National Employment Council for
Zimbabwe Energy Industry
Training Manual

Manual 1

Sources of Law

INTRODUCTION

IN the area of labour law and employment relationship, in dealing with disputes and/or grievances we use various sources of the law to find a solution.

The sources may be divided into primary and secondary sources of law.

The primary sources of law include the contract of employment of the parties together with common law and legislation or statutes. The later encompasses the Constitution of Zimbabwe, Acts of Parliament, statutory instruments, and registered collective bargaining agreements.

Secondary sources of law include writings by legal scholars and customs. International law is a source of law that may be useful in some instances.

PRIMARY SOURCES OF LAW

Contract of Employment and common law

Contract of employment

THE starting source of law is the contract of employment. This is an agreement of the letting and hiring of personal services by an employee to an employer in exchange for remuneration.

The contract of employment is made up of express terms and implied terms covering things like salary, working hours, leave, termination of employment. Express terms are those terms that the parties have directly agreed to, verbally or in writing. Implied terms are those that are implied in every contract of employment by the common law. The provisions of the contract of employment are usually modified by statutes, which may provide minimum standards that each contract of employment should comply with. For instance s 6 of the Collective Bargaining Agreement for the Zimbabwe Electricity and Energy Supply Industry, S.I. 1 of 2008 provides:

"No person shall become an employee or commence duties with a company unless he and a Company have executed a contract of employment in the form prescribed in section 54."

This means that every employee in the industry must have a contract of employment that covers the items provided in s 54 of the CBA. Where provisions of the contract of employment offer better terms than those in the collective bargaining agreement, the terms of "the provisions of that contract of employment shall apply or prevail" in terms of s 3 (1) (a) (i) of S.I. 1 of 2008.

Section 12 of the Labour Act [*Chapter 28:01*] also requires the employer to ensure that every contract of employment is reduced into writing and covers the various aspects specified there such as names of the parties, period of the contract, particulars of remuneration, working hours and so forth.

Note though that an individual employee and employer cannot make an agreement for lesser than the salary or benefits provided for in a registered CBA in terms of s 6 (1) of the Labour Act. See - **Zimbabwe Energy Workers Union and National Energy Workers Union v ZESA Holdings (Pvt) Ltd** HH-887-15.

The courts or tribunals will normally apply whatever has been agreed to in the contract of employment unless these are contrary to the Constitution, Labour Act , statutes or a registered collective bargaining agreement or is against public policy:

- In **ZESA v Smith & 55 Ors** S-9-05 the court rejected an employer's belated attempt to reverse an offer which had been accepted by its employees for sale of its houses to them, because it had made a mistake. Also **Magodora & Ors v CARE International** S-24-14.

In **S v Collet** 1978 (1) RLR 205 AD at 212D-E where a white farmer who had affected corporal punishment on his employee for misconduct, ostensibly by consent in the contract of employment, was still found guilty because such an agreement was held against public policy.

Common law

The terms of the contract of employment are also derived from what is known as common law. This refers to the general body of non statute law that applies in Zimbabwe subject to any statutes applica-

ble. The common law in Zimbabwe is called Roman Dutch common law. This is because it is a hybrid of Roman Law (codified in 6AD) and Dutch Law which was established in the Republic of the Netherlands in the 17th Century AD and came to apply as general law in that country in the absence of statutes. These laws were imposed by the Dutch on their Cape Colony from 1652 AD. The Cape became a British colony in 1806 but the Roman Dutch common law was retained as general law but could be modified by statute or principles of English law where necessary. The Cape was the British colony which spearheaded the conquest of Zimbabwe. The law of the Cape as of 10 June 1891, namely Roman Dutch law was also imposed as the common law of Zimbabwe by the British colonialists.

Roman-Dutch law was retained as the common law of Zimbabwe despite independence in 1980. This was by way of s 89 of the old Constitution which provided that the law applicable in Zimbabwe - "shall be the law in force in the colony of the Cape of Good Hope on the 10th June 1891, as modified by subsequent legislation having in Zimbabwe the force of law." This position was carried through in s 192 of the new Constitution of Zimbabwe Amendment (No. 20) Act, 2013.

Principles of common law are found in court judgments, works of classical Roman Dutch jurists like Voet and Grotius and authoritative texts of law.

Under Roman law, the contract of employment, known as the *locatio conductio operarum*, or contract of service, involved an agreement in terms of which the worker agreed to work for and under the control of the employer in return for payment of wages.

The parties can agree to modify or remove some of the principles of the common law in their contract. Terms under the common law can also be modified or partially or wholly ousted by a statute. The courts have held that there is a strong presumption against ouster of the common law and that ouster would only be upheld where there are clear, unequivocal and express provisions of a statute or by necessary implication:

- **Hama v NRZ** 1996 (1) ZLR 664 (S) where the common law principle that a wrongfully dismissed employee is normally given damages and not reinstatement, was upheld. Also **United Bottlers v Kaduya** 2006 (2) ZLR 150 (S) at 155B-C

In **Nyamande & Anor v Zuva Petroleum (Pvt) Ltd** S-43-15, the court upheld the common law right of the employer to dismiss an

employee on notice.

An example where the common law is ousted is under s 18 (1) of the Labour Act which provides that a female employee who has served for at least one year has the right to paid maternity leave, but such right is not provided for the common law.

Because the common law does not recognise principles of social justice in the workplace or does not recognise collective bargaining or the differences in power between the individual employee and the employer, it tends to be unfair to the weaker party, the employee. This is why the legislature has intervened to modify common law to ensure that there is substantive fairness. Collective Bargaining Agreements do the same. For instance an employer is required to follow principles of procedural fairness under an employment code before dismissing an employee under s 12B(2) of the Labour Act. Section 2A(1) of the Act states that the purpose of the Labour Act is to promote social justice and democracy in the workplace. Section 65 of the Constitution provides for various basic labour rights.

In the same light s 9 (8) of the Zimbabwe Energy Industry Employment Code of Conduct, 2011 requires that a Disciplinary Committee –

> *"... shall exercise impartiality, independence, fairness, and observe the principles of natural justice during the proceedings and in making determinations."*

There are no such requirements of natural justice in dismissal of employees under the common law. See - **Chirasasa & Anor Nhamo NO & Anor** 2003 (2) ZLR 206 (S).

The new Constitution places a duty on the courts to develop the common Some earlier court decisions had also held that the courts should reject outdated common law principles that did not result in fairness or social justice. See - **Delta Corporation vs Gwashu** S-96-00 and **Zimnat Insurance Co. Ltd v Chawanda** 1990 (2) ZLR 143 (S)

Following the new Constitution, courts are developing the common law in this way. The Supreme Court held that natural justice principles apply before an employer can dismiss an employee who

has exhausted their sick leave days who must be consulted before dismissal-**ZIMASCO (Pvt) Ltd v Marikano** S-6-14, or that an employee should be consulted before being transferred-**Sagandira v Makoni RDC** S-70-14.

3.1 Legislation

Besides the contract of employment, the most important source of labour law is legislation or statutes. Legislation refers to laws passed by Parliament, assented to by the President and published in the Government Gazette. It includes the Constitution of Zimbabwe. It also includes secondary legislation passed under authority of Parliament.

3.2 The Constitution

The Constitution is the supreme law of the country in terms of s 2 of the Constitution:

> "*2 (1) The Constitution is the supreme law of Zimbabwe and any law, practice, customs or conduct inconsistent with it is invalid to the extent of the inconsistency.*"

The Constitution is binding on every person, natural or juristic and applies to all executive, legislative and judicial organs of the State – s 2 (2) Constitution.

Unlike in the past, the new Constitution now provides for entrenched labour rights and fair labour standards in the Declaration of Rights.

The key provision being s 65 which provides for *inter alia*:

- The right of every person to fair and safe labour practices and standards and to be paid a fair and reasonable wage.
- The right to form and join trade unions or employer's organisations and to participate in the activities of such organisations, excerpt for members of the security services.
- The right of every employee to participate in collective job action, except for members of the security services.
- The right of every employee to just, equitable and satisfactory

conditions of work.

- To engage in collective bargaining and to organise
- Rights of women to equal remuneration with men for similar work
- Right of women to be fully paid maternity leave for a period of at least three months.

b. Provision for strong gender rights including the right to equality and non-discrimination, including affirmative action to redress effects of past unfair discrimination – sections 56 and 17; and the removal of customs, traditions, laws that infringe on the rights of women – s 80.

c. Under s 46 (1)of the Constitution, courts and tribunals must to take into account international law and relevant foreign law.

d. Under s 46 of the new Constitution courts are required to give full effect to rights, to promote the values that underlie a democratic society and to be guided by the spirit and objectives of the Constitution.

Under s 85 (3) (c) of the Constitution courts must not be "unreasonably restricted by procedural technicalities."

Principal Legislation

4.1 General

Laws which are passed by Parliament are called principal legislation. There are various types of legislation governing the employment relationship.

The main legislation on labour law is the Labour Act [*Chapter 28: 01*]. Section 2(3) of the Act states that the Labour Act shall prevail over any other enactment inconsistent with it. Further s 3 (1) provides that the Act "shall apply to all employers and employees except those whose conditions of employment are otherwise provid-

ed for in the Constitution." Thus the Act does not apply to members of the Civil Service and Security Services. Civil servants are mainly covered by the Public Service Act [*Chapter 16:01*].

Other important principal labour statutes include:

- National Social Security Authority Act [*Chapter 17:04*]
- Pension and Provident Funds Act [*Chapter 24: 09*]
- Factories and Works Act [*Chapter 14:08*] and the

Hazardous Substances and Articles Act [*Chapter 28: 02*].

4.2 Subsidiary Legislation

Below principal legislation is delegated or subsidiary legislation. This refers to laws passed by a body under authority from and in terms of an Act of parliament. Such laws are called statutory instruments and usually come in the form of regulations or notices.

Subsidiary legislation must be in conformity with the enabling Act, otherwise it would be declared invalid as *ultra vires* the enabling Act - **Hama v NRZ** 1996 (1) ZLR 664 (S).

Some of the most important statutory instruments are made in terms of s 17 of the Act. Such regulations override every contract, agreement, arrangement of any kind whatsoever, determination or regulation made in terms of any enactment which related to the employment of an employee to the extent of any inconsistency. Examples include:

- Labour (Settlement of Disputes) Regulations, S.I. 217 of 2003
- Labour (Arbitrators) Regulations, S.I. 173 of 2012
- Labour Relations (HIV and AIDS) Regulations, S.I. 202 of 1998
- Labour Relations (Employment of Children and Young Persons) Regulations, S.I. 72 of 1997

Labour Relations (Protection Against Any Acts of interference Between Workers' Organisation and Employers' Organisation) Regulations, S.I. 131 of 2003

There are important regulations also made under other provisions of the Labour Act. For instance in terms of s 109 (9) is the Labour (National Employment Code of Conduct) Regulations, S.I. 15 of 2006 which provides for the model national employment code on which workplace and industry employment codes are modelled. The Labour Court Rules, S.I 59 of 2006 made in terms of s 90 (3) govern the procedure in the Labour Court.

In terms of other principal legislation, other important statutory instruments include – the National Social Security Authority (Accident Prevention) (Workers Compensation Scheme) Notice S.I. 68 of 1990, the National Social Security Authority (Pensions and Other Benefits Scheme) Notice, S.I. 393 of 1993, the Pension and Provident Funds Regulations S.I. 323 of 1991

4.3 Registered collective bargaining agreements

A special type of statutory instrument is the registered collective bargaining agreement, which is made in terms of Part X of the Labour Act. This is a collective agreement made between registered trade unions and employers or employers associations and which on registration with the Registrar and publication in the Government Gazette becomes a statutory instrument in terms of s 80 of the Labour Act.

A registered collective bargaining agreements binds all employers, contractors and their respective employees in the industry to which the agreement relates in terms of s 82 (1) of the Act. It does not matter that the employers or employees are not members of the employers' association or trade union.

Failure to comply with a registered CBA is a criminal offence and unfair labour practice under sections 82 and 6 of the Act. In **Zimbabwe Energy Workers Union and National Energy Workers Union v ZESA Holdings (Pvt) Ltd** HH-887-15 it was held:

> "*The employees do not have a right to compromise, abandon and waive the right to be paid in terms of the CBA... It does not matter which of the parties initiated the agreement or that both the employees and employers agreed to pay*

less than the prescribed wages and back pay. The conduct remains offensive. The intention of the legislature in introducing s 6 was not only to sanction the conduct of the employer, but also to protect the employees against themselves."

A registered collective bargaining agreement usually provides the most detailed source of terms and conditions of employment for non-managerial employees. The CBA for the Zimbabwe Electricity and Energy Supply Industry applies in the electricity and energy industry. Section 3 (1) (a) (i) states that where the provisions of the CBA are in conflict with a contract of employment, then the provisions of the contract shall apply or prevail. This situation refers to provisions of a contract which are better than those in the CBA, because under sections 6 (1) and 82 (1) of the Labour Act, the minimum conditions set out in a registered collective bargaining agreement are mandatory.

S.I. 1 of 2008 applies to all "all employees in respective companies within the Zimbabwe Electricity and Energy Supply Industry scope of coverage" in terms of s 3 (1) of S.I. 1 of 2008. The CBA does not apply to the following:

- Managerial employees, as these are not covered by the registered trade unions under s 45 (1) of the Act.

To expatriate employees, unless their contracts states that they are covered.

The CBA only partially applies to contract and casual workers for whom certain provisions are not applicable as set out in Part III of the CBA. They also partially apply to apprentices but where the CBA is in conflict with the provisions of the Manpower Planning and Development Act [Chapter 28:02] the provisions of the latter Act shall apply in terms of s 3 (1) of S.I. 1 of 2008.

Under s 3(3), the CBA must be read in conjunction with the Administration Policy and Procedure Manual of a company provided that where there is conflict the provisions of the CBA shall apply to the extent of the inconsistency.

International Law

International law is a secondary but increasingly important source of labour law. International law is usually in the form of treaties. In terms of s 327 (1) of the Constitution, the term "international treaty" means "a convention, treaty, protocol or agreement between one or more foreign States or governments or international organisations."

International treaties do not automatically apply in Zimbabwean law. After ratification of a treaty by the President a treaty does not bind Zimbabwe until it has been approved y Parliament and does not form part of the law of Zimbabwe unless it has been incorporated into the law through an Act of Parliament- s 327 (2) of the Constitution as applied in **Magodora and Ors vs CARE International** S-24-14.

However some international labour standards may still be incorporated by the courts as international customary law, which are principles that of universal and general application under international law - **Kachingwe, Chibebe and ZLHR v Minister of Home Affairs and Commissioner of Police** 2005 (2) ZLR 12 (S).Section 46 (1) (c) of the Constitution provides that, a court, tribunal or forum "must take into account international law and all treaties and conventions to which Zimbabwe is a party." Under s 327 (6) when a court is interpreting legislation it "... *must adopt any reasonable interpretation that is consistent with any international convention, treaty or agreement which is binding on Zimbabwe, in preference to an alternative interpretation inconsistent with that convention, treaty or agreement."*

The above means that in areas were the Labour Act is not clear the courts must use as a guide the principles of law developed under the international treaties that Zimbabwe has ratified. This was done in **Mavisa v Clan Transport** LC/H/199/2009 where the court applied ILO Conventions No. 135 and No. 87 in interpreting s 14B(c) and s29 (4a) of the Act. Also - **S v Moyo & Ors** 2008 (2) ZLR 338 (H) at 341E-F and **Capital Radio (Pvt) Ltd v Broadcasting Authority of Zimbabwe & Ors** S-128-02.

Of significance are treaties made under the auspices of the International Labour Organisation (ILO), a United Nations specialized agency dealing with employment matters. These are called Conventions. There are also Recommendations which are ILO labour standards that amplify the conventions or provide guidelines on the direction states should take but are not legally binding on the states and not open for ratification.

Currently there are over 185 ILO Conventions, of which eight are

deemed core or fundamental. To date Zimbabwe has ratified all the core conventions and eighteen other conventions. These may be seen at: http:/www.ilp.org/ilolex/english

Besides ILO conventions there are also other important treaties that Zimbabwe has ratified, which provide for important labour standards. The Charter of Fundamental Social Rights in SADC, 2003 provides for basic labour and social security rights recognised in SADC. Internationally are; the Universal Declaration on Human Rights (1948); International Covenant on Economic, Social and Cultural Rights (1966); International Covenant on Civil and Political Rights (1966), and the Convention on the Elimination of all Forms of Discrimination against Women (1979).

Judicial Precedent

Judicial Precedent is a secondary source of labour law. It refers to a previous court decision which serves as a rule or guide for similar cases heard in the future. It is expressed in the maxim, **stare decisis et non quieta movere**.

Decisions of the High Court and Supreme Court bind all lower courts and of the Labour Court bind lower bodies like arbitrators – r 35 Labour Court Rules S.I. 59 of 2006.

The Supreme Court is not bound by its own decisions. What is binding is the essential reason for the decision, called the *ratio decidendi*, as opposed to secondary observations that are not essential to the decision, the *obiter dictum*. Decisions of appeals courts in other Roman – Dutch common law jurisdictions, like South Africa are not binding but are of persuasive authority

Decisions of the superior courts are found in the Zimbabwe Law Reports and electronic sites like **www.zimlii.org/zw** and **www.jsc.org.zw**.

Legal Writings

Authoritative writings of eminent jurists are a secondary source of law. The writings of writers like Grotius, Voet and so forth are of

importance on the principles of common law.

Custom

Customary law is a minor source of law. It may exist as trade usages in the industry or customary international law. The customary rules of local African people may also apply. For customary rules to be recognized as law, they must be of general application and used consistently over a period of time. A custom of 15 years of not working on Sunday was rejected by the court in **Agrifoods v Chiruka & Ors** S-50-03.

There has been minimum use of local customs in labour law both because of the racism of the colonial power and the fact that such rules were designed to deal with pre-capitalist societies. Yet local customs are a potential source of labour law. For instance they can be useful in interpreting what constitutes a reasonable cause for absence or "justifiable compassionate ground" for special leave. However, retrogressive customs which discriminate against women are invalid under s 80 (3) of the Constitution.

Prepared for NEC Zimbabwe Electricity and Energy Industry

by Munyaradzi Gwisai - 2015

Zimbabwe Labour Centre

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