An Overview of The Supreme Court of Zimbabwe's Approach to Unfair Dismissal Cases.

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ABSTRACT

This paper outlines and describes the Supreme Court of Zimbabwe's approach to the resolution of unfair dismissal cases. The paper also critiques the procedural steps and requirements for a party aggrieved by a determination of the Labour Court in order to have an audience in the Supreme Court. Unfair dismissal in this paper is assessed based on two criterion namely substantive and procedural fairness. The paper argues that the Supreme Court's approaches to both procedural and substantive fairness are rooted in the common law where an employer's discretion to dismiss for misconduct going to the root of the employment relationship is not lightly interfered with. Such discretion can only be interfered with if it is shown that the employer's discretion to dismiss only when it is irrational, and outrageous in its defiance of logic or accepted moral standards that no sensible person who applied his mind to the question could have arrived at such a conclusion. The paper argues that the current approach by the Supreme Court of Zimbabwe is incompatible with the legislative aims of unfair dismissal laws, particularly Section 12B (4) of the Labour Act and Section 65 of the Constitution. The paper argues that there is need to shift from a unitarist approach to a pluralist approach where both employer and employee needs are considered, and the fairness of a dismissal is not only view through the lens of a reasonable employer but through the lens of an impartial adjudicator. In other words, the paper argues that while the employer has the right to dismiss the fairness of such dismissal is the preserve of the court.

Key words: Unfair Dismissal, Employment, Supreme Court of Zimbabwe, Labour Court.

INTRODUCTION

The Supreme Court of Zimbabwe (SCZ) sits at the apex of labour dispute settlement in Zimbabwe. It hears appeals from the Labour Court only on a question of law. Appeals against decisions of the Supreme Court can only be taken to the Constitutional Court only if and when the appeal raises a constitutional issue. The right not to be unfairly dismissed is provided for under Section 12B (1) of the Labour Act [Chapter 28.01] which provides that *"Every employee has the right not to be unfairly dismissed."* The right not to be unfairly dismissed can reasonably be inferred from the Constitutional Right to fair labour practices[1] and International Labour instruments[2]. Under International Labour Organisation (ILO) jurisprudence a fair dismissal has two components namely, substantive fairness and procedural fairness. This article discusses the SCZ's approach to both components of the concept of unfair dismissal. It is also worth noting that the Supreme Court's approach is assessed in light of the fact that although it is a general court of law, when it hears appeals from the Labour Court it is hearing appeals from a court of equity. The Labour Court is a creature of statute not common law, it derives its powers from the Labour Act. The Labour Act under Section 2A provides that *"the purpose of this Act is to advance social justice and democracy in the workplace by:-*

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

[1] Section 65

[2] See Termination of Employment Convention, 1982 (No. 158) and Termination of Employment Recommendation, 1982 (No. 166)

It is in this context that the Supreme Court of Zimbabwe's approach to unfair dismissals is discussed. The articles first discuss the procedural requirements for a litigant who wishes to appeal against a decision of the Labour Court and whether these requirements have any bearing on the approach adopted by the SCZ.

Appeals to the Supreme Court

Appeals against the decisions of the Labour Court of Zimbabwe (LCZ) lie with the SCZ. The SCZ hears appeals from the LCZ only on "a question of law."[3] A party wishing to appeal against a decision of the LCZ is required to seek leave from the President who made the decision or, in his or her absence, from any other President to appeal that decision.[4] Where leave to appeal has been denied or refused the party may seek leave to appeal from a judge of the SCZ.[5] The rationale for Section 92F was elucidated *in Ngazimbi v Murowa Diamonds* as follows:

> *The purpose of requiring leave before noting an appeal to be given by the President of the Labour Court or upon refusal, by the judge of the Supreme Court in terms of Section 92F(2) of the Act is to* ***prevent appeals not based on questions of law*** *getting to the Supreme Court. The right to appeal given by s 92F (1) is a limited right. The exercise of it is made conditional upon leave being granted.* [6]

Makarau JA (as she then was) went further to explain the SCZ's stance in accepting appeals from the LCZ in *ZIM v Kadungure* SC 115-2020 wherein she stated:

> *It is my understanding from the above authorities that broadly speaking, an appeal from the Labour Court to this Court is competent only if it questions what the law has said in other binding cases on the issue to be determined, presumably in matters where the court has discretion, or questions what the law is on the specific issues raised in the appeal or attacks the decision a quo on the facts as being irrational. The remit of this court in determining appeal from the court a quo is therefore fairly narrow. Put differently, the broad position of the law is that an appeal from the court a quo to this Court must call upon this Court to determine and pronounce on the correct and true rule of the law on the matter in dispute or, if based on the facts of the matter, to set aside the decision as being irrational. It cannot invite this court to revisit the entire dispute and exercise a fresh discretion in the matter.*

Section 90F can also be seen as defining the extent of the SCZ's jurisdiction in labour matters. The SCZ's jurisdiction in labour matters is therefore limited or restricted to appeals that only raise questions of law. The Labour Act therefore limits the circumstances a decision of a lower body can be appealed. This stance is also found in non-labour matters, for instance in *Nachipo and Nachipo v Maticha & 5 Others* SC 72-2022, Guvava JA had this to say:

> *It should always be borne in mind that, the rationale which is considered by this court is that, a wholly unrestricted right to appeal from every judicial decision by a lower court, is frowned upon and may have serious consequences. For instance, a wealthy party may, at every turn, and every ruling appeal thus causing immense problems and a grave injustice upon the other party who may not be so well heeled.*

What is a Question of Law?

Section 92F provides that the right of appeal to the SCZ is limited to questions of law. This is important in the sense that it implies that the SCZ is guided by lawfulness in its approach to labour matters. It is submitted that the granting of leave to appeal is not only dependent on "prospects of appeal" but on the President and/or Judge of the SCZ being satisfied that the appeal raises a question of law. What constitutes a question of law has been discussed in *Muzuva v United Bottlers.*[7] In this case the Court alluded to the fact that the phrase "question of law" has three possible meanings as follows:

[3] Section 92F (1) of the Labour Act.
[4] Section 92F (2) of the Labour Act
[5] Section 92F (3) of the Labour Act
[6] SC 27-2013
[7] 1994 (1) ZLR 217 (S)

1. *A question which the law itself has authoritatively answered to the exclusion of the right of the court to answer the question as it thinks fit in accordance with what is considered to be the truth and justice of the matter.*
2. *Second, it means a question as to what the law is. Thus, an appeal on a question of law means an appeal in which the question for argument and determination is what the true rule of law is on a certain matter.*
3. *And third, any question which is within the province of the judge instead of the jury is called a question of law.*

Gubbay CJ followed the explanation taken by Grosskopf JA in the South African case of *Media Workers' Association of South Africa & Others v Press Corporation of South Africa.*[8] This SA approach with regards to "*question of law*" has recently been clarified in *DPP, Western Cape v Schoeman*[9] where the court elaborated the three requirements that must be satisfied:

i. The question must be couched precisely as to leave no doubt on what the legal point is.

ii. The factual basis upon the appellant is relying on must be clear.

iii. The factual basis must be set out fully in the record together with the question of law.

It follows from these requirements that there must be precision and certainty not only on the factual basis on which the point of law is based but also regarding the question of law that was in issue at the court aquo.[10] However, in *National Foods v Magadza* the court appeared to expand the meaning of the phrase "question of law" when it ruled that: -

> *It is true that this court only has jurisdiction to hear an appeal from the Tribunal on a point of law. But clearly if there is a clear misdirection on the facts, it amounts to a misdirection in law. The giving of reasons that are bad in law constitutes a failure to hear and determine according to law.*[11]

The expanded scope of a question of law in *National Foods v Magadza* is subject to a rider in *Hama v NRZ*, where the SCZ qualified that the misdirection on facts must be irrational to amount to a misdirection in law. In the *Hama v NRZ* the Supreme Court stated that:

> *The general rule of the law, as regards irrationality, is that an appellate court will not interfere with the decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to decided could have arrived at such conclusion.*[12]

If there is no irrationality the leave will not be granted and ultimately the SCZ will not interfere with the original decision.

The relevance of Section 12B (4) in determining the fairness of a dismissal

In determining the appropriateness or fairness of a dismissal, it is critical to appreciate the applicable legal framework and principles concerning the powers of the LCZ in relation to their discretion in imposing a penalty. Of importance is the fact that the common law position has been significantly modified by the Labour Act, fair labour standards in terms of the Constitution and ILO standards. Section 12B(4) of the Labour Act provides for factors to be considered by a determining authority when deciding on a penalty. It provides as follows:

> *In any proceedings before a labour officer, designated agent or the Labour Court where the fairness of the dismissal of an employee is in issue, the adjudicating authority shall, in addition to considering the nature*

[8] 1992 (4) SA 791 (A)
[9] [2019] ZASCA 158
[10] *DPP Limpopo v Molope and Another* [2020] ZASCA 69
[11] SC 105-1995
[12] 1996 (1) ZLR 64 (S)

or gravity of any misconduct on the part of the dismissed employee, consider whether any mitigation of the misconduct avails to an extent that would have justified action other than dismissal, including the length of the employee's service, the employee's previous disciplinary record, the nature of the employment and any special personal circumstances of the employee.

In *Johnson v Unysis* the House of Lords remarked that:

Employment law requires a balancing of interests of employers and employees, with proper regard not only to the individual dignity and worth of the employees but also to the general economic interest. Subject to observance of fundamental human right, the point at which this balance should be struck is a matter for democratic decision.[13]

Whilst it is submitted that where a superior court takes the view that the lower body did not follow the guidelines provided for under Section 12B(4), such failure constitutes a misdirection which entitles it to interfere, the SCZ has taken a different approach in *Innscor Africa v Chimoto* the SCZ took the view that:

The unanimous view of the court is that the LCZ seriously misdirected itself in coming to the conclusion it did. The issue of prejudice was irrelevant to the assessment of an appropriate penalty because the purpose of the introduction of the docket system was to obviate dishonest conduct on the part of pizza makers. The finding that the pizza was only $4.00 was of no consequence. The offence committed involved a betrayal of trust and confidence reposed in the respondent by the appellant thereby going to the root of the relationship between the employer and the employee.[14]

It is clear that while the LCZ appears to take Section 12B(4) as a mandatory guideline in deciding the appropriate penalty.[15] The SCZ on the other hand pays lesser significance to the provision. The approach by the SCZ in the *Chimoto* case is at variance with the approach taken in *Coh Coh v Mativenga and Another* wherein McNally JA stated:

I incline to the view that where a code states that certain conduct "warrants" dismissal, it does not mean that where the conduct is proved dismissal must inevitably follow. For example, "wilful destruction of company property" is conduct which warrants dismissal (I speak from memory, not having a copy of the code). Yet I would not think that a worker who angrily snaps a company ballpoint pen in half could be dismissed for that offence. We must bear in mind that codes of conduct, being often drafted by laymen, should not be over-strictly interpreted. I draw the analogy in the criminal law where a person committing a particular offence is "liable" to suffer a particular penalty. It is clear that in a proper case a lesser penalty may be imposed.[16]

The LCZ's reference to section 12B(4) is also seen in its decisions in *Simba Masaiti v CMED* where Chidziva P noted that in failing to afford the appellant the chance to address in mitigation it meant that all the considerations in Section 12B(4) were not considered, consequently the employer cannot be expected to justify dismissal. Following the principle in *Coh Coh v Mativenga* the LCZ reversed the dismissal on the basis that:

The present is a proper case where a lesser sentence is called for. This is so in that he has worked for the respondent for 8 years. Nothing has been shown that he had a bad record. Further the value of the coupons has not been given and the appellant has since replaced those coupons. Dismissal was too harsh in the circumstances. A fine or a written warning would have sufficed in this case. Appellant has been out of employment since November 2010. That is enough punishment for him.[17]

It is submitted that the SCZ must give more significance to Section 12B(4) than it is currently doing, the approach in the *Coh Coh v Mativenga* is more relevant to labour matters than the narrow approach in the *Chimoto* case. Decision makers in disciplinary procedures while entitled some discretion with regards to sanctions, must pay

[13] [2011] IRLR 279
[14] Chimoto case ibid
[15] *Mupombwa v Minister of Education Sports & Culture* LC-H-09-14
[16] 2001 (1) ZLR 151
[17] LC-H-281-12

special attention to particular circumstances, mitigatory or aggravatory. Failure to consider the factors stated in Section 12B(4) renders employees address in mitigation pointless and a mockery of the legislative intention under those provisions.[18] The approach in the *Chimoto* and *Manyarara* cases essentially reduces hearing officers to robots who once satisfied that an act of misconduct has been proved dismissal becomes inevitable regardless of the circumstances.[19] The stance taken in *Chimoto* and *Manyarara* cases seems to entitle employees to dismiss for misconduct which maybe *"trivial, so inadvertent so aberrant or otherwise so excusable that the remedy of summary dismissal was not warranted."*[20]

This approach raises serious concerns on the substantive fairness of the SCZ approach. It may result in the rise of cases of disproportionate dismissals for minor misconduct or insignificant instances of misconduct or breaches of the company's procedures that have no consequences, damaging or otherwise[21], for employers have been held repeatedly to be capable of justifying a dismissal. This situation is troubling and runs contrary to the protective aims of the statute in introducing a right not to be unfairly dismissed.[22] It is submitted that the proper approach to Section 12B(4) is the one adopted and endorsed in *Tiger Brands v AFADWU and Others*[23] following on the Sidumo test formulation:

> *In approaching the dismissal dispute impartially, an [adjudicator] will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that has been breached. The [adjudicator] must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. A [adjudicator] has to determine whether a dismissal is fair or not. An [adjudicator] is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision, an [adjudicator] is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.*

While the decision to dismiss an employee belongs to the employer, the determination of fairness is the preserve of the court. The court's sense of fairness must prevail over the employer's discretion, such an approach guarantees industrial justice and peace. It is submitted that the interference with a sanction imposed by the employer is justified where the sanction is unfair or where the employer acted unfairly in imposing the sanction. The court is justified, and duty bound to declare unfair a dismissal sanction that is so excessive as to shock one's sense of fairness. In such a case the Commissioner has a duty to interfere.[24]

Supreme Court's Approach to Substantive Fairness

The first dimension of a fair dismissal is substantive fairness. Substantive fairness relates to the reason for terminating employment. It is therefore common to receive appeals which attack the substantive fairness or harshness of the dismissal. Where the substantive fairness of a dismissal decision is attacked the SCZ's approach is best understand by asking to two important questions.

a) What is the extent of the employer's discretion in imposing the penalty of dismissal?
b) Is it all misconduct which warrants dismissal?

Substantive fairness has two important elements. The first element is that there must be a 'valid' reason for the dismissal. The reason provided by the employer must be the genuine reason for the termination. If there no reason advanced by the employer, the dismissal is unfair. An employer cannot provide a reason that violates the Labour Act or is related to discrimination otherwise the dismissal falls under the category of automatically unfair dismissal. Article 4 of ILO Convention 158 provides for a good starting point in determining the fairness of a dismissal:

[18] Section 12B(4) of the Labour Act (28.01)
[19] *Nyamhunga v Hwange Colliery Company* LC-H-378-12
[20] *Wala v Freda Rebecca Mine* SC 56-2016 and *TSF v Chimwala* 1987 920 ZLR 210 (S)
[21] *Robert Bates Wrekin Landscaping v Knight* (2014) UKEAT/164/2013
[22] P Collins PM, Finding fault in the Law of Unfair Dismissal: The Insubstantiality of reasons for Dismissal, 2022, Vol 51, *Industrial Law Journal*
[23] [2023] ZALCJHB 301
[24] *County Fair Food v CCMA* 1999 20 ILJ 1710

> *Employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.*

To comply with the 'valid reason' test, an employer must be satisfied, judged objectively, that the misconduct, with which the employee is charged, is supported by sufficient evidence/proof.[25] It must be noted that it is not for an employee to prove his innocence. It is for the employer to prove the employee's guilt. The employer is only required to prove the employee's guilt on a balance of probabilities.[26] The employer must satisfy the court that the facts on which it relied on to justify the dismissal existed. Suspicion of misconduct and or investigation alone is not sufficient to warrant dismissal. Substantive fairness also requires that the reason for the dismissal does not violate the rules of natural justice and passes reasonableness test.[27] Impliedly and consequently the principle of proportionality applies. The employer's response in terms of penalty must be proportional to the offence.

The second element of substantive fairness under the SCZ's approach arises once the reason has been accepted as valid. It requires the court to make an assessment whether in the circumstances it was reasonable to dismiss for that reason. The SCZ has summarised these elements in *Circle Cement v Nyawasha*, when it held:

> *Once the employer had taken a serious view of the act of misconduct committed by the employee to the extent that it considered it to be a repudiation of contract which it accepted by dismissing her from employment the question of a penalty less severe being available for consideration would not arise* ***unless it was established that the employer acted unreasonably in having a serious view of the offence committed by the employee****.*[28]

Where the substantive fairness of a dismissal is in question, the approach of the SCZ seems to be rooted in common law where the employer is given the discretion to mete out dismissal for any act of misconduct if the employer has formed the view that such misconduct goes to the root of the employment contract.[29] This has been clearly stated in *Malimanjani v CABS* where the SCZ stated that *"the issue of what punishment to impose after an employee is found guilty of an act of misconduct is clearly one of discretion."*[30]

The SCZ *Mashonaland Turf Club v Mutangadura* in was more emphatic in its upholding of managerial discretion in dismissing an employee, where Ziyambi JA said:

> *In the exercise of their powers in terms of s 12B (4) of the Labour Act, the Labour Court and arbitrators must be reminded that that the section does not confer upon them an unbounded power to alter a penalty of dismissal imposed by an employer just because they disagree with it. In the absence of a misdirection or unreasonableness on the part of the employer in arriving at the decision to dismiss an employee, an appeal court will generally not interfere with the exercise of the employer's discretion to dismiss an employee found guilty of a misconduct which goes to the root of the contract of employment.*[31]

This approach is aligned with the South African approach as enunciated in *Herholdt v Nedbank* where it was held that *"this Court has made it clear that it will not interfere with a decision of the Labour Appeal Court only because it considers it to be wrong. There must, in addition, be special circumstances that take it out of the ordinary.*"[32] The case of *Standard Chartered Bank Zimbabwe v Chapuka* summarises the SCZ approach to substantive fairness as follows:

[25] *Phirinyane v Batignolles* [1995] BLR 1 (IC)
[26] *ZESA v Dera* 1998 (1) ZLR 500 (S)
[27] SC 60-2003
[28] SC 60-2003
[29] *Toyota Zimbabwe v Posi* 2008 (1) ZLR 173 (S)
[30] 2007 (2)0 ZLR 77 (S)
[31] SC 05-2012
[32] [2013] 34 ILJ 2795 (SCA)

> *Conduct which is found to be inconsistent or incompatible with the fulfilment of the express or implied conditions of a contract of employment goes to the root of the relationship between an employer and an employee, giving the former prima facie right to dismiss the latter.*[33]

This approach is *"extremely conservative and formalistic in its outlook."*[34] It ignores the intention of Section 12B(4) which requires a court to consider fairness by considering the circumstances without necessarily deferring to the employer's discretion. The approach also requires a relook, in line with Section 65(1), of the Constitution and judicial development in other countries. Fairness of a dismissal needs to be assessed by an independent body without deference to the employer.[35]

Matsikidze asserts that the SCZ has tended to be more conservative in its approach on labour matters as it generally leans on lawfulness rather than fairness. For example, a termination of employment may be lawful (procedurally fair) but unfair in terms of its substantive aspects.[36] The assertion by Matsikidze is also supported by the view in *Toyota Zimbabwe v Posi*[37] where the SCZ held that the Labour Act contains no provision which either expressly or by necessary implication purports to alter the common law principle that an employer has a right to dismiss an employee for misconduct going to the root of the employment relationship. Once it was accepted that the misconduct the appellant was found guilty of went to the root of the contract of employment, dismissal was the appropriate penalty. Generally, an appellate court will not interfere with decisions of lower courts on substantive correctness of a decision unless the decision by the court aquo was so irrational that no court would arrive at such a decision. These principles have also been applied by the SCA of South Africa, in *Rustenburg Platinum Mines v CCMA.*[38] The SCA approach, although later rejected by the Constitutional Court in the Sidumo case is similar to the SCZ's approach in *Zinwa v Moyounotsva.*[39]

A key question that often arises in appeals that are based on substantive fairness is how an employer makes a distinction between offences warranting dismissal and those warranting warnings. While it can be submitted that gross offences warrant dismissal it is not always as clear cut and as noted in *Coh Coh v Mativenga* and *Malimanjani v CABS.* Some codes of conduct fail to properly categorise acts of misconduct and applicable sanctions.[40] The SCZ has formulated the approach that the seriousness of a misconduct is measured by looking at its effect on the employment relationship and the contract of employment. If the misconduct the appellant was found guilty of went to the root of the contract of employment in that it had the effect of eroding the trust the employer reposed in him the dismissal sanction is accepted as fair. This approach or test of whether misconduct is serious enough to warrant dismissal was set in *Tobacco Sales Floors v Chimwala* where the McNally JA observed that:

> *I consider that the seriousness of the misconduct is to be measured by whether it is 'inconsistent with the fulfilment of the express or implied conditions of his contract'. If it is, then it is serious enough prima facie to warrant summary dismissal. Then it is up to the employee to show that his misconduct, though technically inconsistent with the fulfilment of the conditions of his contract, was so trivial, so inadvertent, so aberrant or otherwise so excusable, that the remedy of summary dismissal was not warranted.*[41]

Several scholars have begun to call for greater scrutiny by the courts on the reasons provided by employers to justify dismissal[42] this is because *"[t]he case law under the head of "substantial reason" has become too friendly to managerial prerogative in a statute explicitly proclaiming itself to provide a "right" to protection against*

[33] 2005 (1) ZLR 52 (S)
[34] MG Gwanyanya 'Legal formalism and the new Constitution: An analysis of the recent Zimbabwe Supreme Court decision in Nyamande & Another v Zuva Petroleum' (2016) 16 African Human Rights Law Journal 283-299
[35] M Gwanyanya, Legal Formalism and the New Constitution: An Analysis of the Recent Zimbabwe Supreme Court decision in Nyamande v Zuva Petroleum. 2016 Vol. 16 No. 1 *African Human Rights Law Journal*
[36] Matsikidze (2017) ibid
[37] Supra
[38] [2006] 11 BLLR 1021 (SCA);,
[39] Supra
[40] Labour (National Employment Code of Conduct) Regulations, 2006. (SI 15 of 2006)
[41] 1987 (2) ZLR 210 SC
[42] H Collins. *Justice in Dismissal: The Law of termination of Employment.* Oxford Clarendon Press 1992

unfair dismissal."[43] It is submitted that given the Labour Act's aims of social justices and guarantees of fair dismissal, there is need for greater scrutiny by the courts of the reasons provided by the employer. As it stands the employer's decisions to dismiss can only be challenged on the basis of lack of evidence which may also be difficult given that the standard of proof is on a balance of probabilities. The current approach, it is submitted, undermines the principle that the statutory provisions are designed to ensure that the dismissed employee receive a proper assessment by the tribunal of the reasons advanced by the employer for the dismissal. Instead, the judgment of the employer is set up as that prima facie to be applied.

Under what circumstances can the Supreme Court reverse a dismissal on substantive grounds?

In light of the wide discretion afforded employers in deciding on the penalty it may be difficult to find instances where the SCZ has upheld an appeal purely on substantive grounds. In *Marvo Stationery v Jokwani & Ors* the SCZ interfered with the employer's decision to dismiss on the basis that:

> *The evidence does not establish that the (offence of) gambling was serious. If anything, the evidence establishes that it was a one-off occurrence, ... I arrive at my conclusion on the basis that although gambling during working hours is, prima facie, conduct that is in breach of an employee's contractual obligation, such a breach has to be of a serious nature before it can amount to a contravention of s 3.8.1 of the Code. The gambling revealed on the papers is not of such a serious nature as would amount to a contravention of the Code.*[44]

The case of *Celsys v Ndeleziwa* also provides some indication of when the SCZ can accept an appeal, in this case it was held that:

> *In short, while the respondent admits to having acted contrary to the express or implied conditions of his employment, I find myself in agreement with the conclusion of NEC and the court a quo that the misconduct was not one that, on any reasonable basis, merited the harsh penalty of dismissal. In view of this I find that the appellant acted unreasonably in dismissing the respondent from employment, and therefore misdirected itself.*[45]

In the above cases the courts looked at other alternative forms of disciplinary sanctions other than dismissal, and arrived at the conclusion that dismissal was unfair under the circumstances. This follows the dictum in *Enterprise Foods v Allen*, where it was held that *"the court must examine whether there is a fair reason to dismiss. If there are two rational solutions one of which preserves the job, it is the one that should be adopted by the employer."*[46] Problematically, a dismissal in such circumstances would still be considered fair, as it falls within the band of reasonableness, and courts would still defer to the employer. Expectedly, this approach is under threat from recent cases in the UK and South Africa. In *Quintiles Commercial UK v Barongo*[47] the EAT held that the Employment Tribunal erred in holding that a dismissal without warning for 'serious' misconduct (as distinct from 'gross' misconduct) was unfair. The EAT held that a dismissal even if not categorised as 'gross' is capable of being a fair dismissal provided it is for a reason related to the employee's conduct. In *Eskort v Mogotsi & CCMA*[48] an employee was charged and dismissed for failing to adhere to Covid-19 safety protocols. However, the employer's code categorized the offence as a schedule 3 offence warranting a final written warning. The employee challenged the dismissal on the basis that the offences warranted a final warning not dismissal as per the schedule of offences in the employer's code. The CCMA found that the dismissal was therefore not appropriate. The employer appealed against the arbitrator's decision arguing that, notwithstanding the sanctions provided for in the code, the CCMA had to make an inquiry into the appropriateness of the dismissal sanction in light of the nature of the offence and the circumstances of the offence. The employer argued further that under the circumstances the offence was of a gross nature and serious enough to warrant dismissal. The Labour Court agreed that once the commissioner/arbitrator accepted that the offence was serious he/she was bound to accept

[43] P Collins, Finding Fault in the Law of Unfair Dismissal Law. The Insubstantiality of reasons for dismissal. 2022 Vol 51 No. 3 *Industrial Law Journal*
[44] 2005 (2) ZLR 261 (S)
[45] SC 49-2015
[46] [2004] ZALAC 5
[47] [2018] UKEAT 0255
[48] [2021] 42 ILJ 1201 (LC)

the employer's discretion to impose the dismissal as appropriate. The Labour Court thus upheld the initial dismissal.

The interference with employer's discretion only happens in exceptional cases and must be seen as exceptions to the general rule that appeal courts should not lightly alter penalties of dismissal without showing that there was gross unreasonableness, mala fide or capriciousness on the part of the decision maker.[49]

The Supreme Court Approach to Procedural Fairness

Procedural fairness relates to the pre-dismissal steps taken by an employer. The basic requirement for a procedurally fair dismissal is set out in Article 7 of ILO Convention 158 of 1982, which article reads as follows:

> *[t]he employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided with an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity.*

The rules of natural justice form the basis of procedural fairness. These are derived from the common law, conventions and recommendations of the ILO, and employment codes of conduct.[50] The case of *Dalny Mine v Banda*[51] is the leading case on procedural irregularities. The most significant case before the Dalny Mine case was *MMCZ v Mazvimavi*[52] where the employee was charged with various acts of misconduct which the disciplinary committee found him guilty and recommended his dismissal. The dismissal was endorsed by the General Manager. The employee appealed to the then Labour Relations Tribunal (LRT) under Section 101 of the then Labour Relations Act. The Tribunal reversed, the dismissal based on a number of irregularities in the hearing among them:

1. The employee had been denied legal representation.
2. Improper composition of the committee (The Human Resources Manager had sat in the hearings as an "observer" but had actively influenced the outcome)
3. Violation of the nemo judex principle

The Tribunal having found that the dismissal was tainted by several irregularities ordered reinstatement of the employee. On appeal by the employer, the SCZ, upheld the tribunal's decision arguing that: -

> *What is plain is that in allowing Mr Sibanda (the Human Resources Manager) to be present, in a capacity other than a silent observer, the disciplinary committee went beyond the parameters of the code. It was an act impliedly forbidden. Thus, a procedural irregularity occurred which, if not vitiating the proceedings, rendered them voidable at the instance of the respondent. The irregularity was calculated to prejudice the respondent and was not shown by the Corporation not to have caused any prejudice.*[53]

In *Air Zimbabwe v Mlambo* McNally JA held that in case of procedural irregularities, the LCZ has three options available to it namely: -

a) It may confirm the original decision. It may remit the matter for a re-hearing; or

a) It may substitute its own determination for that appealed against.

The SCZ held that in the present case the court did not utilise any of these options. Once the LCZ made a finding that there had been serious irregularities it had only one option, which is to remit the issue for a hearing de novo. This is because the finding that the disciplinary proceedings were a nullity meant that the employee was never lawfully dismissed and must continue to be treated as an employee. The parties reverted to the status quo ante

[49] *Geza v ZFC* 1998 (1) ZLR 137 (SC)
[50] *Sebako & Another v Shona Gas* 2006 (1) BLR 86 (IC)
[51] 1999 (1) ZLR 220 (H)
[52] 1995 (2) ZLR 353 (S)
[53] Mazvimavi case supra

the "dismissal" that is, Suspension pending disciplinary hearing. McNally JA also presided over the *Dalny Mine v Banda* matter and stated the rule with regards to procedural irregularities as follows:

> *As a general rule it seems to me undesirable that labour relations matters should be decided on the basis of procedural irregularities. By this, I do not mean that such irregularities should be ignored. I mean that the procedural irregularities should be put right. This can be done in one of two ways:*
>
> (a) by remitting the matter for hearing de novo and in a procedurally correct manner.
>
> (b) by the Tribunal hearing the evidence de novo.[54]

In the aftermath of the Dalny Mine decisions courts have generally followed the rule that labour disputes should not be decided on technicalities. In *Standard Chartered Bank of Zimbabwe v Chikomwe and 211 Others*[55] the court followed the first option in the Dalny Mine case of remitting the dispute back for a fresh hearing (hearing de novo) procedurally prudent manner. In *Air Zimbabwe v Mnensa* the Court endorsed the approach taken in the *Chikomwe* case, and added that:

> *A person guilty of misconduct should not escape the consequences of his misdeeds simply because of a failure to conduct disciplinary proceedings properly by another employee. He should escape such consequences because he is innocent.*[56]

In *Nyahuma v Barclays Bank,* the SCZ set the requirement for vitiating proceeding as demonstratable prejudice. Sandura JA stated that:

> *I wish to state that it is not all procedural irregularities which vitiate proceedings. In order to succeed in having the proceedings set aside on the basis of a procedural irregularity, it must be shown that the party concerned was prejudiced by the irregularity.*[57]

This position was endorsed in *Sadziwani v NatPak* where the court summarised this position as follow:

> *It is our unanimous view that the court a quo correctly found that the procedural irregularities alleged by the appellant did not vitiate the disciplinary proceedings conducted by the respondent. Furthermore, we are satisfied that the Labour Court correctly found that no prejudice was occasioned to the appellant, as, in the circumstances of the case, he had received a fair hearing before the disciplinary committee and subsequently the Appeals Committee.*[58]

The court's approach to irregularities can be said to offer some flexibility and allows employers room to get away with some non-compliance. Since disciplinary hearings are held in terms employment codes of conduct, the approach to irregularities must also been reconciled with how the Courts have looked at Codes of conduct. The case of *Stuttafords Removals v Nyakutsikwa*[59] is one of the few cases that called for strict compliance with the code of conduct. The court held that it is the employer who develops employment codes and must be held to the standards they create in the code. An employee facing allegations and charges emanating from an employment code must have his matter decided in terms of that code. The flexible approach which accommodates non-compliance with procedural steps defies the essence of having the code in the first place. If statutory and contractual provisions are held to apply equally to both employers and employees as held in the Zuva case, then the same should be extended to the application of provisions in the code. If procedural non-compliance by the employer can be accepted, it must be accepted that minor transgressions also by the employee must be accepted such that the dismissals in the *ZB v Manyarara* and *Innscor v Chimoto* would be unfair on the basis that the offence was substantively immaterial.

[54] *Dalny Mine v Banda* 1999 (1) ZLR 220 (H)
[55] SC 77-2000
[56] SC 89-2004
[57] 2005 (2) ZLR 438 (S)
[58] SC 06-2017
[59] SC 108-2002

The true import of *Dalny Mine v Banda* is that once the Labour Court decides that the proceedings were fatally defective it has no choice but to order a hearing de novo so the defects can be corrected and matters are decided on the merits. The Labour Court is also equally entitled to determine the matter itself if it is of the view that the matter can be determined based on the evidence before or based on the record. The decision in Dalny Mine however, raises an important question which was also canvassed in *Eastern Highland Plantations v Mapeto & 136 Others*[60], that is, ***Does the Court have powers to remit?***

Power of the Court to Remit

There have been two contrasting SCZ decisions on the power of the Court to remit a matter. In *Mackenzie v Rio Tinto*[61] Chidyausiku CJ ruled that the power to remit is a power that is inherent in any appellate body that can only be ousted by a clear statutory provision to the contrary. On the contrary in *Eastern Highlands Plantations v Mapeto and 136 Others*[62] the court took a different view. The matter concerned an employer's appeals against a Court order to remit a matter to an arbitrator for a reconsideration of the dismissed employees' cases individually. The appeal was based on a restricted reading of Section 89(1) of the Labour Act. The employer's reading of the provision was that when determining an appeal in terms of Section 89, the LCZ does not have the power to remit a dispute to an arbitrator. Such powers are only available when the Labour Court is hearing an appeal in terms of Section 93(7). This contention found favour with Gowora JAA who started by stating that the Labour Court is a creature of statute and thus only capable of exercising only those powers that it is imbued with by the enabling statute. Thus, when the LCZ heard the appeal in terms of Section 89(1) it did not have this power to remit, the decision of the LCZ to remit was therefore not competent as the LCZ is not imbued with the power to order a remittal outside the perimeters of Section 93. As a creature of statute, by giving a remittal order the LCZ "*it assumed a power it did not possess*".

The SCZ in the *Eastern Highlands case* took a narrow approach to interpreting the Labour Act, contrary to the jurisprudence set in the Dalny Mine case, Section 2A of the Act and Section 65 of the constitution. A better view of the powers of the LCZ with regards to the power to remit is the one expressed by Chidyausiku CJ in *Mackenzie v Rio Tinto* when he said:

> *……An appeal court or a body vested with authority to hear an appeal has, at least, the jurisdiction to allow an appeal, dismiss an appeal, or remit the matter for a re-hearing. The jurisdiction to do any of the above is inherent in the authority to hear an appeal. Where the lawmaker does not wish the appeal court or authority to have any of the three above options the language of the statute has to be explicit. Thus, in the absence of explicit language or implication from the language that an appeal authority cannot remit a matter for a hearing de novo, the appeal court or authority has such jurisdiction.*[63]

The powers of the LCZ as a specialised platform for the resolution of labour disputes must be interpreted widely and purposively so as to allow it to fully meet the purpose of the Labour Act as per Section 2A of the Labour Act.

When are procedural irregularities fatal?

As held in the *Nyahuma Case* for disciplinary proceedings to be set aside, the employee must have suffered some prejudice. There are several decided cases which provide guidance as to when irregularities can be deemed to be fatal. The circumstances when proceedings can be vitiated by irregularities involve a gross violation of the natural principles of justice and these include:

a) Denial of the right to be heard[64]
b) Denial of the right to representation[65]

[60] SC 43-2016
[61] SC 144-2004
[62] SC 43-2016
[63] SC 144-2004
[64] SC 42-2001
[65] 2003 (1) ZLR 517 (H)

c) Inadequate notice[66]
d) Denial of access to witnesses for cross examination[67] [68]
e) Improper composition of a hearing panel[69]
f) Application of the wrong code[70]
g) Violation of the nemo judex principle[71]

Can an Employer mero motu correct Irregularities?

An employer may fail to follow the requisite steps as the code of conduct or apply the wrong code. When the employer later realises his/her mistake the question that arise is whether "*the employer can mero motu correct the irregularities*?"

This question was canvassed in two SCZ cases namely, *Madawo v Interfresh Holdings* and in *Munchville Investments v Mugavha*.[72] According to Marume (2021) labour law appears to recognize the employer's right to correct a wrongly adopted procedure in dismissing an employee by instituting fresh proceedings without falling foul of the functus officio principle. The author's observation is based on Chinhengo J's remarks in *Madawo v Interfresh Holdings* where he stated that *"if an employer recognizes that it has adopted an incorrect or inappropriate procedure in effecting a dismissal there is nothing to prevent him from adopting the correct procedure to effect the dismissal."*[73]

In *Munchville Investments v Mugavha*, Patel JA while accepting that the employer can correct the irregularities acknowledged the need to create some exceptions. Patel JA started by accepting that existing case law seems to follow the principle that labour matters must not be decided on technicalities. Consequently, an employer is entitled to rescind the improper proceedings and have a "*second bite of the cherry*" in the proper manner. However, there are situations where exceptions to this general rule must be created. The justification for the exceptions is to advance social justice at the workplace as required by Section 2A of the Labour Act. In the words of Patel JA:

> *The particular circumstances that would warrant such departure is the situation where the employer proceeds in a manner that evinces bad faith or where he actively and explicitly acquiesces to his participation in alternative proceedings for the resolution of any dispute with the employee. In the instant case, I take the view that the appellant acted disingenuously and clearly mala fide in the following respects. Firstly, the appellant only reversed the irregular dismissal of the respondent after the matter was referred to a labour officer and on the very day that it received the labour officer's notification to attend the conciliation hearing two weeks later. Secondly, and again quite insidiously, the appellant almost immediately thereafter instituted fresh disciplinary proceedings and hurriedly concluded them, fully aware of the fact that the conciliation hearing before the labour officer was scheduled to take place only three days later.*[74]

The Supreme Court Approach to Non-Compliance with Supreme Court Rules in Unfair Dismissal Cases

The exercise of the right to appeal to the SCZ of Zimbabwe after granting of leave is instituted by way of a Notice of Appeal.[75] There are several procedural requirements with regards to manner and form the Notice of Appeal must take. Rule 59(3) of the Supreme Court Rules prescribes the form and substance of an appeal to the SCZ. Rule 59(4) provides that:

[66] 1997 (1) ZLR 220 (S)
[67] SI 15-2006
[68] HH169-2003
[69] SC 97-2002
[70] SC 26-2012
[71] *Muza v Batanai Supermarkets* LC-HH-2009
[72] SC 62-2019
[73] 2000(1) ZLR 669 (H)
[74] SC 62-2019
[75] Rule 59 (1) of the Rules of the Supreme Court 2018

(4) If the appellant does not serve the notice of appeal in compliance with subrule (2) as read with Rule 60, the appeal shall be regarded as abandoned and shall be deemed to have been dismissed."

According Gwisai there is debate around the extent to which non-compliance with the SCZ rules is fatal. Gwisai argues that a strict adherence to the rules effectively closes the doors to the SCZ for appellants many of whom cannot afford legal fees. Early SCZ jurisprudence on this seems to suggest that "*the practice of the courts though has not been encouraging reflecting an inarticulate premise of neoliberal unitarism."*[76]

In practice, the courts have adopted a conservative jurisprudence with emphasis on legal formality. In *Jensen v Avacolas* Korsah JA couched the applicable principle as:

> *A notice of appeal which does not comply with the rules is fatally defective and invalid. That is to say, it is a nullity. It is not only bad but incurably bad, and, unless the court is prepared to grant an application for condonation of the defect and to allow a proper notice to be filed, the appeal must be struck off the roll with costs"*[77]

Similarly, in *Tamanikwa and Another vs ZIMDEF* Bhunu JA dismissed an application to amend the notice and struck off the appeal for failure to specify *"the exact nature of the relief sought,"* holding that:

> *It is settled law that save in exceptional circumstances, the term 'shall' denote the law maker's intention to render the rule mandatory. This Court has ruled on numerous occasions that failure to comply with mandatory provisions of the Rules of court will render an appeal a nullity.*[78]

In *Matanhire v BP & Shell Marketing Services*, the court went a step further to state that:

> *It is not usual to write a judgment on a matter that has been struck off the roll… This judgment has been written for purposes of drawing the attention of legal practitioners to the fact that all the matters required by the Rules of Court to be stated in a valid notice of appeal are of equal importance so that failure to state one of them renders the notice of appeal invalid.*[79]

However, Mathonsi JA in *Mazambani vs International Export Trading Company and Anor* took a different approach when stated "*This is a court of justice which is required to resolve the real issues between the parties. It should not dabble too much into small technicalities"*[80]. Gwisai argues that in line with the purpose of the Labour Act and jurisprudence set in *Zhakata v Mandoza NO and NMB* it must be appreciated that:

> *A cornerstone of labour justice is that access to the courts be fully facilitated, and formalities kept to a minimum. Yet as pointed out in Mazambani, the use of technicalities has become the bane of courts in Zimbabwe with devastating effect on ordinary workers and poor litigants.*[81]

The Mazambani case developed a jurisprudence that marks a departure from the conservative approach of the past which *"is consistent with the doctrine of rule of law and equal protection of the law. Overemphasis on technicalities places a premium on legal formality over substantive justice, which promotes abuse of courts especially by deep-pocketed litigants."*[82]

The SCZ in *Mapondera & 55 Others v Freda Rebecca Gold Mine* following on the ratio in the Mazambani case held that:-

> *Because of their legal training and the involvement of lawyers, Labour Court judges often stray into the morass of legal jargon and technicalities much to the bewilderment of the unsophisticated litigants. This*

[76] M Gwisai, Access to Labour Justice and Procedural barriers in Commencement of Proceedings: A Paradigm shift in Zimbabwean Court Practice or A judicial mirage. 2021 Vol. No. 1 *The Global Labour Rights Report*
[77] 1993 (1) ZLR 216 (S)
[78] SC 73-2017
[79] SC 113-2004
[80] SC 88-2020
[81] Gwisai (2021) supra
[82] Supra

> *unwelcome tendency has the undesirable effect of mystifying industrial legal proceedings thereby clouding the dispensation of industrial justice. It therefore acts as a barrier to accessing industrial justice. This prompted McNally JA in Dalny Mine v Banda to remark that…….*

The Mazambani and Mapondera cases can be taken as authorities for the proposition that the prime role of a court is to dispense *"simple justice between the parties without dwelling too much on legal technicalities. It is also self-evident that the general courts of law are beginning to mellow and drift towards the idea of correction of simple procedural errors to do real and substantial justice."*

In employment codes courts must strive to give a wide liberal interpretation that is not entangled in technicalities to deliver social justice based on equitable labour standards. It is submitted that the approach by Mathonsi JA in Mazambani is the better view and more suitable to labour matters. It is also more aligned to Section 85(3) of the Constitution of Zimbabwe which provides that:

> *(3) The rules of every court must provide for the procedure to be followed in cases where relief is sought under subsection (1), and those rules must ensure that-*
>
> *a) the right to approach the court under subsection (1) is fully facilitated;*
> *b) formalities relating to the proceedings, including their commencement, are kept to a minimum;*
> *c) the court, while observing the rules of natural justice, is not unreasonably restricted by procedural technicalities;*

CONCLUSION

From a discussion of the cases above, the SCZ approach to unfair dismissal cases can be said to be rooted in the common law and unitarist perspective. It recognises and upholds managerial prerogative by overlooking procedural irregularities during disciplinary proceedings and accepting wider discretion to the employer in deciding whether to dismiss or not. The SCZ's approach fits into the words of Russian jurist, Kiselyov that a principal feature of labour law under capitalism is;

> *The class partisan character of the institutions of enforcement of labour law especially at the highest levels of the judiciary which determine the principles of court practice and rectify 'incorrect' decisions made by the lower courts in favour of workers and trade unions to ensure the continued dominance of the capitalist class.*[83]

It is submitted that the SCZ's approach is at odds with ILO jurisprudence and unfair dismissal legislation in that it treats employment contracts like ordinary contracts which should be governed by the common law rules of contract. This renders the unfair dismissal legislative provisions meaningless in many instances. The dictates of fairness, justice and equity must be read into employment contracts. The reasons why Section 65 of the Constitution and the Labour Act were enacted was to balance the relationship between employer and employee so that the relationship can be guided on the principles of fairness.[84] It would seem that the Courts have failed to heed the lawmaker's intention in labour matters. As Davies puts it, *'it seems to be quite difficult for Parliament to alter the judges' perception of their proper place in employment law'.*[85]

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