



**NENJY || NYAMAPFENE
LAW PRACTICE**



Dear Reader!

Welcome to our first edition of NN Law Practice Newsletter. Our aim is to inform and educate our readers and clients on the developments in the law in Zimbabwe on issues affecting families or businesses. Since we want the newsletter to be as relevant as possible we

invite your comments and suggestions.

Some of the cases that dominated the 2015 Calendar -Throwback 2015. As we have just entered into 2016, it is worth noting some of the legal issues and developments that dominated the 2015 legal calendar.

LABOUR LAW

A significant number of people lost their jobs due to the Supreme Court Judgment of **Don Nyamande and Another v ZUVA Petroleum (Pvt) Ltd SC-43-15**. A number of companies took advantage of this judgment and proceeded to terminate their employees' contracts of employment on notice basing on this judgment thereby deepening the anomaly in the law. A ruling was given to the effect that under common law both the employer and employee had the right to terminate the contract of employment on notice and hence employers could terminate their employees' contracts anytime without offering packages provided the employees were given three month's notice. The result of this was a serious threat to job security. The judiciary's role was to interpret and apply the law as it is and from its findings the labour court was correct in allowing ZUVA Petroleum to terminate the contracts of employment, it therefore lied with the legislature to make amendments to the law so as to safeguard employment loss. This judgment triggered the Amendment to the Labour Act that is the passing into law by Parliament of the Labour Amendment Act, 2015 to protect the interests of the employees. This Amendment to the Labour Act was passed by Parliament to amend provisions of the Labour Act[Chapter 28:01] relating to termination of employment on notice, retrenchment, dispute resolution among others. On termination of employment on notice, the current position is that termination of a contract of employment on notice was not abolished but such termination must be done by following the provisions of the Labour Amendment Act, 2013. The

amendment to section 12 of the Act on termination of employment on notice inserted new subsections 4(a) and 4(b) to the effect that no employer shall terminate a contract of employment on notice unless one of the following grounds is established:-The termination must be in terms of an employment code or model code or the employer and the employee must have mutually agreed in writing to the termination or the employee must have been engaged for a fixed duration or for performance of a specific service or pursuant to retrenchment. Section 4b provides that, for termination of employment where an employee is employed under the terms of a contract without time limit (permanent contracts) compensation for loss of employment is to some extent dealt with in the same manner that compensation for loss of employment to retrenchment is done. Currently the Act sets a minimum retrenchment package which is payable no later than the date when the termination on notice takes effect.

Severance packages refer to pay and benefits an employee receives when employment terminates. On severance packages or "minimum retrenchment packages" as stated in the Amendment to the Labour Act, Section 12C(2) of the Act provides that, "unless better terms are agreed between the employer and employees concerned such package of not less than one month's salary or wages for every two years of service as an employee (or the equivalent lesser proportion of month's salary or wages for a lesser period of service) shall be paid by the employer as compensation for loss of employment".



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Pertaining dispute resolution, in light of the referral process of a matter, the Amendment to section 93 of the Labour Act now supports expedite resolution of labour disputes in Zimbabwe. This promotes curtailment of proceedings since currently if the matter concerns a dispute of right, Labour Officers are now empowered by the law to make or give a ruling on such dispute of right. A dispute of right according to section 2 of the **Labour**

Act[Chapter 28:01] refers to, “Any dispute involving legal rights and obligation, including any dispute occasioned by an actual or alleged unfair labour practice, a breach or alleged breach of the Act or of any regulations made under the Act or breach of any terms of a collective bargaining agreement or contract of employment”. It is one which concerns the alleged breach of a legal right.

INHERITANCE LAWS

Bhila v The Master of the High Court HH-549-15- this was a landmark ruling passed by Justice Mwayera to the effect that children born out of wedlock have the same right to their parents' estate just like those born inside wedlock. In this case one of the issues that sought to be determined by the High Court was whether children born out of marriage (out of wedlock) can inherit from the estate of their late father who dies intestate (without living a written will specifying how his estate should be disposed). In the past years such children were not entitled to inherit from their father who died without living a valid will. This position discriminated such children. The Bhila case bases its reasoning on the Constitution of Zimbabwe which is to the effect that children should not be discriminated on such basis as whether or not they were born in or out of wedlock as enshrined in section 56(3) of the Constitution. The law as it stands now is that under the new Constitution, children born out of wedlock are entitled to an inheritance equally as those born within marriage if there is no written will. No more illegitimate children or bastards, these children are now called children born out of wedlock under the law.

Chiminya v Estate (Late Dennis Mhirimo Chiminya) and others HH-272-15. In this case the surviving spouse sought an order to the effect of disregarding or setting aside of a will by her late husband and that the only property of the estate (a house) be awarded or given to her as the surviving spouse. The deceased bequeathed or gave the property (the matrimonial home) to his grandson and not to his wife (the surviving spouse). Her contention in her application was that as the surviving

spouse, she was entitled to the matrimonial home at law. The court made a determination to the effect that, despite there being a will and that a person has freedom of testation (that is power to dispose or distribute his property in a manner he wants), there are also limitations to such freedom. In the case of **Estate Late Wakapila v Matongo and Others 2002 ZLR 43**, the court sought to illustrate that a spouse customarily married would not inherit where the deceased spouse would have died testate (leaving a valid written will) and made dispositions by way of will. In the **Chiminya case**, it was noted that whereas it is important to uphold wills in the interest of fulfilling of a testators wishes, the mischief of disinheriting the legal and rightful beneficiary is what section 5(3) of the Wills Act [Chapter 6:06] is about and seeks to cure. The position in the **Chiminya case** distinguishes itself from the **Estate Late Wakapila's decision** thereby creating inconsistencies and uncertainty in the law. This lacuna in the law can only be remedied and clarified by legislative reform. As it stands there is confusion as to the position of the law and the legislative intent in its enactment of section 5(3) of the Wills Act on whether or not it sought to interfere with the testators freedom of testation or to protect the surviving spouse from disinheritance.

What does the law say? It was expounded in the **Chiminya Case** that, “the right and freedom of testation cannot be viewed as absolute to the extent of eroding the proprietary and inheritance rights of a legally recognised surviving spouse. Section 5(3) of the Wills Act provides that, “No provision, disposition or direction made by a testator in his will shall operate so as to vary or prejudice the right of



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any person to whom the deceased was married to share in the deceased estate or in the spouses joint estate in terms of any law governing the property rights of married persons...". The law therefore protects the surviving spouse from being disinherited by way of a will. In this case the will was held invalid since it disinherited the surviving spouse and the house since it was the only matrimonial property was awarded to the surviving spouse as her entitlement at law.

Dear Reader, when making a will, due regard must be given to provisions of the **Wills Act [Chapter 6:06]**. If not adhered to properly such will may be taken to be invalid and your intentions on how you want your property to be disposed or distributed will not be taken into account and will proceed to be dealt with as if you died intestate (without a written will). Debt management in this harsh economic set-up is very important. A lot of people are failing to manage or pay their debts.

DID YOU KNOW? That an ordinary debt or general claims prescribe after 3 years. The exception is where any enactment provides otherwise. Other periods of prescription are contained in section 15 of the Prescription Act.

What is prescription? The Prescription Act [Chapter 8:11] unfortunately does not define what prescription entails. Prescription means the matter is out of time ie the claim can no longer be brought before court because of lapse of time. The period within which a right must be exercised has lapsed. What happens when a debt prescribes? It means one can no longer bring the claim before court because it will be taken to be out of time. You can no longer exercise the right to have whatever is owed to you by the other party before the court. There are however exceptions to this general rule, prescription can be interrupted or stopped from running. This can be by an express or tacit acknowledgment of liability by the debtor, by service on the debtor of any process whereby the creditor claims payment of a debt (judicial interruption) eg service of summons. Prescription is deemed not interrupted if the creditor does not successfully prosecute his claim under the process in question to final judgment or successfully prosecutes his claim under the process in question to final

judgement, but abandons the judgement or the judgement is set aside. Creditors be informed that you should claim whatever is owed to you by the debtor within the time frame of 3 years failure which after the lapse of 3 years, the debt will be taken to be prescribed and the debtor can use it against you in court.

Other periods of prescription other than an ordinary or general claim are:-

30 years in the case of a debt secured by mortgage bond, a judgement debt, a debt in respect of taxation imposed or levied by or under any enactment, a debt owed to the state and arising out of an advance or loan of money or a sale or lease of land by the state to the debtor unless a longer period applies in respect of the debt concerned.

15 years, in the case of a debt owed to the state and arising out of an advance or loan of money or a sale or lease of land by the state to the debtor unless a longer period applies in respect of the debt concerned.

6 years in the case of a debt arising from a bill of exchange or other negotiable instrument or from a notarial contract, a debt owed to the state unless a longer period applies in respect of the debt concerned.

Ignorance of the law excuses no man: Not that all men know the law, but because it is an excuse every man will plead, and no man can tell how to refute him. John Selden

N.B There is no prescription under customary law

Know the law and use it. It's your right

By NN Law

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