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RESIGNATION OF AN EMPLOYEE UNDER ZIMBABWEAN LABOUR LAW: A UNILATERAL ACT

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1. Introduction

The common law recognizes the right of an employee to terminate a contract of employment by giving the employer the agreed notice period or reasonable notice.¹ This is an inherent feature of a contract of employment for an indefinite period and when notice is given the contract is regarded as having been lawfully terminated.² Termination on notice at the instance of the employee is referred to as resignation and is not a dismissal.³ It is statutorily recognized in s12 (4) of the Labour Act [Chapter 28:01] (the LA)⁴ which governs the time periods that apply when a contract of employment is terminated on notice at the instance of either the employer or employee. Though the Labour Amendment Act No. 5 of 2015 (the LAA), in s12 (4a), caveated the employer's right to terminate the contract of employment on notice, the employee's right to resign on notice at any time was retained. Notwithstanding, resignation in Zimbabwe is heavily regulated by the common law.

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¹ It is in this context that Grogan J in *Workplace Law* (2000) 72-3 states that;

"Both the employee and the employer may, by giving the statutory or agreed or reasonable notice terminate the contract of employment. That a contract of employment has been entered into does not under the common law or statutory law give either a vested right to the continuance of the resulting employment relationship in perpetuity. Consequently, either party may give the other agreed or, in the absence of agreement on this point, the prescribed notice of termination."

² As for a fixed term contract, none of the parties has the right to terminate the contract prior to the expiry of the fixed period. It is not an inherent feature of fixed term contracts. It can only be terminated on notice if the contract provides for such termination, otherwise any termination would amount to repudiation. See Wallis MJD, *Labour and Employment Law* (1992) 5-10; Gwisai M *Labour and Employment Law in Zimbabwe* (2006) 148; *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49.

³ A resignation is termination at the instance of the employee whilst a dismissal is termination at the behest of the employer. See van Niekerk A *et al*, *Law @ Work* (2012) 224.

⁴ In its own words section 12(4) of the LA provides as follows;

"(4) Except where a longer period of notice has been provided for under a contract of employment or in any relevant enactment, and subject to subsections (5), (6) and (7), notice of termination of employment to be given by either party shall be:

- (a) three months' notice in the case of a contract without limit of time or a contract for a period of two years or more,
- (b) two months in the case of a contract for a period of one year or more but less than two years,
- (c) one month in the case of a contract for a period of six months or more but less than one year,
- (d) two weeks in the case of a contract for a period of three months or more but less than six months,
- (e) one day in the case of a contract for a period of less than three months in the case of casual work or seasonal work."

Usually the legal act of resignation is unambiguous whilst in some cases it is not as straightforward as it seems. This often results in courts being called upon to determine whether an employee resigned or not. Some of the problematic situations involve cases where employees facing disciplinary action resign impulsively so as to avoid the stigma associated with a dismissal, but later on regret the act and attempt to resurrect the contract by withdrawing the resignation. Despite resignation, some employers have proceeded to conduct disciplinary hearings against employees. It is also common for employers to refuse to accept an employee's resignation. In other instances, it is not unusual for employees to allege that when they resigned they did not appreciate the consequences of their actions due to emotional stress or that it was a moment of weakness or madness. Others claim that they resigned under protest, undue influence or duress rendering the termination constructive dismissal. Though the demise of the employment relationship is brought by an employee's voluntary and deliberate conduct, the act of resignation has in some cases proved difficult to comprehend. This has inevitably raised several questions relating to the true nature of the juristic act constituted by resignation.

There are various questions that have arisen regarding resignation, and both the legislature and the judiciary have gone a long way in answering these questions. Various academic writers have weighed in, creating a lot of relevant jurisprudence on this issue. The questions vary from the simple and straightforward to the complicated. For instance, what in essence constitutes a resignation? How should resignation be communicated, and at what stage does resignation become effective? What is the effect of a resignation on the employment relationship? Is there an obligation on the employer to accept or reject a resignation? What are the remedies available to an employer against an employee who resigns without giving notice? Can a resignation be withdrawn by an employee? Can an employer continue with disciplinary proceedings if an employee resigns so as to avoid such proceedings? Is it possible for an employee who has committed an act of misconduct to be given an option to resign or face disciplinary action? What is the difference between resignation and constructive dismissal, retirement, retrenchment, and mutual termination? Is an employee entitled to any terminal benefits on resignation? This article attempts to ascertain the true

nature of the legal act of resignation and debunk the fallacies associated with resignation.⁵ In essence, it sheds some light on the diverse questions raised above and the legal and practical implications of the legal provisions relating to resignation. The mechanics of resignation will further be discussed against the backdrop of the abovementioned problematic questions. Critical to this discussion are rights of both employees and employers, and the implications on the relationship between these two parties on resignation.

2. The juristic act of resignation

The LA does not define the term resignation, meaning that the legislature has entrusted the courts to establish the actual definition and scope of the term 'resignation'. In *Madondo v Conquip Zimbabwe (Pvt) Ltd*⁶, the SC accepted the Oxford Advanced Learners Dictionary definition to the effect that resignation is an act of giving up one's job or position. Barker and Holtzhausen⁷ define resignation as,

".....the termination of employment on the employee's initiative, of his or her own volition and without employer coercion."

Therefore, from this definition, it is clear that the act of resignation is a voluntary and deliberate unilateral act by the employee in terms of which he or she brings the employment relationship to an end without the consent of the employer. It can either be on notice or without notice.⁸ In the absence of agreement as to the notice period, the period applicable will be governed by s12 (4) of the LA. This provision is only ousted by the contract of employment or any other legislation which regulates notice period, provided that these allow for a longer period.

⁵ In terms of s3 (1) of the LA, the Act applies to all employers and employees except those whose conditions of employment are otherwise provided for in the Constitution. In other words, it does not apply to state employees or civil servants. This article only deals with resignation in respect of employees in the private sector and quasi-state institutions such as local authorities, parastatals and state universities, who are covered by the LA. Logistical constraints preclude the examination of the equally problematic issue of resignation of state employees. These are covered by a plethora of Regulations but notable examples include s 15 of the Public Service Rgns, 2000; s 15 of the Health Service Rgns, 2006 and s 14 of the Judicial Service Rgns, 2015.

⁶ SC 25/16.

⁷ Barker FS and Holtzhausen MME, *South African Labour Glossary* (1996) 127.

⁸ Madhuku L, *Labour Law in Zimbabwe* (2015) 93.

To be legally effective a resignation must be clear, in that it must indicate an employee's intention to give up his or her job or position or leave employment.⁹ Put differently, the resignation must be unambiguous and leave no doubt that the employee has given up his or her job. But how can one determine whether or not an employee has resigned? For instance, employees use very clear and unambiguous words or terms, such as, "*I am resigning, leaving or quitting*". In this instance, the words have clear literal meanings and are unlikely to create controversy or disputes.

It should be added that in most circumstances where the need to establish whether or not there was a resignation arises, a court has to evaluate what the intention of the parties was.¹⁰ In the South African case of *Fijen v Council for Scientific and Industrial Research*,¹¹ it was held that the test for establishing resignation is that an employee has to:

".....either by words or conduct, evince a clear and unambiguous intention not to go on with his contract of employment."

In *Mafika Sihlali v SABC*,¹² Van Niekerk held that a resignation is established by:

".....a subjective intention to terminate the employment relationship, and words or conduct by the employee that objectively viewed clearly evinces that intention."

As demonstrated in the following cases, a court will look at the facts objectively from a reasonable employer perspective.¹³ If the employee's conduct and/or words clearly and unequivocally lead a reasonable employer to the conclusion that the employee did not intend to continue with his or her employment, a finding that the employee has resigned will be made.

In *Lee Group of Companies v Ann Clare Elder*,¹⁴ an employee completed her probation and remained in employment. No dissatisfaction with her work was raised but permanent employment was not confirmed. She made several requests for confirmation of permanent

⁹ See *Amazwi Power Products (Pty) Ltd v Turnbull* (2008) !U 2554 (LAC); *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (SCA); *Loitering & Others v Stellenbosch Municipality* [2010] 12 BLLR 1306 (LC)

¹⁰ *van Niekerk A et al* n3 224.

¹¹ (1994) 15 ILJ 759 (LAC) at 772 C-D.

¹² (2010) 31 ILJ 1447 (LC).

¹³ Smit N, *Resignation - An Act That Is Not As Straightforward As It Seems?* (1) TSAR (2011) 107; Freedland MR, *The Personal Employment Contract* (2003) 420.

¹⁴ SC 6/05.

employment but the employer did not respond. One day she met a member of management whom she confronted regarding her status. She was told that the employer was not happy with her performance and she was not going to be confirmed as a permanent employee. Disturbed by this news she packed her personal belongings and left the employer's premises without any explanation. She only came back three days later with a doctor's report to the effect that she was suffering from severe reactive depression due to the altercation she had with a member of senior management. She also brought an apology letter. The employer took the stance that the employee had verbally resigned and this had already been confirmed by the employer in a letter addressed to the employee accepting the resignation. When the employee challenged the termination of her contract which she perceived to be an unfair dismissal, the court held that the issue for determination was whether or not the employee had resigned. The court looked at the facts of the case objectively and concluded that the conduct of the employee in leaving the workplace abruptly, going on to stay away for three days and the letter by the employer, indicated an unequivocal and unambiguous intention to resign.¹⁵

Recently in *Madondo v Conquip Zimbabwe (Pvt) Ltd*,¹⁶ the Supreme Court (SC) concluded that resignation is established by looking at what a reasonable employer would have understood by an employee's words or actions. In this case the Appellant was suspended by the Respondent. After the suspension Appellant completed a document called "Pension Withdrawal Claim Form" in terms of which she stated the reason for withdrawal of the pension as "*leaving Conquip*". The withdrawal form was signed by the General Manager of Respondent resulting in Appellant receiving her pension contributions from Marsh Employee Benefits Zimbabwe (Pvt) Ltd. The pension benefits could only be withdrawn on retirement, resignation or death. When the Appellant challenged the disciplinary proceedings which had been instituted by the Respondent, the Respondent aborted the same and indicated that the Appellant had resigned. The Appellant then claimed unfair dismissal and the issue for determination was whether the Appellant had resigned from employment. The SC held that by filling the Pension Withdrawal Form and writing the

¹⁵ See also *Murire v NSSA HH 124/97*; *Chimanikire & Anor v The Posts and Telecommunications Corporation SC 199/95*; *Riva v NSSA 2002 (1) ZLR 412 (H)*.

¹⁶ SC 25/16.

reason as "*leaving Conquip*" the Appellant had resigned. The document carried a clear and unequivocal notice directed to the employer that she was giving up her job.¹⁷

What is clear from these cases is that resignation is a question of fact dependent on the evidence and conduct of the individual employee. Where evidence shows that an employee exercised his right to terminate his or her relationship with the employer, the resignation takes effect immediately when the conduct is committed or becomes apparent to the employer. However, it must be noted that the hallmark of a resignation is that it is a voluntary and deliberate unilateral act of the employee. It is this fact which differentiates resignation from constructive dismissal.

Constructive dismissal only arises when an employee terminates the contract of employment with or without notice because the employer made continued employment intolerable for the employee.¹⁸ It is a dismissal since the resignation of the employee is not voluntary but as a result of the employer's conduct, which compels him or her to terminate the contract of employment. The requirements for constructive dismissal include the following: that the termination of the contract of employment must have been at the instance of the employee, by resigning or otherwise. Secondly, the termination by the employee must have been as a result of the employer's conduct. The employer's conduct must have been brought about by its act or omission, but need not necessarily be intended to bring the employment relationship to an end. Thirdly, the employee who claims constructive dismissal must objectively establish that the situation has become so unbearable that he or she cannot be expected to work any longer. This is viewed from the perspective of a reasonable person in the shoes of the employee. The employee must prove that he or she would have carried on with the employment relationship had it not been for the employer's conduct. Lastly, the employee must exhaust all possible remedies before

¹⁷ See *Jakazi v The Anglican Church of the Province of Central Africa* SC 10/13; *The Church of the Province of Central Africa v The Diocesan Trustees for the Diocese of Harare* 2012 (2) ZLR 392 (S); *Muzengi v Standard Chartered Bank* 2002 (1) ZLR 334 (S)

¹⁸ This common law principle is codified in section 12B (3) (a) of the LA which provides that;

"(3) An employee is deemed to have been unfairly dismissed -

(a) if the employee terminated the contract of employment with or without notice because the employer deliberately made continued employment intolerable for the employee."

resigning.¹⁹ The onus to prove constructive dismissal on the basis of these requirements lies on the employee.²⁰

When a resignation is as a result of force, coercion, duress or undue influence it will amount to constructive dismissal. For instance, in *Fonda v Mutare Club*,²¹ an employee who had incurred shortfalls was forced to resign as an alternative to having the matter handed over to the police and be prosecuted. The court did not hesitate to conclude that the resignation was tainted with duress, thus constituting constructive dismissal. The resignation had been triggered by the employer. However, it will not amount to constructive dismissal if an employee facing disciplinary action is given a choice to resign. In the absence of duress, undue influence or threats, if that employee takes up the alternative of resigning, he or she cannot flip flop and complain of constructive dismissal. In *Mudakureva v Grain Marketing Board*,²² an employee was hauled before a disciplinary committee. He was found guilty of committing acts of misconduct but before the penalty of dismissal was imposed he was given an option to resign. He elected to resign and thereafter claimed that he was forced to resign. He challenged the termination. Though the matter was decided on other grounds, the attitude of the court was clear that there was nothing wrong in an employer giving an employee a reasonable alternative option like resignation.²³ The same position is applicable to employees who resign so as to avoid disciplinary processes. In the absence of undue influence or duress, they cannot cry foul and claim constructive dismissal.²⁴

3. Is acceptance of a resignation necessary for its validity?

There is a general perception by employers that they have a right to accept or reject a resignation. In the case of *Murire v NSSA*,²⁵ the High Court (HC) held that once a resignation is tendered, it is up to the employer to accept the resignation. The court insinuated that an employer had an option to either accept or reject a resignation and its validity was

¹⁹ van Niekerk A et al n3 223.

²⁰ Grogan J, *Dismissal, Discrimination and Unfair Labour Practices* (2007) 107.

²¹ HH 40/91.

²² 1998 (1) ZLR 145 (S).

²³ See also the following cases; *Kandoma v Shades of Black Cosmetics (Pvt) Ltd SC 189/06*; *Astra Holdings v Kahwa SC 97/04*; *Thomas Miekles Stores v Mwaita & Anor 2007 (2) ZLR 85*. For a detailed discussion of Zimbabwean law on constructive dismissal see Muचेche C, *Unlocking the Law on Constructive Dismissal in Zimbabwe in A Practical Guide to Labour Law in Zimbabwe* (2013) 70-84.

²⁴ See *Muzengi v Standard Chartered Bank 2002 (1) ZLR 334 (S)*; *Riva v NSSA 2002 (1) ZLR 412(H)*.

²⁵ HH 24/97.

dependent on its acceptance by the employer.²⁶ With all due respect, this proposition is incorrect. The correct view is the one adopted in the South African case of *Rustenburg Town Council v Minister of Labour & Ors*,²⁷ and a long line of cases thereafter to the effect that resignation is a unilateral act that does not need to be accepted by the employer. Murray J stated that;

"The giving of notice is a unilateral act: it requires no acceptance thereof or concurrence therein by the party receiving notice, nor is such party entitled to refuse to accept such notice and to decline to act upon it."

This statement has been cited with approval in several Zimbabwean cases.²⁸ However, there is nothing at law that precludes an employer from accepting a resignation. The rationale behind this principle lies in international labour standards, the Constitution and labour legislation which outlaw forced labour.

Forced labour is universally condemned and ILO Forced Labour Convention No. 29 of 1930 and Abolition of Forced Labour Convention No. 105 of 1957 prohibit all forms of forced or compulsory labour.²⁹ These conventions define forced labour as;

".....all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."

Zimbabwe ratified the abovementioned conventions on 27th of August 1998 and they are entrenched in the Constitution which guarantees the right not to be made to perform forced or compulsory labour.³⁰ This right must be read with the right to fair and safe labour practices guaranteed by s65 of the Constitution. The aforementioned right is given effect in s 4A (1) of the LA which provides that no person shall be required to perform forced labour. The LAA then defines forced labour as;

²⁶ A similar argument was accepted in the following South African cases, *Uthingo Management (Pty) Ltd v Shear NO* (2009) ILJ 2152 (LC); *Chemical Energy Paper Printing Wood & Allied Workers Union v Glass Aluminium 2000 CC* (2000) ILJ 695 (LAC).

²⁷ 1942 TPD 220.

²⁸ See *Bulawayo Municipality v Bulawayo Indian Sports Ground Committee* 1955 SR 114; *Kadada v City of Harare HH* 26/94, *Muzengi v Standard Chartered Bank Zimbabwe Ltd & Anor* 2002 (1) ZLR 334 (S); *Saltrama (Pvt) Ltd v Majindwi SC* 79/04 *Riva v NSSA* 2002 (1) ZLR 412 (H); *Lee Group of Companies v Ann Clare Elder SC* 6/05; *A. C Controls (Pvt) Ltd v Midzi & Anor HH* 75/10.

²⁹ These conventions must be read with Protocol of 2014 to the Forced Labour Convention, 1930 and Forced Labour (Supplementary Measures) Recommendation No. 203 of 2014.

³⁰ See s 55 of the Constitution which must be read with ss 24, 51, 53, 54 and 64.

".....any work or services which a person is required to perform against his or her will under the threat of some form of punishment."

Thus, if validity of a resignation was dependent on its acceptance by the employer, the employer could simply reject the resignation and compel an employee to work against his or her will. Such conduct is a criminal offence and an unfair labour practice in terms of s 4A (3) of the LA as well as a violation of an employee's fundamental rights under the 2013 Constitution.³¹

4. Communicating A Resignation

There is no set method of communicating a resignation.³² The Shorter Oxford Dictionary defines to communicate as "the imparting, conveying or exchange of ideas, knowledge etc (whether by speech, writing or signs)". A resignation can be conveyed through various forms of communication. It can either be oral or written communication or by conduct,³³ as long as the words or conduct are unambiguous and unequivocal that an employee does not intend to fulfill his or her part of the contract of employment. If the communication is written it can only be effectively conveyed to its recipient's mind by its reading. Such communication must be directed to the employer and in particular, a responsible person in the sense that it must be conveyed to someone who has authority to receive such communication. Usually it is the employee's immediate superior unless the parties agree that it must be communicated to a specific authority. On the same token, if required to do so in writing, then the notice of resignation must be given in writing for it to be valid.³⁴ On

³¹ In *Mafika Sihlali vSABC* (2010) 31IU 1477 (LC) Van Niekerk J succinctly summarized the rationale as follows;

"In other words, it is not necessary for the employer to accept any resignation that is tendered by an employee or to concur in it, nor is the employer party entitled to refuse to accept a resignation or decline to act on it. (See *Rosebank Television and Appliance Co. (Pty) Ltd v Orbit Sales Corporation (Pty) Ltd* 1969 (1) SA 300 (T)). If a resignation is to be valid only once it is accepted by employer, the latter would in effect be entitled, by a simple stratagem of refusing to accept a tendered resignation, to require an employee to remain in employment against his or her will. This cannot be - it would reduce the employment relationship to a form of indentured labour."

For a discussion of this decision see Le Roux PAK, Resignations - an update: The final unilateral act of an employee (2010) 19/6 *Contemporary Labour Law* 51.

³² *Madondo v Conquip Zimbabwe (Pvt) Ltd* SC 25/16.

³³ Sometimes referred to as implied resignation. It is where an employee conducts himself or herself as to lead a reasonable employer to believe that the employee has terminated the contract. See Selwyn N, *Selwyn's Law of Employment* (2011) 455.

³⁴ *ANC v Municipal Manager, George Local Municipality & Ors* [2010] 3 BLLR 221 SCA.

this aspect it may be necessary to have regard to recent case law on how a resignation must be communicated.

In *Madondo v Conquip Zimbabwe (Pvt) Ltd supra*, an employee had completed a document called "Pension withdrawal Claim Form" in terms of which she indicated reason for withdrawal as "leaving Conquip." The SC accepted that by that act the employee had communicated to the General Manager her resignation. The document was accepted as carrying a clear and unequivocal message or notice of resignation. In *Riva v NSSA supra*, Riva was suspended by NSSA. Before disciplinary proceedings could be instituted against him he wrote a letter to the following effect "I wish to give three months' notice to terminate my employment with NSSA as per my contract, I wish to buy the car, cell phone and cell line as per my contract," NSSA did not respond to this letter and ten days later Riva wrote to NSSA retracting the notice of resignation since he had not received any confirmation. At this juncture NSSA wrote to Riva accepting his resignation. Riva then approached the High Court seeking a *declaratur* to the effect that he had not resigned as the letter was a mere offer to resign. This argument was shot down by the court which held that the letter was not an offer to resign but a clear and unequivocal statement of intention to resign. In the South African case of *Mafika Sihlali v SABC supra* an employee send a short message service (text) message to SABC's Group CEO indicating that "he quit with immediate effect". He contended that this did not constitute a valid termination because it was a requirement for notice of termination to be reduced to writing. The court rejected this argument and held that the sms was written communication and the resignation had been communicated to the proper person.³⁵

Once communicated to the appropriate authority, a resignation takes effect and it becomes binding such that it cannot be withdrawn without consent of the employer.³⁶ This applies to both the act of resignation and the notice of resignation. Most employees utter words indicating an intention to resign as a result of uncertainty or a manifestation of anger and emotions. After realizing that their impulsive decision is ill conceived, they attempt to withdraw the resignation. In this regard, the following sentiments by Murray J in *Rustenburg*

³⁵ See also *Jafta v Ezemvelo KZN Wildlife (2009) ILJ 131 (LC)*.

³⁶ See *Whitear- Nel N, Grant B and Van Rensburg J, Is an attempted retraction of a resignation consistent with a claim for constructive dismissal? (2012) ILJ 2300; Du ToitvSasko (Pty) Ltd (1999) 20 ILJ 1253 (LC)*.

Town Council v Minister of Labour & Ors supra are apposite and endorsed with respect herein:

"... if so, it seems to follow that notice once given is final, and cannot be withdrawn - except obviously by consent - during the time in excess of the minimum period of notice. In the present case, the position was undisputed, and I think undisputable, the town clerk is the authorized agent of the applicant council empowered to receive communications to it: once therefore the resignation in question had been lodged with him, it constituted a final act of termination by the third respondent, the effects whereof he could not avoid without the permission of the applicant council."³⁷

Madhuku submits that this position is correct where an employee resigns on notice, whilst it presents problems when an employee summarily resigns or gives short notice.³⁸ In such cases the employee is in breach of the contract, entitling the employer to either hold the employee to what is left of the contract or to cancel the contract summarily and sue for damages. It is in these circumstances that it has been argued that it is necessary for the employer to accept a resignation. However, as shall be discussed herein below resignation without notice is still a valid unilateral act by the employee of bringing the employment relationship to an end without the employer's consent.³⁹

Though it is trite that a resignation can only be withdrawn with consent of the employer, it is possible for an employee to withdraw his or her resignation as long as the communication of the resignation has not reached the employer. This was the case in *ANC v Municipal Manager, George Local Municipality & Ors*.^m In this case a councilor resigned in writing in terms of s 27 (a) of the Local Government: Municipal Structures Act 117 of 1998. The sealed letter was delivered to the receptionist of the Municipal Manager. The letter was not read as the Municipal Manager had other pressing commitments. The author of the letter then came and withdrew the letter before it had been read by the Municipal Manager. The issue

³⁷ This dicta has since been endorsed by Zimbabwean courts in the following cases; *Monteiro v Wankie Colliery Co. Ltd* HH 100/95; *Kujinga v Forestry Commission* SC 29/93; *Muzengi v Standard Chartered Bank Zimbabwe Ltd & Anor* 2002 (1) ZLR 334 (S); *A. C Controls (Pvt) Ltd vb Midzi & Anor* HH 75/10; *Lee Group of Companies v Ann Clare Elder* SC 6/05; *Riva v NSSA* 2002 (1) ZLR 412 (H); *Jakazi & Another v The Anglican Church of the Province of Central Africa & Ors* SC 10/13.

³⁸ Madhuku L n8 93.

³⁹ This issue is discussed in detail under remedies available to the employer par 6.

⁴⁰ [2010] 3 BLLR 221 (SCA).

which was before the court was whether Jones had resigned as a councilor given that his letter of resignation was withdrawn before it had been read by the Municipal Manager. The court held that an employee who wished to resign must communicate his intention to the employer. If required to do so in writing, the notice of resignation must be in writing and will only become effective when conveyed to its recipient's mind by its reading. Consequently, if the communication has not been read an employee would be entitled to withdraw his or her resignation without consent of the employer. What is critical is that the withdrawal of the resignation must be done before the communication is read by the employer.⁴¹

5. The Effect of a Resignation

A resignation brings the employment relationship to an end.⁴² The rights and duties which arise from the employment relationship are extinguished. In the event of resignation on notice, it does not terminate the employment relationship on the date the notice is given but on expiration of the notice period.⁴³ Though an employee can give notice at any time, if the notice is given latter than the first day of the relevant period of the month, it will only expire at the end of the next month and not the month it was given.⁴⁴ If the employee having given notice and elects not to render his or her services, the employer has no obligation to remunerate the employee on the basis of the common law maxim, *no work no pay*. The situation is different if the inability to work is at the instance of the employer.⁴⁵ In that case, the employer has an obligation to pay the employee cash in *lieu* of notice since the employer would have waived the right to notice.⁴⁶ Apart from cash in *lieu* of notice an

⁴¹ For a commentary of this case see Smit N, Resignation - An Act that is not as straightforward as it seems? (2011) 1 TSAR 100.

⁴² van Niekerk A *et al* n3 224; Grogan J, *Workplace Law* (2011) 15; Grogan J, *Dismissal* (2010) 21-22; Rycroft A and Jordaan B, *A Guide to South African Labour Law* (1992) 90.

⁴³ See SALSTAFF *obo* Bezuidenhout v Metrorail [2001] 9 BALR 926 (AMSA); Lottering & Ors v Stellenbosch Municipality [2010] 12 BLLR 1306 (LC).

⁴⁴ Gwisai M n2 150.

⁴⁵ In Britian, New Zealand and Australia such an employee is said to be on garden leave. This is where an employee who has resigned and is serving notice is instructed by the employer not to report for duty whilst he is paid his remuneration during the notice period.

⁴⁶ See s12 (7) of the LA. One disquieting practice by employers is to force an employee who is serving resignation notice to set off his or her vacation leave days with the notice period. Such a practice has no basis in the LA and the common law. The South African Basic Conditions of Employment Act 75 of 1997, has made it abundantly clear in s 20 (4) (b) that an employer may not require an employee to take annual leave during any period of notice of termination. In addition, employers in South Africa have an obligation to give an employee

employee who has resigned is also entitled to wages and benefits upon termination prescribed in s13 of the LA. With the exception of cash in *lieu* of notice, all the other wages and benefits are applicable in cases of summary resignation.⁴⁷ The right to terminal benefits prescribed in s13 of the LA does not override the employer's right to set off any liquidated debts owing to the employee.⁴⁸ This position is also supported by the proviso in s 12A (7) of the LA.⁴⁹

Notwithstanding this, some employees, on resignation claim from their employers a gratuity, severance pay or a retrenchment package. A resignation is different from a retrenchment. Whilst a resignation is termination at the instance of the employee, a retrenchment is at the instance of the employer. It is defined in s 2 of the LA as:

"...terminate the employee's employment for the purpose of reducing expenditure or costs, adapting to technological change, reorganizing the undertaking in which the employee is employed, or for similar reasons, and includes the termination of employment on account of the closure of the enterprise in which the employee is employed."

On retrenchment an employee is entitled to the minimum retrenchment package of not less than one month's salary for every two years of service as compensation for loss of employment.⁵⁰ This is in addition to the wages and benefits prescribed in s 13 of the LA. Retrenchment and resignation cannot be conjoined as they do not co-exist. Accordingly, the benefits that arise from both are claimed differently and under different legal situations and scenarios. This position was echoed in *Matema v ZINWA*,⁵¹ where the court ruled that it is ludicrous at law for an employee who has resigned to be entitled to a retrenchment package since the contract of employment is as good as dead. With voluntary retrenchment, it has

who has resigned a certificate of service. In the Zimbabwean context it's the equivalent of a recommendation letter and there is no legal obligation imposed by the LA on employers to issue one on resignation.

⁴⁷ These include outstanding vacation, outstanding medical aid, and any pension where applicable.

⁴⁸ *Madhuku L n8 111*. These deductions must be confined to those permitted by s12A (6) of the LA which prohibits deductions or set-off of any description from an employee's remuneration except in limited circumstances.

⁴⁹ It allows an employer to deduct from the total remuneration due to an employee on termination an amount equal to any balance which may be due to the employer in terms of s 12A (6) (a), (c), (e) and (f).

⁵⁰ See s 12C (2) of the LAA. Retrenchment in Zimbabwe is regulated by ss 12C and 12D of the LA as amended by the LAA read with the Labour (Retrenchment) Regulations SI 186 of 2003.

⁵¹ HH 103/04.

the same consequences with a resignation since employees voluntarily resign in return for some consideration.⁵²

As for gratuity, it is not a terminal benefit as contemplated by s 13 of the LA. In *Standard Chartered Bank Zimbabwe Ltd v Matsika*⁵³ a gratuity was defined as a pecuniary present of an amount fixed by the giver in recognition of an inferior's good offices and paid either as a lump sum or in instalments. In labour law it signifies an amount of money given to an employee in recognition of service rendered for a specific period or on leaving employment. It can only arise *ex contractu* or *ex lege*. For instance, some contracts of employment and collective bargaining agreements provide that an employee who has served a given number of years is entitled to certain payments on termination of employment for whatever reason. In such cases a resigning employee will be entitled to gratuity as a terminal benefit. Be that as it may, in the absence of agreement or a statutory obligation an employee who has resigned is not entitled to a gratuity.

As for retirement it has clear and different connotations from resignation though the legal effect may be the same. When an employee reaches the agreed or specified retirement age, the contract of employment automatically comes to an end. It is not a dismissal for purposes of the LA and it is not a resignation.⁵⁴ Such an employee is not entitled to a retrenchment package. However, if an employee takes up early retirement, such a situation is comparable to a resignation and the results are the same.⁵⁵ The main distinction between the two is that retirement occurs after a prescribed period of qualifying service whilst resignation can be tendered at any given time.

It is also necessary that a resignation be distinguished from mutually agreed termination of employment. Since the employment relationship is constituted by agreement between the employer and employee, it can also be terminated by agreement, mutual termination. In this instance therefore, termination is not unilateral or at the instance of either party but

⁵² See *Retrenched Employees of National Breweries Ltd v National Breweries & Ors* 2003 (1) ZLR 71 (H); *Storia Mpfu & Anor v Thomas Miekles Stores* LC/H/242/13.

⁵³ 1997 (2) ZLR 389 (S).

⁵⁴ As posited by van Niekerk A *et al* n3 226 the question of whether an employee has reached retirement age is a matter of fact and is determined from the contract of employment, applicable policies and relevant pension fund rules.

⁵⁵ See *Mutare Board & Paper Mills (Pvt) Ltd v Kodzanayi* 2000 (1) ZLR 641 (SC); *Athol Evans Hospital Home v Marata* SC 66/05; *Munhumutema v Tapabwa* 2010 (2) ZLR 509 (H); *Water and Allied Workers Union of Zimbabwe v City of Harare* HH 238/15.

both parties - by mutual consent. The parties enter into a new contract which takes precedence over the initial contract. This form of termination assumes that the employee enters into the agreement to terminate with the full knowledge of its implications and that there has been no misrepresentation by the employer that induced the employee to conclude the agreement otherwise it will amount to constructive dismissal.⁵⁶ Accordingly, an agreement to terminate the contract must be reduced to writing as provided for in s 5 (c) of the Labour (National Employment Code of Conduct) Regulations, 2005 read with s12 (4a) (b) of the LAA⁵⁷ and the reason for the agreement is irrelevant. The agreement to terminate is final such that a party can only withdraw from it by consent of the other.⁵⁸ From the foregoing it is clear that the main distinction between resignation and mutual termination is that the former is a unilateral act, whereas the latter requires consent of both parties. Even where an employer accepts or acknowledges resignation of an employee that does not make the termination mutual.⁵⁹ The position is different where an employee offers to resign and the employer communicates with the employee that the offer is being accepted or there is a counter offer which the employee accepts. Such termination is no longer resignation but becomes mutual termination. In this regard Madhuku⁶⁰ correctly states that:

"...the offer to resign is an invitation to enter into a mutual agreement of termination, which if the employer accepts the employment relationship is brought to an end by mutual termination and not a resignation."⁶¹

Since it is accepted that a resignation terminates the employment relationship at the instance of the employee, an employer who has instituted disciplinary proceedings cannot continue with the same once an employee has resigned. It is an exercise in futility since the employer- employee relationship is no longer in existence. This was the position of the SC in

⁵⁶ See Basson AC *et al*, *Essential Labour Law* (2005) 53; Madhuku L n8 114-116.

⁵⁷ See also *Choga v Johnston's Motor Transport (Pvt) Ltd* 1998 (2) ZLR 560 (H); *Ruturi v Heritage Clothing (Pvt) Ltd* 1994 (2) ZLR 374 (S); *Clarke Engineering Transport v Chikozho* SC 104/04.

⁵⁸ Gwisai M n2 156.

⁵⁹ See *Tafuma v Tudor House Consultants (Pvt) Ltd* 2002 (2) ZLR 1 (H); *Mushonga v National Railways of Zimbabwe* 1986 (1) ZLR 111 (H).

⁶⁰ Madhuku L n8 95.

⁶¹ The general principles of offer and acceptance in the law of contract are applicable to the offer to resign; *Monteiro v Wankie Colliery Co. Ltd* HH 100/95; *Kujinga v The Forestry Commission* SC 29/93. These cases must be distinguished with *Riva v NSSA* 2002 (1) ZLR 412 (H) in which the HC rejected an employee's contention that his letter was an offer to resign and not a statement of resignation. Thus, the offer to resign must be carefully drafted so that it is not mistaken for an intention to resign.

Muzengi v Standard Chartered Bank.⁶² In this case Muzengi was employed by the Bank as Branch Manager. Disciplinary proceedings were instituted against him and he responded by tendering a resignation letter. Despite this act, the employer proceeded with the hearing and found him guilty. He was suspended pending the decision of a labour relations officer to dismiss him. He then submitted a second resignation letter which the Bank accepted. Thereafter Muzengi alleged constructive dismissal. The court held that Muzengi had resigned voluntarily when he submitted his first letter of resignation, thereby bringing the employment relationship to an end. There was no need for an inquiry or the second resignation letter. The employee-employer relationship had been lawfully terminated and one cannot discipline or dismiss a person who is not an employee unless the employer accepts withdrawal of the resignation.⁶³ Resignation has the effect of placing an employee beyond the reach of disciplinary proceedings. It must also be noted that if an employee resigns on notice the contract is terminated at the end of the notice period. But the employee remains subject to his or her normal terms and conditions of employment. If he or she commits an act of misconduct whilst serving notice he or she may still be disciplined and dismissed.

6. Remedies Available To the Employer

Resignation of an employee without notice or on short notice is not illegal, nor is it an unfair labour practice under the LA. Unfair labour practices under the LA can only be committed by employers, trade unions and workers committees on employees.⁶⁴ The position of the law is set forth by Madhuku⁶⁵ as follows:

"Not everything that is "unfair" is an unfair labour practice under the Labour Act. To be an "unfair labour practice" an action (or omission) must be specifically described as such by the Act. In other words, one has to point to a specific provision within the Act that prescribes the action as an "unfair labour practice." If a practice is not specified as unfair in the Labour Act, it cannot be raised as an "unfair labour practice" under the Act....."

⁶² 2002 (1) ZLR 334 (S) which confirmed the HC decision of *Muzengi v Standard Chartered Bank & Anor* 2000 (2) ZLR 137(H).

⁶³ See also *Murire v NSSA* HH 124/97; *Lee Group of Companies v Ann Clare Elder* SC 6/05; *Thomas Miekles Stores v Mwaita & Anor* 2007 (2) ZLR 185 (S).

⁶⁴ See ss 8 -10 of the LA read with the preamble to the Act.

⁶⁵ Madhuku L n8 78.

The question which then arises is whether an employer has a remedy against an employee who resigns without giving notice or who gives short notice? Section 65(1) of the Constitution guarantees "every person" the right to fair and safe labour practices. The term "every person" refers to both natural and juristic persons, employees and employers. An employee may commit conduct against an employer which may be lawful but unfair.⁶⁶ For instance, resignation is a lawful act of terminating the employment relationship, but resignation without giving notice is unfair on the employer. This conduct despite not being prescribed as an unfair labour practice in the LA is a practice that is contrary to s 65(1) of the Constitution, therefore unfair.⁶⁷ Thus, an employer's remedy can lie in raising an action based on s 65(1) of the Constitution. Nevertheless, South African courts have refused to grant employers relief against employees on the basis of s23 of the South African Constitution which is equivalent to s65 of the Constitution of Zimbabwe, on the ground that the common law provides employers with adequate remedies.⁶⁸ Traditionally, the common law envisaged the employer as the holder of power, and the employee as the bearer of duties. Section 65 is aimed at destroying this unfair fictitious position and seeks to balance the patent inequality of bargaining power inherent in the employment relationship. Against this backdrop it is submitted that there are no compelling reasons to give employers remedies under the Constitution when the common law as demonstrated herein below provides sufficient recourse.

The employer's remedy as indicated above lies in the common law and specifically the general principles of the law of contract. Every employee has a right to resign and resignation is not a breach of contract. Grogan⁶⁹ and Brassey⁷⁰ submit that resignation

⁶⁶Tsabora J & Kasuso TG, 'Reflections on constitutionalising of individual labour law and labour rights in Zimbabwe' (2017) 38 ILJ 43 at 56.

⁶⁷ See the South African cases of *National Union of Metal Workers of SA v Vetsak Co-operative Ltd & Ors* 1996 (4) SA 577 (H); *Council for Scientific and Industrial Research v Fijen* (1996) 17 ILJ (1C).

⁶⁸ In *National Entitled Workers Union v CCMA* (2007) IU 1223 (LAC) the court held that;

"In general the position of employers is different from that of employees, particularly in this country. In general terms it can be said that, when an employer has lost an employee due to resignation, the employer does not need the courts to deal with the situation. Employers will normally simply look for another employee and, in most cases, will find an employee to replace the one who has resigned. Where the employee has resigned without giving notice in circumstances where he was obliged to give notice, usually the employer does not even sue the employee for damages which in law he would be entitled to do.....However, if an employer wants to sue an employee in such a situation, he does have a right to do so both at common law and the BCEA. Employers hardly use even this right."

⁶⁹ Grogan J, *Dismissal, Discrimination and Unfair Labour Practices* (2007) 157.

⁷⁰ Brassey M, *Employment and Labour Law* (1998) 108.

without giving the agreed notice makes the termination breach of contract such that its acceptance is in principle necessary since repudiation terminates the contract if the employer elects to act on it. To the contrary, deficient notice does not contaminate the act of resignation or make the resignation a nullity. There is a distinction between notification to terminate and the date of termination which is determined by the notice period. A deficient notice can only constitute a breach with regard to the period of notice which should have been served. This entitles the employer to either cancel the contract and claim damages against the employee or hold the employee to the contract and require that he or she serve the notice period. This view was embraced by Cheadle AJ in *Lottering & Ors v Stellenbosch Municipality supra*, in which he stated that:

"... As a matter of principle a decision to terminate on notice can never be a repudiation [sic] or a breach although the failure to properly give notice may do so. The breach is not the decision to terminate but the failure to give proper notice."⁷¹

This view is jurisprudentially sound. If notice is deficient, the resignation remains a lawful act of bringing the employment relationship to an end with no room for the employer to accept or reject it.⁷² Put differently, the breach is not the decision to terminate but the failure to give notice. This breach will entitle the employer two alternative remedies namely, specific performance or damages.⁷³

In respect of the first remedy, the breach will entitle the employer to hold the employee to the contract by demanding that he or she gives proper notice and render services for the notice period. Thus, specific performance is the primary remedy⁷⁴ and will only be refused if a recognized hardship to the defaulting party (the employee) is proved. However, a court will also consider the following factors; the terms of the contract of employment, the relationship between the employer and employee, the nature of the services or work performed by the employee and prejudice or hardship to be suffered by the innocent party

⁷¹ See also *Nationwide Airlines (Pty) Ltd v Roedieger & Anor* (2006) 27 ILJ 1469 (W); *Honono v Willowvale Bantu School Board & Anor* 1961 (4) SA 408 (A); *Pemberton NO v Kessell* 1905 TS 174.

⁷² Quoting Deakin S and Morris C, *Labour Law* (1995) 94, Madhuku L n8 93-94 argues that the automatic or unilateral theory states that a repudiatory breach going to the root of the contract automatically terminates the contract.

⁷³ Smit N 'Resignation- An Act That Is Not As Straightforward As It Seems' (2011) 1 TSAR 110.

⁷⁴ This is different with English law position where the remedy of specific performance is a secondary or equitable remedy.

(employer) vis a vis that which will be suffered by the employee.⁷⁵ Despite the fact that this is the primary remedy available to the employer this relief is granted in exceptional cases.

In *Nationwide Airlines (Pty) Ltd v Roediger supra*, a pilot was required to give three months' notice of termination but gave one month notice. The employer approached the HC seeking an order enforcing the notice provisions or an order for specific performance. In exercising its discretion the court granted the relief sought by the employer. It held that the employer was entitled to three months' notice and not one month notice given by the employee. The employee had entered into the contract freely and he was a highly skilled professional contracting on equal terms with the employer. The three month notice period had not been forced on him. Furthermore, the court also took note of the fact that the potential harm to the employer related to its inability to replace a pilot with a sufficiently qualified pilot within two to three months. This would likely result in the cancellation of flights and a potential loss to the employer of approximately R1 million per flight. The court followed the precedent which had been set in the case of *Santos Professional Football Club (Pty) Ltd v Igesund*.⁷⁶ In *Immaculata Secondary School v Bvuma and Another*⁷⁷ two school teachers had resigned without giving the requisite notice period. The employer approached the HC on an urgent basis seeking an order interdicting the teachers from breaching their contracts of employment. The court noted that the employees were not illiterate and had contracted freely and voluntarily. There was no evidence that the relationship between them and the school had irretrievably broken down to such an extent that their notices of termination would be impossible. Furthermore, it was the court's finding that learners were likely to suffer prejudice as a result of the absence of the teachers. It was therefore in the best interests of the learners that the teachers serve their notice periods. They could not abandon them during the second half of the academic year and the court accordingly granted specific performance with costs. Public interest demanded that the parties adhere to their contracts.

However, the suitability of the remedy of specific performance can be questioned in the Zimbabwean context in light of the relevant provisions of the Constitution. One of the

⁷⁵ These considerations are discussed in detail by Naude T, Specific performance against an employee: *Santos Professional Football Club (Pty) Ltd v Igesund* (2003) SALJ 269.

⁷⁶ 2003 (5) SA 73 (C). For detailed discussion of this case and the appeal decision see Naude T, *supra*.

⁷⁷ [2012] ZAGPJHC 168; *Penrose Holdings (Pty) Ltd v Clark* (1993) 14 ILJ 1558 (1C).

objectives of the Constitution is that the state and all institutions and agencies of government at every level must adopt reasonable policies and measures, within the limits of the resources available to them, to provide everyone with an opportunity to work in a freely chosen activity, in order to secure a decent living for themselves and their families.⁷⁸ The Constitution also guarantees the right to dignity⁷⁹, freedom from slavery or servitude⁸⁰, freedom from forced or compulsory labour⁸¹ and freedom of profession, trade or occupation.⁸² Similar provisions are also found in the Constitution of South Africa and it has been argued that on the basis of these provisions the remedy of specific performance is unconstitutional.⁸³ This argument has been rejected by the South African courts and it is likely that Zimbabwean courts will follow suit.⁸⁴ It has been noted that the same Constitution values dignity, equality and freedom. When parties freely and voluntarily enter into contracts of employment courts must respect these contracts and enforce them in the event of breach by either party. Thus, an employee must not cry foul if he or she is ordered to serve the notice period, during which she or he will receive remuneration. This does not amount to forced labour and the discretion to grant specific performance must be exercised with restraint. It must only be granted in exceptional circumstances.

The other alternative remedy available to an employer is a claim for damages arising from a breach of contract through the failure to serve notice.⁸⁵ It is common for employers to deduct from an employee's terminal benefits an amount which is equivalent to notice pay as damages for resigning without giving notice.⁸⁶ With respect, this approach has no legal basis and is outlawed by the LA. Section 12A (6) of the LA bars employers from resorting to self-help by precluding them from effecting any deductions or set off of any description

⁷⁸ Section 24 of the Constitution.

⁷⁹ Section 51.

⁸⁰ Section 54.

⁸¹ Section 55.

⁸² Section 64.

⁸³ Currie I and De Waal J, *The Bill of Rights Handbook* (2001) 380.

⁸⁴ See *Santos Professional Football Club (Pty) Ltd v Igesund* 2003 (5) SA 73 (C); *Immaculata Secondary School v Bvuma and Another* [2012] ZAGPJ HC 168; Mould K, *The Suitability of the Remedy of Specific Performance to a Breach of a "Player's Contract"* with specific reference to the Mapoe and Santos Cases (14) 2011 *PER/PELJ*.

⁸⁵ *A. C Controls (Pvt) Ltd v Midzi & Anor* HH 75/10.

⁸⁶ Employers borrow this approach from s 15(5) of the Public Service Rgns, 2000, which provides that,
 "A member who leaves the Public Service without giving the appropriate notice shall in respect of his failure to do so, pay the State such sum, not exceeding three months' salary....."

As indicated in n6 these Regulations only apply to civil servants or state employees and not those in the private sector.

from an employee's remuneration save for those prescribed in subsections (a) to (e).⁸⁷ The proper route is for the employer to institute a claim for damages for the breach. The employer will have to provide compelling proof of damages with an easily identifiable quantum for the claim to succeed. The approach was summarized in *Aaron's Whole Rock Trust v Murray and Roberts Ltd & Anor*⁵⁸ as follows::

"Where damages can be assessed with exact mathematical precision, a plaintiff is expected to adduce sufficient evidence to meet this requirement. Where, as is the case here, this cannot be done, the plaintiff must lead such evidence as is available to him (but of adequate sufficiency) so as to enable the court to quantify his damages and to make an appropriate award in his favour. The court must not be faced with an exercise in guesswork, what is required of a plaintiff is that he should put before the court enough evidence from which it can, albeit with difficulty, compensate him by an award of money as a fair approximation of his mathematically unquantifiable loss."

It is necessary to illustrate that proving these damages is not an easy feat. In *South African Music Rights Organisation (SAMRO) v Mphatsoe*⁸⁹ an employee resigned without giving the employer the agreed notice. The employer claimed damages equal to the value of the services that it alleged the employee would have provided over the period, which it equated to the remuneration he would have earned for the period he was in breach. The court held that the employer had failed to prove any damages it had suffered and there was no logic in assuming that damages equated to the remuneration the employee would have earned over the notice period. As the court noted, the damages could even have been more and depending on the facts, the employer could have suffered no loss at all. Whilst in other cases the employer could have benefited rather than suffer loss as a result of resignation of an employee as it is relieved of the duty to pay remuneration. The court then concluded that these damages must be quantified and it was not proper for an employer to just pluck a figure from the air.⁹⁰

⁸⁷ See *S v Never Simon* HH 84/04; *Muchabaiwa v City of Harare* HH 252/99; *City of Bulawayo v Fuyana* SC 68/95.; *Bevcorp (Pty) Ltd v Nyoni & Ors* 1992 (1) ZLR 352 (S).

⁸⁸ 1992 (1) SA 652.

⁸⁹ [2009] JOL 23 476 (LC).

⁹⁰ The notion in *National Entitled Workers Union v CCMA* (2007) ILJ 1223 (LAC) that damages for breach are equivalent to the notice pay the employee was entitled to was rejected. See also *Air Traffic and Navigation Services Co v Esterhuizen* [2014] ZASCA 138.

In *Laboumet Payment Solutions (Pty) Ltd v Vasloo*⁹¹ an employee resigned without giving the employer the agreed notice. The employer sued for damages in the sum of R53 000-00 which was equivalent to the income the employee would have earned had she served her notice period. The court held that in calculating damages there must be a connection between the breach and the damages alleged to have been suffered. The enquiry as held by the court is two pronged. Firstly, the factual causation must be determined. This entails showing that 'but for' the breach the employer would not have suffered loss. The second enquiry involves establishing legal causation. The court will determine whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether the loss is too remote.⁹² The employer had argued that the damages arose automatically from the breach, therefore it was entitled to damages equivalent to the notice pay. This argument was rejected by the court which held that the employer had failed to show the alleged loss it had suffered as a result of the breach. Accordingly, the claim was dismissed as damages for breach do not arise automatically. Thus, it can be concluded that an aggrieved employer in the event of deficient notice of resignation can claim specific performance or, alternatively damages for the breach.

Regrettably, dispute resolution mechanisms established under the LA, such as the Labour Court (LC) do not have jurisdiction to entertain such claims. The Labour Court is a creature of statute and its exclusive jurisdiction is only limited to those matters enumerated in s 89 of the LA.⁹³ Though the LC has exclusive jurisdiction over labour matters, s89 of the LA did not take away the inherent power of the HC. The significance of this provision is that jurisdiction of the LC remains explicitly confirmed to matters under s 89(1).⁹⁴ The LA does not make resignation without notice an unfair labour practice and it does not provide any remedy. In

⁹¹ (2009) ILJ 2437 (LC)

⁹² *International Shipping Company (Pty) Ltd v Bentley* 1990 (1) SA 680.

⁹³ This must be read with s 89(6) which provides,

"No court other than the Labour Court shall have jurisdiction in the first instance to hear and determine any application, appeal or matter referred to in subsection (1)."

⁹⁴ See *Nyahora v CFI Holdings (Pvt) Ltd* SC 81/14. It must be noted that by virtue of s 171 (1) of the 2013 Constitution, which provides that, the HC has original jurisdiction over all civil and criminal matters throughout Zimbabwe, jurisdiction of the HC in all labour matters has been restored. In other words, the inescapable conclusion is that the HC has concurrent jurisdiction with the LC to deal with purely labour matters at the first instance. This view was endorsed in *Kuchena v SIRDC* HH 180/16; *Chitiki v Pan African Mining (Pvt) Ltd* HH 656/15; *Confederation of Zimbabwe Industries v Mbatha* HH 125/16; *Mazarire v Old Mutual Shared Services (Pvt) Ltd* HH 187/14. This interpretation has since been criticized in *Nyanzara v Mbada Diamonds (Pvt) Ltd* HH 63/16; *Machote v Zimbabwe Manpower Development Fund* HH 813/15 and *Triangle Limited & Ors v Zimbabwe Sugar Milling Industry Workers Union & Ors* HH 74/16.

any event, s 89(1) does not clothe the LC with jurisdiction to hear and determine claims for specific performance and damages in unfair resignation cases.⁹⁵

7. Conclusion

This contribution demonstrated that resignation is a voluntary, unilateral act by the employee whose effect is to terminate the contract of employment. It is established by a subjective intention to terminate the employment relationship, and by unambiguous words or conduct by the employee that, objectively viewed, clearly evince an intention to give up one's job. Once communicated and becomes apparent to the employer, a resignation takes effect and need not be accepted by the employer. It also follows that it cannot be withdrawn without consent of the employer. Furthermore, on resignation an employee has a right to be paid wages and benefits on termination in terms of s13 of the LA, whilst an employer has a right to be given notice of termination. In the event that an employee resigns without notice or gives insufficient notice, it entitles the employer to elect whether to cancel the contract and saddle the employee with a claim for damages or, alternatively, hold the employee to the contract and claim specific performance. It is therefore imperative that a decision to resign must be an informed one and not triggered by emotions or done impulsively. In essence an employee must resign within his or her rights while at the same time not trampling upon the employer's rights.

⁹⁵ This unsavoury situation is uncalled for, it evokes concerns regarding legal certainty, forum shopping and undermines legislative intent. It is submitted that the LC must have exclusive jurisdiction in all labour matters including the power to handle employer claims in situations of unfair resignation. Clearly, stripping the LC of its jurisdiction over labour matters will render this specialised court redundant and its establishment nugatory.