

ZIMIND PUBLISHERS (PVT) LTD
versus
MINISTER OF PUBLIC SERVICE,
LABOUR AND SOCIAL WELFARE
and
ATTORNEY-GENERAL OF ZIMBABWE

HIGH JCOURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 9 March 2017 and 15 March 2017

Opposed Matter

T Zhuwarara, for the applicant
E Mukucha, for the respondents

MATANDA-MOYO J: Before hearing this matter I heard an application filed by the respondents under case number HC 8966/16 for condonation for delay in filing opposing papers in this matter. The applicant herein did not oppose such application on condition the respondents pay costs for such application. Mr *Mukucha* left the issue of costs in the court's hands. It is my view that it is appropriate that the respondents pay such costs.

The applicant herein seeks a declaratur in the following:

1. That s 18 of the Labour Amendment Act No. 5 of 2015 is inconsistent with ss 56 (1) 65 (1) 71 (2) and 86 of the Constitution of Zimbabwe and is therefore invalid. Accordingly it is ordered that:
2. Section s 18 of the Labour Amendment Act No. 5 of 2015 shall be and is hereby struck out of the Labour Act [*Chapter 28:01*].
3. There shall be no order as to costs except in the event that their application in opposed in which event the opposing respondent shall indemnify applicants in respect of its costs.

The brief facts of this matter are that the applicant is accompany duly incorporated in terms of the laws of Zimbabwe and carrying on business in Zimbabwe. On 27 July 2015 and on

20 August 2015 the applicant terminated by way of notice, in terms of the prevailing laws, the contracts of employment of its seventy five employees. Such employees were paid their salaries for the months of July and August and in addition three months salary in lieu of notice. The Labour Act was subsequently amended by Labour Amendment Act, Number 5 of 2015. The effect of the amendment was to give those employees, whose contracts of employment had been terminated on or after 17 July 2015 a right to be paid compensation. Such law had retrospective effect in that it sought to create rights retrospectively. The applicant's former employees have approached the applicant to enforce their rights in terms of the new law. Aggrieved by that action the applicant through this application seeks a declaratur that amendment unconstitutional, in so far as it imposes post-conduct obligations.

Counsel for the applicant argued that s 18 of the Labour Amendment Act No. 5/15 is clearly constitutionally offensive as it violates the applicant's fundamental rights as enshrined in ss 56 (1), 65(1), 71 (2) and (3) of the Constitution. In so far as it imposes post conduct obligations on the applicant, the amendment offends the applicant's right to the protection and benefit of the law. Such amendment also offends the applicant's right to property as it imposes a pecuniary obligation on the applicant.

The applicant complains against the amendment which it submitted provides for punishment after carrying out a conduct which was lawful then. The information which punishes certain conduct must be available before the conduct. If a conduct is lawful then, and ones acts in terms of the law, such conduct cannot in future be impugned.

Counsel for the applicant also argued that the amendment has the effect of levying a pecuniary obligation on the applicant. It therefore forcibly deprives the applicant of its money to the benefit of third parties who were never entitled to such money at the time. The amendment abrogates s 71 (3) of the Constitution. In this proposition the applicant referred me to the cases of *First National Bank of SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another*; *First National Bank of SA Limited t/a Wesbank v Minister of Finance* 2002 (4) SA 768 and *Mike Campbell (Pvt) Ltd & Another v Minister of National Security and Others* S 49/07. The applicant argued therefore that the amendment offends s 71 (3) of the constitution.

The applicant further argued that such amendment is not justifiable in a democratic society. Creating legislation with retrospective effect is the hallmark of tyranny as such laws place citizens at the mercy of government. The applicant also referred me to the case of *Agere v Nyambuya* 1985 (2) ZLR 336 (SC). Counsel for the applicant argued that the ordinary supposition is that legislation is crafted to deal with future events and circumstances, and has never been designed to deal with past demeanors. For that proposition counsel referred me to the following cases; *Principal Immigration Officer v Purshotam* 1928 AD 435 at 450; *R v Magolis and Others* 1936 OPD 143 at 144; *Batman v Dempers* 1952 (2) SA 577A at 580 C; and *Katzenellenbogen Ltd v Mhillin* 1977 (4) SA 855 (A) at 884 D.

Democratic societies have held against legislation in retrospect. They have generally believed that to be unfair. It is the applicant's belief that the amendment can never be justifiable in a democracy.

The applicant argued that the amendment is shockingly unfair and creates an imbalance in employment relationships. The amendment obliges an employer to remunerate an employee who performed no duties towards the employer. Our law recognizes the right of an employee to receive payment only when work is done. The applicant referred me to the case of *National Railways of Zimbabwe v Zimbabwe Railways Artisan Union and Others* 2005 (1) ZLR 341 (S).

The amendment also seeks to exonerate employees from the effects and consequences of contracts they freely entered into. Such circumstances are contrary to public policy. See *Delta Operations (Pvt) Ltd v Origen Corporation (Pvt) Ltd* 2007 (2) ZLR 81 (S). The amendment thus violates s 61 (1) of the constitution.

Counsel for the respondent argued that the observation of the presumption against retrospectively in the interpretation of statutes is a fundamental principle of our law. He quoted R. M. M. King, *Manual on Legislative Drafting* where he says:

“It is wrong in principle to change the character of past Acts and transactions which were validly carried out upon the basics of the then existing law”

Counsel for the respondents submitted that generally legislation should not have retrospective effect. However he argued that there are exceptions to that general rule and that s 18 of the Labour Amendment Act falls under those exceptions.

The respondent argued that it becomes lawful to legislate retrospectively where there is need to clear cases of injustice or disgrace. He quoted Lord Denning in the case of *Escoigue Properties v Inland Revenue Commission* [1958 1 ALLER 406 (HL)] at 414 D where he said:

“A statute is not passed in vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To amice at its true meaning, you should know the circumstances with reference to which the words were asked, and what was the object, appearing from those circumstances, which Parliament had in view.”

Counsel for the respondent argued that the Amendment came about to correct a situation which government perceived as unjust. The country’s employees were being short changed by their employers which resulted in a public policy decision being taken to remedy the breach.

Once retrospectivity is clearly spelt out in an enactment and the purpose clearly defined the courts have generally not declared such as incompetent – See *Egunjobi v Federal Republic of Nigeria* (2002) FWLP (PT 105) @ 923-4 CA. It is respondent’s submission that where a piece of legislation confers a benefit to the beneficiary of the law retrospectively then such law is valid. In so far as s 18 seeks to protect a disadvantaged class it can never said to be contrary to s 65 (1) of the Constitution.

The respondent denied the Amendment offends s 71 (2) and (3) of the Constitution. The respondent further submitted that the Amendment is justifiable in a democratic society in terms of s 86 of the Constitution. The Amendment brought sanity in the society in the form of public order.

From the onset the parties are agreeable that the Labour Amendment Act No. 5/15 was intended to operate retrospectively and take away vested rights in an employer of terminating an employment contract upon giving three months’ notice without further paying compensation. It is correct that such Amendment has retrospective effect. It is also apparent that the amendment was a response to the Supreme Court decision in the case of *Don Nyamande and Anor v Zuva Petroleum (Pvt) Ltd* SC 281/14 which permitted employers to terminate employment contracts on three months’ notice. What constitutes retrospectivity was enunciated in *Walls v Walls* 1996 (2) ZLR 117 (H) at 158 D where the court quoted a passage from *Crime on Statute Law* 5ed p 357 as follows:

“A statute is deemed to be retrospective which takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past.”

The parties then differs on whether such retrospectivity is lawful or not. Section 3 of the Constitution recognises the fact that ‘the principles of good governance which bind the State and all institutions and agencies of government at every level, include – due respect for vested rights. Section 132 of the Constitution provides for commencement of Acts Parliament. It provides.

“An Act of Parliament comes into operation at the beginning of the day on which it is published in the Gazette, or at the beginning of any other day that may be specified in the Act on some other enactment.”

Section 17 (1) (b) and (c) of the Interpretation Act [*Chapter 1:01*] provides as follows:

“17. Effect of repeal of enactment

1. Where an enactment repeals another enactment, the repeal shall not
- 1.
2. affect the previous operation of any enactment repealed or anything duly done or suffered under the enactment so repealed; or
3. affect any right, privilege, obligation or liability acquired, accrued or incurred under the enactment so repealed.”

In the case of *Nkomo and Anor v Attorney-General and Ors* 1993 (2) ZLR 422 (S) GUBBAY CJ said at p 428 H – 429 C:

“It is a cardinal rule in our law dating probably from Codex 1:14:7, that there is a strong presumption against a retrospective construction See *Agere v Nyambuya* 1985 (2) ZLR 336 (S) at 3389 – 339G. Even where a statutory provision is expressly stated to be retrospective in its operation, it is not to be treated as in anyway affecting act and transactions which have already been completed, or which stand to be completed shortly, or in respect of which action is pending or has been instituted but not yet decided, unless such a construction appears clearly from the language used or arises by necessary implication. See *Beel v Voorsitter van die Raskassis Fikasier aa den Andere* 1968 (2) SA 678 A at 684 E-F

Care must always be taken to ensure that the retrospectivity is continued to the exact extent which the section of the Act provides. See *Attwood v Minister of Justice and Anor* 1960 (4) SA 911 (T) at 914 F; *Lentell v Registrar General and Anor* 1979 (2) RLR 465 (A) at 470 F-G.”

It is trite that there is a presumption against retrospectivity of statutes. But where the enactment in question provides for retrospectivity then such presumption is rebutted. As a rule, without clear words to the contrary, statutes do not apply to the past. They apply to a future state or circumstance.

Section 18 of the labour Amendment No. 5 of 2015 provides:

“18 Transitional provision s 12 of the Labour Act [*Chapter 28:01*] as amended by this Act applies to every employee whose services were terminated on three months’ notice on or after the 17th July 2015.”

The Labour Amendment No. 5 of 2015 came into operation on 26 August 2015.

Section 18 above clearly provides for retrospectivity as it provided that it would apply to all employees whose services were terminated on or after 17 July 2015. The enactment therefore specifically and clearly provides for retrospectivity.

The question which falls for determination is whether such retrospectively as provided is lawful. Generally the rule of law principle requires that the law should be capable of being known to everyone, so that everyone could comply. The doctrine of retrospectivity therefore sits uneasily with such principle. A law with retrospective application seems by its nature incapable of being known and complied with. A person cannot be expected to know of and comply with a law that does not yet exist.

In Australia the law is quite clear, that Parliament can validly enact retrospective laws – See *Polyukhovich v Commonwealth HCA 32* (1991). However in most cases there will be some sort of mitigating factor meaning that, the law although retrospective, is able to comply with the rule of law principle. For example the law is usually backdated to the date of an announcement by Government that the law would be enacted in future. As a result potential perpetrators are put on notice. It can be argued that the law is known and could therefore be complied with. In other words the “wrongful nature of the conduct ought to have been apparent to those who engaged in it.” Where no notice is issued the immorality of the offence should be significant and so obvious that there would be no injustice in retrospectively making it illegal.

Article 15 (1) of the *International Covenant on Covenant Civil and Political Rights* provides;

“No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.”

Section 18 of the Labour Amendment Act was brought about purportedly to restore sanity in the employment sector. It was also purportedly enacted to bring about the original

intention of the legislature of retrenchments rather than dismissal on notice for those employees who would have served companies for a long time. It could be argued that the retrospective legislation could be justified in that it sought to compensate those employees whose services were terminated on notice, who legitimately expected to serve in their positions until retirement.

Whilst the above reasoning may sound reasonable, I am of the view that s 18 offends s 3 (2) (k) of the Constitution which provides for due respect from vested rights. The employers had vested rights to terminate contracts of employees on notice. Taking away vested rights retrospectively cannot be justifiable in a democratic society.

Legislating against past lawful conduct breaches one's right to access and benefit to the law. At the time of the conduct, it must be clear to anyone whether the conduct is lawful or not. A person must take a choice well knowing the position of the law. See *Workmen's compensation commissioner v Jooste* 1997 (4) SA 418 SCA at 424F – 425 A; *National Director of public Prosecutions v Conoulus and Others* 2 000 (1) SA 1127 SCA. Counsel for the applicant referred me to *Chavhunduka v Minister of Home Affairs Zimbabwe and Another* 2 000 (4) SA (1) (ZS) and *Barthold v Germany* (1985) 7 EHRR 383 at 399.

The employees were lawfully terminated. To then declare on a later date that such terminations were unlawful is contrary to the principles natural justice. I have been referred by the applicant to a quotation from Blackstone; quoted by Sampford in *Retrospectivity and the Rule of Law* (Oxford University Press, New York 2006 at 13 that;

“There is still a more unreasonable method than this, which is called making of laws ex post facto; when after the action is committed, the legislation then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it, here it is impossible that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it, and all punishment for not abstaining must of consequence be cruel and unjust. All laws should be therefore made to commence *in futuro*, and be notified before their commencement, which is implied in the then “prescribed”.

Whilst it may be lawful to legislate retrospectivity, such legislation may not take away vested rights.

I am of the view that taking away vested rights is contrary to the Constitution. It is also not in conformity with the principle of the rule of law to prescribe a law ex post fact. Accordingly it is declared that;

1. Section 18 of the Labour Act No. 5 of 2015 is inconsistent with sections 3 (2) (k), 56 (1) and s 86 of the Constitution of Zimbabwe and is therefore invalid.
2. As a consequence the Registrar of the High Court is hereby directed to refer this matter to the Constitutional Court for determination in terms of s 167 (3) of the Constitution of Zimbabwe.

Gill Godlonton & Gerrans, applicant's legal practitioners
Civil Division of the Attorney General's Office, 1st respondent's legal practitioners