerned third State or sending State may provide additional information to assist the Court."

According to these provisions, it is clear that it is not for the requested state to decide on its own whether the reasons that exist warrant denial of the ICC's cooperation request under article 98. Concerning this issue, Sluiter says that:

> "Party states conceded to the ultimate interpretation of the extent of the duty to cooperate when they ratified the Statutes and accepted article 119[50] in particular. This ratification included their concession to the interpretation of the duty to arrest and surrender war criminals to the requesting side, which is typically the ICC."[51]

The fact that the court alone is charged with the responsibility of deciding on the applicability of article 98 (1) further underscores the importance of the discussion as to whether the Court has applied the most justifiable interpretation to this article. The Court reserves the right to determine whether presenting a particular request to a state will put a state in a position of conflicting obligations in view of article 98 (1).[52] Therefore when the Court errs in its interpretation of the article, as it has in the view of the author, it is the duty of academics to point out this error.

[50] Article 119 deals with the settlement of disputes and provides that: "Any dispute concerning the judicial functions of the Court shall be settled by the decision of the Court."
[51] Sluiter *The Library of Essays in International Law: International Criminal Court* 291.
[52] ICC-02/05-01/09-139, para 46.

In the ICC decisions on the cooperation of states parties, the Court states that article 98 cannot be used by states parties to deny the request to arrest and surrender President Bashir but does not state under what circumstances the controversial article may be used.[53] The Court further states that when a state arrests an accused person pursuant to a request by the ICC, the state is not acting in its own right but as a representative or agent of the Court therefore immunities do not apply.[54] The Court barely discusses the relationship between the controversial articles 27 and 98. Instead the Court holds that the fact that article 2 of UNSC Resolution 1593 (2005) requires Sudan to "cooperate fully with and provide necessary assistance to the ICC"; effectively means that the requirement of article 98 (1), that the ICC should not require cooperation "unless the Court can first obtain the cooperation of that third State for the waiver of the immunity", has been dispensed with.[55] In other words the ICC states that the UNSC Resolution 1593 (2005) implicitly waived the immunities applicable to Sudan therefore article 98 (1) cannot apply.

This kind of interpretation is not backed by the doctrine of immunity of states. Immunity belongs to the state itself but since a state does not act by itself but only through its agents, state immunity logically extends to heads of state and other senior state officials.[56] Immunity can therefore not be waived except by the consent of the state to which it belongs. Consequently, a UNSC Resolution cannot be considered to have implicitly waived the immunity of Sudan merely because it decided that "Sudan, and all other parties to the conflict in Darfur, shall cooperate fully and provide necessary assistance to the Court."

3.2 Scholarly Interpretation of Article 98(1)

[53] ICC-02/05-01/09-139, para 41. For a critique of this decision see C Gevers "The ICC Pre-Trial Chamber's Non-Cooperation Decision on Malawi" 16 Feb 2012 http://warandlaw.blogspot.com/2012/02/icc-pre-trial-chambers-non-cooperation.html (accessed 22 April 2014).
[54] Ibid para 46.
[55] ICC-02/05-01/09-195 para 29.
[56] Wirth 2001 *Criminal Law Forum* 431; Wirth 2002 *EJIL* 882.

Some commentators argue that there is no conflict between articles 27 and 98 of the Rome statute.[57] For example, Broomhall opines that:

> "…it is important to note that articles 98 (1) and 27(2) are not necessarily contradictory. Rather Article 27(2) makes clear that immunities under national or international law 'shall not bar the Court from exercising its jurisdiction….' Article 98 (1) instead pertains to the obligations under international law of the requested state as well as the exercise of jurisdiction by such states, rather than by the Court."[58]

However, other commentators argue that there is some tension between the two articles and the arguments espoused by this group of scholars may be loosely classified into two categories. The first group argues that the scope of immunities has shrunk considerably over time therefore article 27 should be interpreted to have a wider scope as it embodies the new position of international criminal law that immunities are not applicable in relation to international crimes.[59] According to this view, therefore, article 98 should be given a narrow interpretation to cover only non-party states so that cooperation may be favored over immunity.

One of the scholars who belong to this school of thought, Akande, opines that the UNSC referral of the Darfur situation to the ICC put Sudan in an "analogous position to a party to the Rome Statute" therefore the Rome Statute is binding to it as it is to a state party to the Rome Statute.[60] As a result, all the provisions of the Rome Statute are applicable to Sudan including article 27 which concerns the irrelevance of both national and international law immunities.[61] This not only gives the ICC jurisdiction over President Bashir, the head of a non-party state, but also

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[57] See Broomhall *International Justice and the International Criminal Court* 141. See also A Dworkin & K Iliopoulis 'The ICC, Bashir, and the immunity of heads of state' *Crimes of war* 3 http://www.crimesofwar.org/commentary/the-icc-bashir-and-the-immunity-of-heads-of- state/#sthash.LWgK6lsL.dpuf (accessed 21 August 2013). They say "It would appear at first glance that this provision conflicts with Article 27. However Article 27 is concerned with the question of the Court's jurisdiction, whereas Article 98 is concerned with international co-operation and judicial assistance."

[58] Broomhall *International Justice and the International Criminal Court* 141.

[59] See Van der Vyver 2011 *African Human Rights Law Journal 693.* He argues that precedence should be given to article 27 since unlike article 98 it endorses a "salient norm of international criminal law".

[60] Akande 2009 JICJ 342. See also D Akande "The Bashir Indictment: Are Serving Heads of State Immune from ICC Prosecution?" *Oxford Transitional Justice Research Working Paper Series* http://otjr.csls.ox.ac.uk/materials/papers/40/Akande.pdf (accessed 21 August 2013). For a contrary view see S Williams and L Sherif "The Arrest Warrant for President al-Bashir: Immunities of Incumbent Heads of State and the International Criminal Court" (2009) 14 *Journal of Conflict & Security Law* 71 at 81.

[61] Akande (2009) JICJ 342

permits states parties to cooperate by arresting and surrendering him to the ICC without triggering the immunity exception under article 98 (1).[62]

The second group of scholars opposes this view. The general argument is that although the mandate of the ICC is vital to international criminal justice, immunities are just as important as cooperation is, and should not be eroded easily.[63] Gaeta, for example, views the conflict between article 27 and article 98 as a clash between two conflicting values, namely[64]on one hand, the need to protect state sovereignty and inter-state relations; and, on the other hand, the need to prosecute the most serious crimes of international concern.[65] The former should be held up and above the latter, she argues, since personal immunities are not permanent but are terminated as the person's term of office is terminated. This, she says, creates the need to respect personal immunity since "quashing of personal immunities would be extremely dangerous for inter-state relations."[66] She opines, elsewhere, with regard to the request to arrest and surrender President Bashir that:

> "The steps taken by the ICC in this respect are *ultra vires* and at odds with Article 98(1). Therefore, states parties to the Statute are not obliged to execute the ICC request for surrender of President Al Bashir, and can lawfully decide not to comply with it."[67]

While commenting on the ICC's decision on cooperation of states Parties, Tladi opines that:

> "The fundamental flaw of the Court's approach is thus that it treats the subject of the unavailability of immunity as a defense before the ICC under Article 27 of the Statute as co- extensive with the question of immunity as a limit to cooperation under Article 98(1). The subject of Article 98(1), to the extent that it refers to immunities, is obviously related to the subject of Article 27 but it is not the same. There is obvious

[62] Akande (2009) *JICJ* 342.
[63] See for example VM Blommestijn and C Ryngaert "Exploring the Obligations for States to Act upon the ICC's Arrest Warrant for Omar Al-Bashir: A Legal Conflict between the Duty to Arrest and the Customary Status of Head of State Immunity" (2010) 6 *ZIS* 428 at 428-430.
[64] P Gaeta "Official Capacity and Immunity" in A Cassese, P Gaeta and J Jones (eds) *The Rome Statute of the International Criminal Court: A Commentary* (2002) 985-986.
[65] Ibid.
[66] Ibid.
[67] Gaeta 2009 *JICJ* 329.

> tension between the two provisions, which the Court concedes. However, instead of addressing the tension between Articles 98(1) and 27, the Court simply proceeds to decide the case as if Article 27 is dispositive of the issue, ignoring completely Article 98(1). The Court asserts, for example, that the requested states cannot raise immunities as they ratified Article 27 of the Statute, as if the requested states did not, at the same time, ratify Article 98."[68]

It can further be argued that, Article 98 should be interpreted to mean that the ICC should not request states parties to arrest and surrender President Bashir unless it "can first obtain the waiver of immunities" from Sudan. The fact it would be impossible to obtain such waiver from Sudan, in this particular case, does not then entitle the ICC to go through a "back door" by holding that the immunities applicable to Sudan were waived by UNSC Resolution 1593 (2005). Waiver of immunity, except by the consent of the state concerned, is impossible for the reasons given above. Although the goal to try and punish perpetrators of crimes in Darfur is important, the need to respect international law principles while accomplishing this is equally vital. There can be no justice unless the Court rightly applies the applicable legal principles. The Court's dismissal of the application of article 98 (1), without proper justification, could reinforce the notion that the ICC is prejudiced against African leaders; a view which is detrimental to the ever deteriorating ICC-Africa relationship.[69]

4. Conclusion

It cannot be disputed that crimes have been committed in Darfur especially against the Fur, Zangawa and Masaalit communities.[70] There is a general consensus that the violence in Darfur is unacceptable and the perpetrators thereof should not go unpunished. The contentious issue, however, is how this should be accomplished. Currently, the issue has turned into a tag of war with President Bashir, the AU and some African states on one side, and the ICC on the other side. President Bashir keeps daring the ICC by defiantly visiting states parties who refuse to arrest him

[68] D Tladi "The ICC Decisions on Chad and Malawi on Cooperation, Immunities, and Article 98" (2013)11 *JICJ* 207.
[69] ibid.
[70] "Massive Atrocities in Darfur: Almost One Million Civilians Forcibly Displaced in Government's Scorched-Earth Campaign" *Human Rights Watch* 3 April 2004 https://www.hrw.org/news/2004/04/02/sudan-massive-atrocities-darfur (accessed 16 August 2015).

in spite the numerous ICC decisions made in a vain attempt to the cooperation of these states. Six years after the first warrant was issued, no progress has been made in the case against President Bashir and in the redressing crimes committed in Darfur. However, according to some commentators, the fact that President Bashir can no longer freely travel without the fear of arrest and that he always has to depart prematurely from the events he attends is in itself a sign of progress.[71]

Be that as it may, it is highly unlikely that President Bashir will be arrested while he is the sitting Sudanese President. His arrest and surrender would inevitably result into a massive political and diplomatic storm and the head of the arresting state, if African, would be a pariah among his/her peers in the AU Assembly. The state concerned might even face AU sanctions.[72] Due to the complexity of the matter, it is no wonder that states have been reluctant to arrest and surrender President Bashir to the ICC. The political consequences of cooperating with the ICC seem, in the view of individual states, to outweigh the possible benefits thereof. Therefore, the stalemate ensues.

One possible way to dissolve the impasse is to have deeper negotiations and cooperation between the AU, the UNSC and the ICC. The three institutions, all stakeholders who have separately contributed in one way or another towards the peace and justice process in Darfur, need to work together to ensure that the crimes committed in Darfur are redressed. Firstly, the UNSC has made several Resolutions directed towards resolving the conflict in Darfur including the Resolutions referring the Darfur Situation to the ICC and creating United Nations Mission in the Sudan (UNMIS).[73] Secondly, the AU has played an important, often overlooked role, in the complex peace negotiations between the government of Sudan and the Sudanese resistance groups.[74] Thirdly, it goes without saying that the ICC has made its contribution, or attempted to do so, by conducting investigations and indicting persons suspected to bear the highest responsibility for

[71] D Kiwuwa "South Africa: Al-Bashir - South Africa's Moment of Glory and Shame" *All Africa* 19 June 2015 http://allafrica.com/stories/201506191598.html (accessed 16 August 2015).
[72] The AU has made a number of decisions urging member states not to cooperate with the ICC and Article 23 of the AU Constitutive Act enables the AU to impose sanctions of a member state that does not comply with AU decisions.
[73] See UNSC Resolutions 1556 (2004), 1564 (2005), 1574 (2004), 1590 (2004), 1591 (2005), 1593 (2004), 1663 (2006), 1665 (2006) and 1679 (2006) and 1706 (2006).
[74] A Sarjoh Bah "The African Union In Darfur: Understanding The Afro-Arab Response To The Crisis" http://fride.org/download/OP_Responses_arab_world_ENG_feb10.pdf (accessed 17 October 2014).

the crimes committed in Darfur. The fact that all these three institutions share the mission to resolve the conflict in Darfur is therefore not an overstatement.

From the foregoing, it is reasonable to conclude that if the three institutions would make a concerted effort towards addressing the peace and justice concerns in Darfur, better results would be achieved than have so far been produced by them working separately. Perhaps the League of Arab States and the Organization of Islamic Cooperation could be consulted and be offered the opportunity to make meaningful contribution towards the resolution of conflict and attainment of justice, not just in the Darfur region but in Sudan in general. For that reason, undertakings such as the 14 August 2015 visit by the President to the Assembly of State Parties to the Rome Statute, to the Chairperson of the AU Commission, with a view "to restore trust between the Court and African States Parties to the Rome Statute";[75] should be highly encouraged and the decisions reached be followed up on. Tackling the current deadlock, in the manner suggested in this article may greatly assist in repairing the AU-ICC relationship and at the same time improve the chances of delivering international criminal justice in Darfur.

[75]"The President of the Assembly of States Parties meets with the Chairperson of the African Union Commission and with the Bureau of the Committee of Representatives" 14 August 2015, ICC-ASP-20150814-PR1138.

Termination of the contract of employment on notice: A critique *of Don Nyamande and Kingstone Donga v Zuva Petroleum (Pvt) Ltd SC 43/15*

Tapiwa Kasuso[1] and Gift Manyatera[2]

1. Introduction

The foundation of the employer-employee relationship is the contract of employment. This contract can be defined as a reciprocal agreement in terms of which an employee places his personal services at the disposal of another person or organisation, or employer, at a determined or determinable remuneration in such a way that the employer is clothed with authority over the employee and exercises supervision regarding the rendering of services.[3] Critical to this employment relationship is the issue of termination of the contract on notice as well as dismissal. It is hardly surprising therefore that the recent Supreme Court decision of *Don Nyamande and Kingstone Donga v Zuva Petroleum (Pvt) Ltd*[4] (the *Zuva Petroleum* case) has elicited a lot of controversy considering the apparent 'rush' by employers to terminate contracts on notice in the aftermath of the Supreme Court decision. In the midst of this entire furore, it is necessary that the position of the law regarding termination of employment be revisited. Significantly, the Zuva Petroleum case has provided jurists with an opportunity to reflect on the laws regulating termination of the employment relationship as well laying the ground for a law reform agenda in Zimbabwe's labour law discourse.

1.1Common law position

The bedrock of the common law position is that parties to the employment relationship had a right to terminate the contract by giving the other the agreed or reasonable notice. When notice of

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[3] See S R Van Jaarsveld *et al, Principles and Practice of Labour Law*, 2007. This contract was developed from the Roman law *locatio conductio operarum*, the consensual contract in terms of which a free man *(liberi)* agreed to let his personal services *(oparae suae)* to another person *(conductor operarum)* for a certain period of time, in exchange for remuneration.
[4] SC 43/15

termination was given by either party, the employment contract was regarded as having been lawfully terminated, irrespective of the terminating party's reasons or motives.[5] Both the employer and employee enjoyed this right which was premised on the principle of equality and reciprocity.

This common law position is based on the precept that the employer and the employee are on an equal economic footing. However, this is a legal fiction. In reality, the employment relationship is a relationship of inequality. It has been described as a relationship between a bearer of power (the employer) and one who is not a bearer of power (the employee).[6] The unfairness of the common law was underscored by Brassey in the following words,

> *"The common law in short, offers little protection against arbitrariness. It allows the party with greater bargaining power (the employer) to extract any bargain he wants, however oppressive, perverse or absurd it may be, provided that it is not illegal or immoral. It allows him to change it when it no longer suits him by threatening to terminate the relationship unless the other party (the employee) submits to that change. It allows him to flout the bargain whenever he likes …"*[7]

Critically, the employer has a right to terminate a contract of employment for any reason, or indeed for no reason at all provided that notice of termination has been given.[8] As a result of the inequalities inherent in the common law, the Zimbabwean government adopted legislative measures in the early 1980's to require employers to demonstrate a fair reason for the termination of an employee's employment and observe procedural fairness. This intervention was inspired by ILO[9] Convention 158 of 1982 on Termination of employment at the initiative of the employer[10] ("*ILO Convention on termination"*). The current statutory protection against unfair dismissal is embodied in Section 12B of the Labour Act ("the LA").[11] It is also secured in sections 12C and 12D of the LA which deal with termination for operational reasons (retrenchment).

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[5] See J Grogan, *Dismissal*, 2010, at 4.
[6] P. Davies; M Friedland, *Kahn Freund's Labour and the Law* (1983) at 18.
[7] Brassey *et al*,*The New Labour Law:Strikes, dismissals and unfair labour practice in South African Law* (1987) at 5
[8] See *Key Delta v Mariner* [1998] 6 *BLLR* 647 (LC).
[9] International Labour Organisation.
[10] This Convention must be read with ILO Recommendation 166 of 1982 on Termination of employment at the initiative of the employer.
[11] [Chapter 28:01]. See also Section 65(1) of the Constitution and Section 5 of the Labour (National Employment Code of Conduct) Regulations, 2006.

Section 12B (2) and (3) of the LA sets out the statutory concept of dismissal. On the other hand, section 12(4) of the LA provides for notice periods applicable in the event of termination of the contract of employment by either party. Termination of a contract of employment by the employer with or without notice is not one of the circumstances defined as unfair dismissal under section 12B (2) and (3) of the LA. The moot question relates to whether section 12B of the LA abolishes the employer's common law right to terminate a contract of employment on notice. This is the crux of the matter which the Supreme Court of Zimbabwe was seized with in the *Zuva Petroleum* case.[12]

2. The *Zuva Petroleum* Case

Before the Supreme Court was an appeal from the decision of the Labour Court in the case of *Zuva Petroleum (Pvt) Ltd v Don Nyamande and Another*[13] which allowed termination of the Appellants employment contracts on notice. In brief, Appellants were employed by BP Shell which sold its business as a going concern to the Respondent. A transfer of undertaking was done in terms of section 16 of the LA and the Appellants contracts of employment were transferred to Zuva Petroleum on the same terms and conditions they enjoyed under BP Shell. Sometime in November 2011, Respondent offered its employees, including Appellants, a voluntary retrenchment package. Unfortunately, the voluntary retrenchment package was declined and Respondent proceeded to institute compulsory retrenchment procedures in terms of sections 12C and 12D of the LA read with the Labour Relations (Retrenchment) Regulations, 2003. The parties failed to agree on the retrenchment package resulting in the dispute being referred to the Retrenchment Board, which falls under the Ministry of Labour and Social Services. On 16 May 2012, the Ministry directed the parties to negotiate further for twenty one days on the retrenchment package payable. Regrettably, before the expiry of the twenty one day period, the Respondent wrote to the Appellants advising them that their contracts of employment had been terminated on notice, with effect from 1st of June 2012. The Appellants employment contracts provided for such termination on notice and they were paid cash in lieu of notice in line with section 12(7) of the LA.

[12] In terms of Section 92F (1) of the LA an appeal against a decision of the Labour Court on a question of law shall lie to the Supreme Court.
[13] LC/H/195/14.

Dissatisfied with the termination Appellants referred an unfair dismissal complaint to a Labour Officer in terms of section 93 of the LA. They argued that their contracts had been unlawfully terminated since they had not been terminated in terms of section 12B (2) of the LA which demands that dismissal must be in terms of a code of conduct. Conciliation by the Labour Officer failed, and a certificate of no settlement was issued resulting in the dispute being referred for compulsory arbitration.[14] The arbitrator found in favour of the Appellants and reasoned that Appellants had been unfairly dismissed since their dismissal was not in terms of section 12B (2). Aggrieved by the decision of the Arbitrator, Respondent appealed to the Labour Court which upheld the appeal and allowed termination of the Appellant's employment contract on notice. It is this decision which was brought by the Appellants on appeal to the Supreme Court.

3. Decision

3.1 Legislative Framework

Section 12(4) of the LA is titled, *"Duration, particulars and termination of employment contract."* This section deals with the concept of termination of employment on notice and it regulates the period of notice to be given by either party. It specifically 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 the contract of employment to be given by either party shall be,*
> *(a) three months in the case of a contract without limit of time or a contract for a period of two years or more;*
> *(b) two months in the case of a contract for a period of one year or more but less than two years*
> *(c) one month in the case of a contract for a period of six months or more but less than one year;*
> *(d) two weeks in the case of a contract for a period of three months or more but less than six months,*
> *(e) one day in the case of a contract for a period of less than three months or in the case of casual work or seasonal work."*

[14] Arbitration under the LA is conducted in terms of Section 98 read with the Arbitration Act [Chapter 7:15] and the Labour (Settlement of Disputes) Regulations, 2003.

Section 12B of the LA is headed "*Dismissal"* and provides as follows:

"12B Dismissal

(1) Every employee has the right not to be unfairly dismissed.

(2) An employee is unfairly dismissed –

(a) if, subject to subsection (3), the employer fails to show that he dismissed the employee in terms of an employment code, or

(b) in the absence of an employment code, the employer shall comply with the model code made in terms of section 101 (9)

(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,

(b) if, on termination of an employment contract of fixed duration, the employee –

(i) had a legitimate expectation of being re-engaged, and

(ii) another person was engaged instead of the employee."

The Supreme Court was therefore called to interpret the meaning and import of these two provisions so as to determine whether the law entrenches on employer's the right to terminate an employment contract on notice.

3.2 Dismissal and termination

In the *Zuva Petroleum* case, the parties were in agreement that under the common law, both the employer and employee have a right to terminate an employment contract on notice. It was also acknowledged by the Appellants that under the current statutory framework the employee has a right to terminate the employment contract on notice by giving the notice period specified in section 12(4) of the LA[15]. What was not accepted by the Appellants was the fact that the employer has a similar right. It was argued on behalf of the Appellants that while the employer's right to terminate on notice exists under the common law, that right has since been abolished by Section 12B of the LA which guarantees every employee the right not to be unfairly dismissed. Thus, the issue for determination as asked by the Supreme Court was, *"whether S12B of the Act, on a proper*

[15] An employee terminates the employment contract on notice by resigning. Resignation is a unilateral act by an employee which has the effect of cessation or premature termination of an employment contract. The employee's right to resign is the difference between employment and forced labour. See *Jakazi and Another v Anglican Church, Province of Central Africa* 2010 (1) ZLR 335 (H), *Saltrama vs Majindwi* SC 79/04 and *Lee Group of Companies v Ann Clare Elder* SC6/05.

reading of that section, abolishes the employer's common law right to terminate employment on notice."[16]

In deciding this question, the court had to first determine whether the term *"termination"* of contract of employment under section 12(4) was synonymous with the statutory concept of *"dismissal"* under section 12B of the LA. Unfortunately, these terms are not defined in the LA. The Appellants had argued that dismissal means all forms of termination of employment or alternatively all terminations of employment are dismissals. The Supreme Court shot down this proposition and accepted that termination of an employment contract is not synonymous with the statutory concept of dismissal.[17]

The statutory concept of dismissal is much broader than the common law concept of termination of employment, and includes a number of elements that would not in the ordinary course amount to a dismissal. Similarly, not every termination of employment is a dismissal. Termination relates broadly to the bringing of a contract of employment to an end, and is usually not as a result of fault by either party to the employment relationship. Examples of no fault terminations include *inter alia* termination by expiration of agreed period, mutual termination, termination on performance of agreed task, retirement, retrenchment and termination by supervening impossibility. As for dismissal, it relates to a specific method of bringing the employment relationship to an end on account of misconduct and pursuant to a disciplinary hearing as well as any circumstances contemplated by Section 12B. Without dispute, the reasoning by the Supreme Court that termination and dismissal are not similar is jurisprudentially correct and cannot be faulted.[18] The correctness of this position was accepted long back in *Chirasasa and Others v Nhamo NO and*

[16] See page 4 of the *Zuva Petroleum* case.
[17] Court relied on the dicta by Garwe J (as he then was) in *Samuriwo v Zimbabwe United Passenger Company* 1999 (1) ZLR 385 (H) wherein it was stated that;
"The code, in compliance with S101 of the Act, steers clear of other matters that have nothing to do with misconduct, such as termination for other reasons. Whilst it must be accepted that the code makes no provision for the managing director himself to be the subject of disciplinary proceedings, it seems to me that this is irrelevant as the termination in the present case is not sought on the basis of the code but in terms of the contract of employment."
[18] See also A van Niekerk et al, *Law @ work*, 2012 at 214, A. C. Basson *et al*, *Essential Labour Law*, 2005 at 75, J. Grogan (fn1) and M. *Gwisai, Labour and Employment Law in Zimbabwe*, 2006 at 147.

Another.[19] In this case the Supreme Court held as follows; *"I find favour with the submission that termination and dismissal are different and distinct …"*[20]

3.3 Meaning of Section 12B

Having ascertained the meaning of termination and dismissal, the Supreme Court went on to interpret section 12B *vis-a-viz* section 12(4) of the LA. It is accepted that at common law, the employer has an unfettered right to terminate a contract of employment on notice.[21] Despite the significant intrusion in the realm of labour law by statute, the employment relationship remains regulated by the common law to the extent that legislation is inapplicable. It is trite that a statute cannot effect alteration to the common law without saying so explicitly. The Supreme Court acknowledged the existence of this principle which finds authority in the case of *Phiri and Others v Industrial Steel Pipe (Pvt) Ltd*[22] in which Korsah JA held that;

> *"There is a presumption, in the interpretation of statutes, that Parliament does not intend a change in the common law, unless it expresses its intention with irresistible clearness, or, it follows by necessary implication from the language of the statute in question, that it intended to effect such alteration in the common law, for construing the statute by adding to it words which are neither found therein nor for which authority could be found in the language of the statute itself, is to sin against one of the most familiar rules of construction…… per LORD HALSBURY LC in Bank of England v Vagliano [1891] CAC 107 at 120."*

Section 12B of the LA deals with the statutory concept of dismissal or circumstances where an employee may be held to have been unfairly dismissed. The Supreme Court, thus accepted that this Section does not deal with termination of employment on notice but dismissal as these words are not synonymous. In other words termination of a contract on notice was held by the Supreme Court as not one of the circumstances of unfair dismissal prescribed under Section 12B. Alternatively, the Supreme Court noted that termination of employment is not among the conduct that Section 12B outlaws as an unfair labour practice.[23] Even if one relies on Section 5 of the

[19] 2003 (2) ZLR 206 (S). See also *Colcom Foods v Kabasa* SC 12/04
[20] *Supra* at 212.
[21] See Halsbury's Laws of England, 4th ed, Vol 16.
[22] 1996 (2) ZLR 45 (S) at 49. See also *PTC vs Mahachi* 1997 (2) ZLR 71.
[23] The LA defines an unfair labour practice in Section 2 and in Section 8 it sets out in some detail conduct outlawed as unfair labour practices. Termination on notice is not conduct outlawed either by Section 12B or Section 8 of the LA.

Labour (National Code of Conduct) Regulations, 2006,[24] it does not alter the common law position just like Section 12B. It merely outlines various forms of termination including dismissal but does not abolish termination on notice. In any event, it is trite that subsidiary legislation cannot effect an alteration in the common law.[25] In light of the above discussion, it is imperative at this juncture to discuss the import of section 12(4) of the LA.

3.4 Section 12(4) of the LA

Section 12(4) of the LA deals with the concept of termination of employment on notice in terms of a contract of employment. It has nothing to do with dismissal and the notice periods do not apply when an employee is dismissed for example, after commission of an act of misconduct, the contract of employment is terminated following a disciplinary hearing in terms of a code of conduct. In applying the literal rule of interpretation,[26] the court reasoned that;

> "*The wording of S12 (4) of the Act is so clear that it leaves very little room, if any, for misinterpretation. It governs the time periods that apply when employment is being terminated on notice. It stands to reason that the notice periods do not apply when an employee is dismissed. In instances of dismissal no notice is required. The periods of notice referred to in S12(4) of the Act can only apply where there is termination of employment in terms of a process involving the giving of notice provided for in a contract of employment."*

In essence the Supreme Court accepted that section 12(4) does not create a right to terminate a contract of employment on notice. It is a right which is available to both parties to the employment contract under the common law. However, it is submitted that, section 12(4) codifies and regulates the exercise of the right conferred on the parties by the common law by prescribing the notice

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[24] Section 5 states that,

"No employer shall terminate a contract of employment with an employee unless -

(a) the termination is done in terms of an employment code which is registered in terms of section 101 (1) of the Act, or
(b) in the absence of the registered code of conduct mentioned in (a), the termination in terms of the National Employment Code of Conduct provided for under these regulations, or
(c) the employer and employee mutually agree in writing to the termination of the contract, or
(d) the employee was engaged for a period of fixed duration or for the performance of a specific task and the contract of employment is terminated on the expiry of such period or on performance of such task."

[25] See *Hama v National Railways of Zimbabwe* 1996 (1) ZLR 664 (SC).

[26] For application of this rule of interpretation see the following cases, *Madoda v Tanganda Tea Company Ltd* 1999 (1) ZLR 374 (S), *Mawarire v Mugabe N.O and Others* SC1/13. See also Maxwell, *Interpretation of Statutes*, 12th ed at 28.

periods applicable in different circumstances.[27] The right is available to both the employer and employee and has not been ousted by the LA or regulations made thereunder.[28] This has always been the position of the law and employers rarely exercised this right on the mistaken belief that this was outlawed by the introduction of Section 12B in the LA through the Labour Amendment Act No 7 of 2005.

4. Critical perspectives

Undoubtedly, the decision by the Supreme Court was based on a literal interpretation of labour legislation. While cognisant of the positivist basis of the Zimbabwean legal system, the law as interpreted by the Supreme Court appears to be unjust and unfair. It tilts the scales in favour of the employer who enjoys unfettered discretion to terminate the contract of employment at will and for no reason. It offers little protection against arbitrariness. It allows the party with greater bargaining power (the employer) to extract any bargain he wants, by threatening to terminate the relationship unless the other party submits to it. It does not take into account the employees' interest in job security and worst it promotes conduct *in fraudem legis* by employers. Instead of going through the costly and rigorous processes of retrenchment and dismissal in terms of a code of conduct, the employer simply circumvents these by terminating the contract on notice.

Though this unsavoury position was created by the Legislature, it is submitted that the judiciary should have treaded on a path that would have avoided inequity and injustice where legislative intervention is not forthcoming by further developing the common law. In any event the common

[27] The court merely reasserted its earlier decision in *Chirasasa and Others v Nhamo NO and Another supra* in which it stated that,
"……..Section 12 of the Act is on "Duration, particulars and termination of employment contract", while Section 12B is on "Dismissal". In my view these sections provide for two different procedural methods of ending a contract of employment through either termination or dismissal".
Similar positions had earlier on been adopted by the Supreme Court in *Kwaramba v Bain Industries (Pvt) Ltd SC 39/01* and *Colcom Foods v Kabasa* (fn16).

[28] The following statement by J. Grogan in Workplace Law, 5th ed at 72-3 is apposite;
"Both the employee and the employer may, by giving the statutory, 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 either agreed or, in the absence of agreement on this point, the prescribed notice of termination."

law is not cast in stone or immune to change. The words of Gubbay ACJ (as he then was) in the case of *Zimnat Insurance Co. Ltd v Chawanda*[29] regarding judicial law-making are instructive:

> *"Even if confirmation of the appellant's liability to the respondent should meet with disapproval of being an encroachment upon the discretion reposed in the law-giver to change the law, we would strongly defend the judiciary's right to do so. Law in a developing country cannot afford to remain static. It must undoubtedly be stable, for otherwise reliance upon it would be rendered impossible. But at the same time if the law is to be a living force it must be dynamic and accommodating to change. It must adopt itself to fluid economic and social norms and values and to altering views of justice. If it fails to respond to these needs and is not based on human necessities and experience of the actual affairs of men rather than on philosophical notions, it will one day be cast off by the people because it will cease to serve any useful purpose. Therefore the law must be constantly on the move, vigilant and flexible to current economic and social conditions."*

The basis upon which the Supreme Court should have developed the common law requires further analysis and is discussed below in light of international labour standards, the Constitution and the purpose of the LA.

4.1 International labour standards

A meaningful study of labour law is incomplete without an understanding of international labour standards made under the auspices of ILO and the relationship between them and domestic legislation. Section 46(c) of the Constitution of Zimbabwe recognises that in interpreting the Constitution, courts must take into account international law to which Zimbabwe is a party.[30] Furthermore, the preamble to the LA clearly states that one of the purposes of the LA is to give effect to the international obligations of Zimbabwe as a member state of ILO. Therefore, international labour standards made under the auspices of ILO are relevant in interpreting labour legislation and members of the judiciary must keep themselves abreast of developments in international law.[31]

[29] 1990 (2) ZLR 143 (s) AT 15 3 supra D-F.
[30] Relevance of international law in domestic legislation is also captured in Sections 34, 326 and 327 of the Constitution of Zimbabwe.
[31] See Section 165(7) of the Constitution.

Critical to this discussion is the ILO Convention on termination of employment. Article 3 states that for purpose of the Convention, termination of employment means termination of employment at the initiative of the employer. It regulates all forms of terminations including dismissals. In essence, the Convention provides for substantive and procedural safeguards which must be upheld for a termination to be fair. Article 4 provides that the employment of a worker may not be terminated unless there is a valid reason for the termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking. Article 5(a)–(e) identifies reasons for termination that do not constitute valid reasons for termination. Article 7 affords employees the right to be heard prior to or at termination of employment. Termination for operational reasons is also covered in detail under Articles 9 and 12. The burden of proving the existence of a valid reason for termination rests with the employer. In terms of Article 11, a worker whose employment is to be terminated shall be entitled to a reasonable period of notice or compensation *in lieu* thereof unless the termination is as a result of misconduct.

What is apparent from the Convention is that termination of an employment contract can only be for a valid reason which relates either to capacity, conduct or operational requirements. It is only in these circumstances that an employee is entitled to be given notice of termination and the right to be heard before such termination. The heart and soul of the Convention is that it outlaws the employer's right to terminate the contract of employment on notice for no reason.

4.2 The Zimbabwean Constitution

On the 22nd of May 2013, Zimbabwe adopted a new Constitution. Section 65 of the Constitution is an embodiment of fundamental labour rights and it guarantees the right to fair and safe labour practices and standards. The main objective of Section 65(1) is to guard against unfairness in the employment relationship. It provides both employers and employees with a minimum guarantee of rights which no court of law or statute can take away.[32] The concept of fairness is elusive, and is a recent development in Zimbabwean labour law. Several South African scholars have attempted

[32] See D Du Toit; M Potgeiter, *Bill of Rights Compendium. Labour and the Bill of Rights*. Service Issue 21 Oct 2007 at 481 in which Section 23 of the South African Constitution which is similar to Section 65 of the Zimbabwean Constitution was being discussed.

to provide meaning to this concept. Their views on section 23 of the South African Constitution are relevant in construing section 65 of the Zimbabwean Constitution.

Du Toit defines fairness as a practice that is, *"…… not capricious, arbitrary or inconsistent".*[33] On the other hand, Grogan[34] defines fairness by categorising the following criteria that may be regarded as the benchmark of unfair conduct: favouritism on the basis of irrelevant criteria, arbitrary treatment (treatment not according to established rules), irrational treatment on the basis of unproven or untested views and suppositions and penalisation or denial of advantages without adhering to the *audi alteram paterm* rule. It has been further argued that in order to ensure fairness in the workplace,[35] an employer must attain organisational justice, which entails the following three components: distributive justice – substantive fairness in the decisions which an employer makes, procedural justice – fairness in procedures adopted by the employer in making decisions and interactional justice – which relates to interpersonal treatment of employees.[36] Brassey defines a labour practice as fair only if it bears both commercial rationale and if it proves legitimate.[37] However, a more appropriate definition of fairness is the one ascribed by the South African Constitutional Court in *NEHAWU v University of Cape Town*[38] in which it was held that fairness entails balancing the employer's commercial interests and the legitimate workplace interests of employees.

Significantly, employers have an interest in flexibility, namely, employment flexibility, which is the freedom to change employment levels quickly. On the other hand, employees have an interest in job security. There is need to balance these two competing interests. Unfortunately, the current position of the law which allows employers to terminate the employment contract for no reason and circumvent unfair dismissal laws in the process tilts the scales in favour of employers. It is accepted that under the common law, the employment relationship is a relationship of inequality pitched in favour of the employer who wields great economic power. In recognition of this

[33] See Du Toit et al, *Labour Relations Law – A Comprehensive Guide*, 5th ed, 2006
[34] See Grogan, *Employment Rights*, 2010
[35] See M Coetzee; L Vermuelen, *"When will employees perceive affirmative action as fair?"* South African Business Review 17 (1) at 17-24
[36] See also M Conradie, *"A critical analysis of the rights to fair labour practices",* Unpublished, LLM Thesis, University of Free State, 2013
[37] See Brassey, *Employment Law*, Vol 1 1998
[38] (2003) 24 *ILJ* 95 (*CC*)

unfairness the legislature constitutionalised labour rights in section 65 of the Constitution. Its main purpose is to regulate the exercise of employer power and the regulation and promotion of broader labour market activities such as employment, job creation, job security, trade unionism, collective bargaining and strike action. Thus, the Constitution must be interpreted purposively so as to protect employees who are vulnerable to the economic power of the employer.[39]

In terms of section 176 of the Constitution, the Supreme Court has the power to protect and regulate its own process and to develop the common law, taking into account the interest of justice and provisions of the Constitution.[40] It is the role of the judiciary in terms of Section 165 (1) of the Constitution to ensure that justice is done to all and its role is paramount in safeguarding human rights. Judicial activism demanded that the Supreme Court should have developed the common law by abolishing the employer's right to terminate the contract on notice for no reasons. The position of clinging to the common law is untenable and against the spirit of the 2013 Constitution and international law. Clearly, this is an opportunity lost by the Supreme Court to show that it now embraces labour rights as fundamental human rights. In any event, the Constitution is the supreme law and any law or practice inconsistent with it, including the common law, is invalid to the extent of the inconsistency[41]. An employer's right to terminate the contract of employment on notice under the common law is not consistent with Section 65 of the Constitution and must be outlawed. It is practice that is capricious, arbitrary and can be invoked by the employer on subjective grounds.

4.3 Purpose of the LA

The constitutional right to fair labour practices is given effect by the LA. The purpose of the LA is outlined in Section 2A which states that;

> *(1) The purpose of this Act is to advance social justice and democracy in the workplace by* –

[39] Rochelle le Roux, *The regulation of work: Whither the contract of employment? An analysis of the suitability of the contract of employment to regulate the different forms of labour market participation by individual workers,* Unpublished Phd Thesis, UCT, 2008. The thesis comments on the purpose of Section 23 of the South African Constitution which is similar to Section 65 of the Zimbabwean Constitution.

[40] South African courts have adopted an active role in developing the common law in light of their Constitution especially in labour matters as can be discerned from the following cases: *South African Maritime Safety Authority v McKenzie* [2010] 3 All SA 1 (SCA); *Fedlife Assurance Ltd v Wolfaadt* [2001] 12 BLLR 1301 (SCA), *Denel (Pty) Ltd v Vorster* 2004 (4) SA 487 (SCA), *Old Mutual Life Assurance C. SA Ltd v Gumbi* (2007) 8 BLLR 699 (SCA)

[41] Supremacy of the Constitution is guaranteed in section 2 of the Constitution.

(a) giving effect to the fundamental rights of employees provided for under Part II

(b) ……

(c) providing a legal framework within which employees and employers can bargain collectively for the improvement of conditions of employment;

(d) the promotion of fair labour standards,

(e) the promotion of the participation by employees in decisions affecting their interests in the workplace,

(f) securing the just, effective and expeditious resolution of disputes and unfair labour practices."

As observed by Gwisai,[42] section 2A of the LA rejects the unitarist perspective of labour relations and embraces the pluralist perspective. The preamble of the LA also states that the purpose of the LA is to declare and define fundamental rights of employees. This view recognises the fact that an employee is the weaker party in the employment relationship and deserves protection. It is on this basis that courts dealing with labour matters have jurisdiction to look into issues of equity and justice. Though section 2A (2) of the LA demands that the LA be interpreted in a manner that ensures the attainment of its purposes,[43] it must also be interpreted in accordance with the Constitution. Given the purpose of the LA, it is submitted that it was possible for the Supreme Court to abandon the archaic and unfair common law position which whittles down employees' right to job security.

4.4 The Labour Amendment Act, 5 of 2015

[42] See M Gwisai (fn 17) at 49.

[43] The purposive rule of interpretation is described by G Devenish, *Interpretation of Statutes*, 1992 at 35 as follows, *"The purposive approach requires that interpretation should not depend exclusively on the literal meaning of words according to semantic and grammatical analysis….The interpreter must endeavor to infer the design or purpose which lies behind the legislation. In order to do this, the interpreter should make use of an unqualified contextual approach, which allows an unconditional examination of all internal and external sources ……Words should only be given their ordinary grammatical meaning if such a meaning is compatible with their complete context".*
This approach is appropriate in interpreting constitutional provisions and legislation that gives effect to constitutional rights such as the LA. With the aim being to move away from formalism and make human rights a practical reality. See *Smyth v Ushewekunze and Another* 1997 (2) ZLR 544 (S).

In response to the *Zuva Petroleum* case and the subsequent massive job losses, the government enacted the Labour Amendment Act No 5 of 2015 (*"the LAA"*). In terms of the explanatory memorandum to the Labour Amendment Bill, 2015 the amendment seeks not only to align labour laws with the Constitution, but also to promote productivity and competitiveness of local industry. Of relevance to this discussion is Clause 4 of the LAA which amended section 12(4) of the LA. The LAA inserts section 12(4a) and (4b) in the LA as follows:

> *"(4a) No employer shall terminate a contract of employment on notice unless –*
>
> *(a) the termination is in terms of an employment code, or in the absence of an employment code, in terms of the model code made under Section 101 (9), or*
> *(b) the employer and employee mutually agree in writing to the termination of the contract, or*
> *(c) the employee was engaged for a period of fixed duration or for the performance of some specific service, or*
> *(d) pursuant to retrenchment, in accordance with Section 12C.*
> *(4b) Where an employee is given notice of termination of contract in terms of subsection (4a) and such employee is employed under the terms of a contract without limitation of time, the provisions of Section 12C shall apply with regard to compensation for loss of employment".*[44]

What the LAA does is to regulate termination on notice by prescribing circumstances under which a contract of employment can be terminated on notice. The first three circumstances in section 12 (4a), (a)-(c) are a mere restatement of the law as set out in section 12B of the LA read with section 5 of the Labour (National Employment Code of Conduct) Regulations, 2006. The other form of termination in section 12(4a), (d) relates to termination pursuant to retrenchment.[45] It is clear that

[44] The new Section 12C deals with retrenchment and compensation for loss of employment on retrenchment or in terms of Section 12 (4a). Section 12C (2) which deal with compensation on termination provides as follows:
"(2) Unless better terms are agreed between the employer and employees concerned or their representatives, a package hereinafter called "the minimum retrenchment package") of not less than one month's salary or wages for every two years of service as an employee (or the equivalent lesser proportion of one month's salary of wages for a lesser period of service) shall be paid by the employer as compensation for loss of employment (whether the loss of employment is occasioned by retrenchment or by virtue of termination of employment pursuant to section 12 (4a), ((a), (b) or (c), no later than date when the notice of termination of employment takes effect."

[45] Retrenchment is defined in S2 of the LA as follows;

the amendment does not repeal the employers' common law right to terminate a contract of employment on notice. A fixed term contract or a contract for the performance of some specific service can still be terminated on notice. In addition, if a code of conduct provides for termination on notice, a contract of employment can still be terminated on notice in terms of that code as provided for in section 12(4a)(a)of the LAA. The situation is further complicated by the fact that there has been no attempt by the Legislature to define the terms, *"termination"* and *"dismissal"* or delimit the relationship between section 12(4) and section 12B of the LA.

Another critical aspect about the LAA is the compensation payable on termination on notice. Apart from cash *in lieu* of notice which an employee is entitled to,[46] section 12(4b) of the LAA specifically provides that permanent employees are also entitled to compensation for loss of employment under section 12C. This section deals with retrenchment and section 12C (2) sets out a minimum retrenchment package of one's month salary for every two years of service or an equivalent lesser proportion for employees who have served for a lesser period. Under the previous statutory framework there was no formula for calculating a retrenchment package and courts relied on the formula set out in *Continental Fashions v Mupfuriri and others*.[47] In this case it was held that a retrenchment package must include the following components, (a) severance allowance for recognition of loss of job, which is a lump sum to help an employee with immediate costs following loss of regular employment, (b) severance allowance for recognition in pay for each year of service, (c) relocation allowance, (d) statutory payments in terms of Section 13 of the LA such as notice pay and (f) miscellaneous benefits which include any benefits which an employee was entitled to, which can be sold to him such as company car, laptops or cell phones.

Clearly, this formula was flawed and resulted in high retrenchment packages,[48] contrary to the purpose of retrenchment which is to save the business and the jobs of remaining workers. Thus, there was need to balance the employers interest in achieving employment flexibility with the need

"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."

[46] Which is payable in terms of Sections 12(4), (7) and Section 13 of the LA.

[47] 1997 (2) ZLR 205 (S).

[48] According to a study carried out by the Zimbabwe Economic Policy Analyst and Research Unit (2014) titled, *"Cost, Driver Analyst of the Zimbabwean Economy",* retrenchment packages averaged 69,2 weeks of wages which is nearly three times as high as compared to other Southern Africa countries whose average is 25,4 weeks.

to mitigate the consequences of loss of employment to the employee whose contract has been terminated. Though it is commendable that the Legislature provided a minimum retrenchment package which provides certainty in the law, the compensation is not adequate. Any compensation payable must also deter employers from unjustifiably terminating contracts of employment on notice. It is suggested that the retrenchment package should have included three components namely, (a) severance pay of one month salary for every year served, (b) relocation allowance of one month salary and (c) cash *in lieu* of notice pay. The LAA should also have stated that nothing contained in section 12C(2) should prevent an employer and employees or their representatives from negotiating a more favourable retrenchment package. This also demanded a realignment of our laws on damages *in lieu* of reinstatement by ensuring that of damages payable for unfair dismissal are crested. Unfortunately the LAA is silent on this aspect and does not provide a formula for damages payable. This is inconsistent with the intention of the legislature in prescribing a minimum compensation payable in the event of termination of employment on notice under section 12C. It must also be noted that the compensation prescribed in section 12C (2) of the LAA is only for permanent employees. It is not applicable to employees on fixed term contracts who could have served a single employer for many years on fixed term contracts which are repeatedly renewed or employees who were engaged for a specific project which took years to complete. These are also vulnerable employees who deserve adequate compensation for loss of employment especially after serving an employer for a long period of time.

Finally, section 12 of the LAA applies retrospectively. Clause 18 of the LAA a transitional provision to the effect that;

> *"Section 12 of this Act applies to every employee whose services were terminated on three months' notice on or after the 17th of July 2015."*

The *Zuva Petroleum* decision was handed down on the 17th of July 2015. In response to this decision employers capitalised on the *lacuna* in the law and embarked on mass terminations of employment contracts on notice. As of the 21st of August 2015 employee organisations such as the Zimbabwe Congress of Trade Union and Zimbabwe Federation of Trade Unions reported that more than 26 000 employees had their contracts terminated on notice. It is on this basis that the LAA was designed to have retrospective effect.

There is a presumption that legislation may not be applied in retrospect. In *Agere v Nyambuya*[49] the principle was explained as follows,

> *"It is a fundamental rule of construction in our law, dating back probably from Codex 1:14:7, that there is strong presumption that retrospective operation is not to be given to an enactment so as to remove or in any way impact existing rights of obligations unless such a construction appears clearly from the language used or arises by necessary implication. For instance, where it is expressly retrospective, or deals with past events, or concerns a matter of procedure, practice or evidence. The supposition is that legislature intends to deal only with future events and circumstances."*[50]

The LAA expressly rebuts the presumption against retrospectivity in Clause 18 by stating that the proposed section 12 applies to every employee whose services were terminated on three months' notice on or after 17th of July 2015. It has been argued that Clause 18 of the LAA is unconstitutional in that it infringes upon the rule of law which is protected under section 3(2) of the Constitution.[51] Unfortunately section 3 of the Constitution merely recites founding values and principles of Zimbabwe as a state and does not outlaw retrospective application of the law. It is different from section 70(1)(k) which expressly states that any person accused of an offence has the right not to be convicted of an act or omission that was not an offence when it took place. Thus, safeguards against this principle in the Constitution only apply to criminal conduct and not civil law.

5 Conclusion

It is apparent that the *Zuva Petroleum* case is a classic example of justice being on the Appellants' side whilst the law was on the Respondent's side. Admittedly, law and justice do not always coincide. Whilst the blame for this *lacuna* may be apportioned on the Legislature, the judiciary also failed in its mandate of developing the common law in light of the Constitution and

[49] 1985 (2) ZLR 336 (SC)
[50] See also L. Madhuku, "*An Introduction to Zimbabwean law*, Weaver Press, 2010 at 166, Maxwell on *Interpretation of Statutes*, 12th ed, *Bater and Another v Muchengeti* 1995 (1) ZLR 80 (S), *Nkomo and Another vs A-G* 1993 ZLR 422 (S) and *S v Mapanzara and Another* HH 141/11
[51] Argument by Chairperson of the Parliamentary Portfolio Committee on legislation.

international labour standards. Its approach of simply interpreting the law as it is, without engaging itself in judicial activism flies in the face of the social justice perspective of labour relations which underlies labour legislation. Though the Legislature hurriedly intervened and attempted to align laws on termination with the 2013 Constitution through the LAA, the amendments are inadequate and unsatisfactory. It is the duty of the State to adopt appropriate policies and measures that create employment for all and guarantee job security in line with sections 14 and 24 of the Constitution.

The starting point should have been the ratification and domestication of ILO Convention on termination of employment. Termination on notice should only be for a valid reason relating to capacity, conduct or operational reasons. It is hoped that the LA will in future adequately address this highly contentious issue. There is need for statute to specifically define the terms "*termination"* and "*dismissal"*. The employers' common law right to terminate the contract of employment on notice must be explicitly outlawed and provided for under the statutory concept of unfair dismissal in section 12B of the LA. This would also demand that section 12 of the LA specifically outlines the valid reasons which relate to capacity, conduct or operational reasons. Alternatively, the employer's right to terminate the employment contract can be retained, as is in the LAA but subject to payment of adequate compensation to the employee for loss of employment. Unfortunately, the compensation in terms of the LAA is inadequate and does not deter employers from terminating employment on notice. It does not cater for employees on fixed term contracts. In balancing this with an employee's right to resign, the LA must also provide employers with remedies against employees who resign without giving notice, for instance by permitting employers to withhold statutory payments on termination listed in section 13 of the LA.

Book Review

Children's Rights in Africa - A Legal Perspective by Sloth-Nielsen Julia (ed) (Ashgate Publishing Limited; 352 pages; 2010**)**

This book is a major contribution to human rights discourse in general and the area of children's rights in particular. The authors bring to the fore topical developments in protecting and promoting children's rights from an African perspective. The book reiterates that the protection of children's rights is not a new phenomenon in the African context but has long been in existence. It also delves into the fundamentals of different aspects of human rights with specific reference to the protection and promotion of African children's rights both in normal and crisis situations. Essentially, the book incites further debate and analysis of issues which affect children with the aim of developing the field of children's rights in Africa.

The book is divided into two main parts: with part one primarily devoted to discussing the African Human rights systems and the mechanisms which are used to protect and promote children's rights in Africa. It provides an idiosyncratically African framework for the protection and promotion of children's rights. The book makes the point that African children suffer more human rights violations than children other parts of the world. Although the protection of children's rights is rooted in the Convention on the Rights of the Child (CRC), the book discusses the significance of the African Charter on the Rights and Welfare of the Child (ACRWC) and other related conventions. It further recognizes African geo-politics and the implications of such politics to the rights and welfare of children. A further interesting theme of the book hinges upon the collision of customary law with human rights law within the African human rights context. Most notably, the book takes into account the role of economic, social and cultural rights in fighting child poverty amongst children in Africa. In this context, the book examines the ACRWC and its relevance in the protection of children's rights from the adverse impacts of culture, economic and social conditions.

In part two, different contributors present the challenges which are commonly faced by African children as well as children who find themselves in distressful situations such as violence,

refugee status, war, and those who are victims of the HIV and AIDS pandemic. This part further explores the rights of vulnerable children as well as the rights of children with disabilities. Quite clearly, the authors take issue with African children in distress situations, enumerating the various situations in which children inevitably find themselves such as armed conflicts, HIV and AIDS, famine and disaster. The issue of child participation in armed conflicts in Africa is expertly considered in the book as a topical issue within the children's rights discourse.

Significantly, the book deliberates on the viability of efforts of engaging children in matters that affect them and how institutional systems and frameworks can be improved in the near future. In light of the fact that African children are seen as facing unique challenges in their lives, the book discusses the normative framework that protects children such as the protection from all forms of violence, child soldiers, child trafficking, child labour as well as children with disabilities and those affected by the HIV and AIDS pandemic. Part two also explores on improving the girl child's right to education as an enabling right which leads to development in societies.

Given that there is limited literature on children's rights in Zimbabwe, this book bridges a void, and is necessary tool to institutions and amenities involved in the provision of care for children as well as advocates for children rights. These include social workers, legal practitioners, judges and presiding officers in courts, students of human rights, academics, non-governmental organisations (NGOs), the law-enforcers and child care-givers.

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Special Report: The LLM Constitutional and Human Rights Law programme

1. Introduction

The Midlands State University, Faculty of Law is pleased to announce the introduction of the LLM (Constitutional and Human Rights Law) degree programme. The programme bridges a huge gap in post-graduate legal studies in Zimbabwe. The programme was approved by the Zimbabwe Council for Higher Education, following an intensive stakeholder consultation process.

This postgraduate degree is a three semester programme offered on a block-release basis. For each module, contact time is a minimum of 60 hours per semester.

For the convenience of our stakeholders across the country, the programme runs concurrently in two campuses, namely the Faculty of Law, Gweru and at Mandel Training Centre, Marlborough, Harare. The Harare class is a weekend school, running from Friday to Sunday, whilst the Gweru class is a week-long block that runs from Monday to Saturday.

2. Entry Requirements

Applicants for the programme are required to meet the following criteria for selection:

i. a Bachelor of Laws degree (LLB). Applicants are required to have at least a 2.2 (Lower Second) degree class, or the equivalent thereof.
ii. other factors such as relevant professional experience will also be taken into consideration in assessing applications.

3. Programme Structure

The Master of Laws (LLM): Constitutional and Human Rights Law is a taught (coursework) programme with a dissertation which commences in the second semester and submitted in the final (third) semester.

The degree programme will run for three semesters and is structured as follows:

First (Opening) semester: 3 core modules.

Second (Penultimate) semester: 2 elective modules plus dissertation.

Third (Final) semester: dissertation (finalization).

Module Code	**Module Description**	**Credits**
Core Modules		
LM601	Advanced Constitutional Law	4
LM602	Advanced Human Rights Law	4
LM603	Research Methodology	4
LM614	Dissertation	16
Elective Modules		
LM604	International Criminal Law	4
LM605	Environmental Law	4
LM606	Women's Rights	4
LM607	Refugee Law	4
LM608	Child Rights	4
LM609	Disability Rights Law	4
LM610	Comparative Constitutional Law	4
LM611	Constitutional and Human Rights Litigation	4
LM612	Constitutional Property Law	4
LM613	Advanced International Humanitarian Law	4

For further inquiries, please visit our website http://ww4.msu.ac.zw/law/ or contact:

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