Dismissal after notice

Struggle to cleanse Zim's colonial ghosts

Although in the *Zuva* case Zimbabwe's Supreme Court allowed for dismissals of workers after receiving notice from an employer, amendments to the labour laws have contained this, writes **Munyaradzi Gwisai**.

Gubbay CJ aptly put it in *Zimnat Insurance Co. Ltd v Chawanda*: 'When these ghosts of the past stand in the path of justice clanking their medieval chains the proper course is for the judge to pass them undeterred.' In *Delta Corporation v Gwashu*, he went on to warn on the dangers of using outdated common law principles to interpret modern statutory employment codes designed to promote employment security. In words very pertinent today, he held:

'Departures from these codes only serve to undermine the labour standards agreed by employees and employers and risk reviving the old master and servant laws of the common law. As the common law was tilted in favour of the employer, continued reliance thereon in labour relations is, in my view, retrogressive.'

The new Constitution has given seal to this direction of modernising common law to make it consistent with a society based on values of equality and human dignity. South African superior courts have certainly shown a willingness to travel in that direction, holding that the common law contract of employment must now be interpreted to include an implied duty on every employer to fairly treat its employees. Commenting on the potential impact of new constitutions that enshrine labour rights on common law, eminent author, J Grogan observed:

'The entrenchment of labour rights in general terms raises the prospect of a constitutional jurisprudence being developed by the civil courts and the Constitutional Court that may have a far-reaching effect on the way the contract of employment and the employment relationship are approached in the future. This could lead to a cross-fertilisation of the principles of labour law, the common law and public law.'

For a while, it seemed Zimbabwean courts were moving in the above direction, upholding the special jurisdiction of the Labour Court to effect social justice and democracy in the workplace, and the application of fairness and equity principles in termination of contracts for incapacity due to illness or in cases of unilateral transfers of employees.

Unfortunately the *Zuva* decision indicated that the majority of the bench, that had always stood for the eminence of classical common law principles over the equity principles clearly implicit in the Labour Amendment Act of 2002 have had the final say. When confronted with the ghosts of the past in *Zuva*, and despite a new Constitution that clearly calls for the cross-fertilisation of common law with social justice principles, the Zimbabwe bench retreated.

But *Zuva* should not be read in isolation. It marked the climax of a projectile of the majority of the bench of promoting classical common law principles, even if these are inconsistent with the new normative values underlying labour law in the country. The court chose to resurrect those ghosts of the past that the post-colonial state had banished more than three decades ago with a set of emergency powers, to reverse an earlier brazen judicial subversion of clear legislative intention to protect workers. As to this character of the Zimbabwean bench, I had in an earlier commentary in 2006 given a hint as to the root cause:

'The current state of labour law exhibits this mixture of contrasting ideological positions – but it is an uneasy balance and one that is unlikely to last. The definitive direction of state and ruling class ideology is labour market liberalisation consistent with unitarism and neo-liberal globalisation. Several factors point to this, including:

- Since 2003, the return to neo-liberal economic policies by the state, spearheaded by Reserve Bank governor, Gideon Gono, who has already significantly restored neo-liberal policies in the financial, monetary and fiscal sectors
- Generally a growing conservatism in Zimbabwe's elites, in particular those in the legislative and judiciary arms of the state – one of the most ominous results of the elite-based land reform programme is that it created a landed local elite but one which is financially weak and therefore compelled to resort to the most brutal anti-working class practices and laws reminiscent of the primitive accumulation and post 1960s eras. Virtually all Zanu PF parliamentarians are now commercial farmers as are at least three quarters of High Court and Supreme Court judges ... On the other hand, the opposition is dominated by petite bourgeois elites, who long ago prostrated themselves before western neo-liberal political and economic forces and are now eager to get into state power, even as junior partners, and accumulate property as a neo-colonial dependent capitalist class (comprador bourgeoisie).'

ZUVA PETROLEUM AND LEGISLATIVE INTERVENTION

In scenes reminiscent of the early 1980s, when the state also intervened to reverse a similar judicial decision overturning a legislative intervention outlawing dismissal on notice, the government fast-tracked amendments to the Labour Act, ostensibly to reverse the *Zuva Petroleum (Pvt) Ltd* decision. The resultant legislation, the Labour Amendment Act 5 of 2015, only partially does so, and potentially worsens the situation.

Under the new s 4(4a) of Act 5 an employer can only terminate a contract of employment on notice under four specified circumstances. These are in terms of an employment code, in terms of a mutual agreement, or if it is in relation to a contract of fixed duration or performance of a fixed task, and in terms of lawful retrenchment.

The amendment thus does not oust the common law entirely but severely restricts it. This is unlike *Zuva*, which fully opened the flood-gates. However, the progressive import of the new provisions were almost wiped out by the changes to the retrenchment provisions. These make nonsense of the restrictions on the common law notice rule by allowing the employer to outflank the restriction on their right to terminate on notice by applying the retrenchment laws.

Whereas under the old s 12C(2) an employer was required to agree with the affected employees on whether retrenchment was justified and the criterion of employees to be retrenched. If retrenchment was justified, the appropriate retrenchment package. If parties disagreed, the final decision lay with the minister on recommendation of the Retrenchment Board. There were thus adequate checks and balances against wholesale lay-off of employees.

On average the minister had been issuing retrenchment packages of one to two months' service pay for every year worked; three months' severance pay; one month relocation allowance; and where applicable continuation of medical aid and funeral policy benefits for three to six months. Generally, the package was paid once or in two installments.

The amendments to s 12C removed the above checks and balances. Retrenchment negotiations at the Works Council have been rendered academic. Under the new s 12C(2) unless there is an agreement, a statutory minimum retrenchment package applies. This is a sum of 'not less than one month's salary ... for every two years of service ...' This implies the justification stage has been removed. Also ousted is the power of the third party, the board and minister, to determine the dispute between the parties.

The default minimum package under s 12C(2) is likely to become the cap, because of the virtual veto power given to employers. Also removed were standard items previously granted like severance pay, relocation allowance, medical aid and funeral policy benefits. Even then, under s 12C(3) the employer can apply to an employment council for exemption to pay a lesser sum. If the employment council fails to determine the application within 14 days, 'the application is deemed to have been granted.' What will stop employer representatives in employment councils dragging their feet to kick in the automatic exemption clause?

In the final analysis the flood-gates that were opened by the *Zuva* decision have only been partially closed by the Labour Amendment Act of 2015. The *Zuva* decision created a crescendo of job losses, whose shadow has continued despite the retrenchments. The response of organised labour, namely media statements and two small demonstrations of less than 200 workers each, reflected the current weak state of the labour movement. It is such weaknesses that have allowed the employer class, the judiciary and the state to enforce an austerity agenda that has cost the working classes massively and likely to continue under the new Act. LB

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