JOSEPHAT GWATIDA

AND
MAXWELL CHAENDERA

AND
PEARSON MSEVENZI

AND
DAVID MUGABE

AND
LOVEMORE MLAMBO

AND
JOSHUA CHIGOVA

AND
BERNARD RUVETSA

AND
SIYAI MOZHENDI

AND
ROBERT WISKESI

AND
PRECIOUS NYIKA

AND
EDISON DENGU

AND
TAPIWA KUMUTSANA

AND
BETTY KIYANA MANDAVA

AND
ONESMUS BHEBHE

AND
MAZURUSE MAHLASERA

AND
AARON DZIMIRI

AND
DANIEL CHINODYA

AND
AARON PAUNDI

AND
DENNIS CHADENGA

AND
DENNIS PARADZA

AND
VINCENT MOYO

AND
GILBERT GUMBA

AND
ABEL BANDA

AND
SAIMON MUTAVIKWA

AND
MEMORY NCUBE
AND

TASISIYO KWINDINGWI

AND
KUDAKWASHE MHLANGA

versus

MINISTER OF JUSTICE, LEGAL & PARLIAMENTARY AFFAIRS
AND
ATTORNEY GENERAL
AND
SMM HOLDINGS

HIGH COURT OF ZIMBABWE
ZISENGWE J
MASVINGO, 2 July 2024
Judgement delivered on 24 February 2025

Application for constitutional invalidty

Mr. C. Ndlovu; for the applicants
Mr. T. Undenge; for the first & second respondents
Mr. O Kondongwe; for the third Respondent.

This is an application challenging the constitutional validity of s 28 (2) of Reconstruction of State Indebted Insolvent Companies Act [*Chapter 24:27*], ("the Reconstruction Act"). The said provision expressly removes employees or former employees of a company falling under the Reconstruction Act (of which the third respondent is one) from the protection afforded by the Labour Act [*chapter 28:01*]. It reads:

> **28. Persons employed by company before its reconstruction**
> (1) … [not relevant]
>
> (2) The provisions of the Labour Act [*Chapter 28:01*] with respect to the retrenchment, dismissal or termination of the employment of employees shall not apply to any employee of a company under reconstruction whom the administrator retrenches, dismisses or otherwise does not retain in the employment of the company.

The applicants who are all former employees of the third respondent contend that the above provision violates two of their rights namely the right to fair labour practices and their right to equality before the law as enshrined in ss 65(1) and 56(1) of the Constitution respectively.

The third respondent was placed under the Act in 2004 after it had experienced serious viability problems, rendering it incapable of meeting its financial and other obligations. Mainly on account of s 28 (2) of the Reconstruction Act, the applicants have been unable to obtain their terminal benefits in the wake of being either being laid off, dismissed or upon reaching retirement age.

The nub of the application is that whereas the impugned provision effectively insulates the third respondent from the obligation to pay the applicants their terminal benefits ostensibly on the basis that the latter needs to be protected until such a time that it returns to financial viability, it does not spell a time frame within which the process has to be concluded. The end result according to them, is that the process of attempting to stir the third respondent back to economic viability might potentially go on in perpetuity with the consequence that the applicants may never get to realize such benefits.

The applicants claim that this provision, in its current form, shielding as it does the third respondent, for an indefinite period from any potential litigation, by its former employees for the recovery of their terminal benefits is patently unjust and must be struck down as violating the aforementioned rights. They further aver that the limitations ushered in by section 28(2) of the Act are neither fair, reasonable, necessary nor justifiable particularly given that they (i.e., applicants) did not play any role in the mismanagement of the third Respondent.

They therefore seek an order in the following terms:

IT IS HEREBY ORDERED THAT:

1. The application be and is hereby grated with no order as to costs.
2. It is declared that s 28 (2) of the Reconstruction of State Indebted Insolvent Companies Act, [*Chapter 24:27*] is constitutionally invalid, in that it violates labour rights as enshrined in s 65 (1) of the Constitution by suspending the operation of the Labour Act particularly s 13 of the same.
3. As a result of the declaration in paragraph (2) above, the legislature is enjoined to amend s 28 (2) of the Reconstruction of State indebted insolvent Companies to include a time frame or limit in which it will be in operation or in which a company may be reconstructed.

The Background

It is common cause that following their retrenchment or upon retiring from the employ of the third respondent, the applicants did not receive their terminal benefits. But for s 28 (2) of the Reconstruction Act, the third respondent would have been obliged to pay the applicants such terminal benefits. Section 13 (1) of the Labour Act in particular provides as follows:

> **"13 Wages and benefits upon termination of employment**
>
> (1) Subject to this Act or any regulations made in terms of this Act, whether any person—
>
> (a) is dismissed from his employment or his employment is otherwise terminated; or
> (b) resigns from his employment; or
>
> (c) is incapacitated from performing his work; or
>
> (d) dies; he or his estate, as the case may be,
>
> shall be entitled to the wages and benefits due to him up to the time of such dismissal, termination, resignation, incapacitation or death, as the case may be, including benefits with respect to any outstanding vacation and notice period, medical aid, social security and any pension, and the employer concerned shall pay such entitlements to such person or his estate, as the case may be, as soon as reasonably practicable after such event, and failure to do so shall constitute an unfair labour practice."

It is further common cause ever since the third was placed under reconstruction in 2004 by the first Respondent it has remained under reconstruction to date, a period in excess of twenty years with no sign of its return to financial viability seemingly in sight.

Also, common cause is the fact that in October 2011 the respective employment contracts of the applicants were terminated. Pursuant to this the third respondent acknowledged owing the applicants their respective terminal benefits. It has failed to pay them to date.

Incidentally, at the time of their employment with the third respondent, all the applicants occupied houses belonging to the third respondent which the latter offered to them by virtue of their employment. With the termination of their employment, they concomitantly lost the right of such occupation. Meanwhile the third respondent commenced litigation to have the applicants evited from the said houses. In the various cases brought before the courts, the applicants were unsuccessful in raising any lien or right of retention as a defence to the various actions for their eviction.

It was then that the applicants sought to sue the third respondents for the recovery of their terminal benefits. However, no sooner had they commenced such litigation did they realise that s 28 (2) of the Act stood firmly in their way seemingly as an impregnable shield protecting the third respondent. They were therefore caught between the proverbial rock and a hard place. Not only were they unable to sue for their terminal benefits, but also, they were being routinely evicted from their accommodation without any legal recourse available to them. Conversely, they aver, the third respondent has the best of both worlds, so to speak; it can evict the applicants with no consequence and fail to pay the applicants, almost with impunity.

The only avenue available to them, they contend, was therefore to bring the current application challenging the constitutionality of s 28 (2) of the Act on the bases outlined earlier. They aver that they cannot wait indefinitely for their terminal benefits.

As regards subsection 3 of s 28 of the Act, the applicants argue that section 103 of the Insolvency Act Chapter 6:04 does not protect them as former employees.

The Respondents' Position

The application is resisted by the all the respondents. Initially all three respondents raised a number of preliminary issues which they claimed rendered the application defective or untenable. However, all the preliminary issues were abandoned during oral submissions in court and the matter was heard on its substantive merits.

The first respondent's position

The first respondent acknowledges that on the face of it, s 28 (2) appears to violate the applicants' labour rights as espoused in s 65 of the Constitution. The high watermark of the first respondent's opposition to the application, however, is that such right is subject to limitation under s 86 (2) of the Constitution. He argues that the impugned provision qualifies as a law of general application under which rights guaranteed may be limited. He therefore avers that the Applicants' rights guaranteed in section 65(1) of the Constitution can be curtailed, in this case by s 28 (2) of the Act. According to him the main justification for such limitation is that a company that is put under reconstruction is one unable to meet its financially obligations Therefore, it is unreasonable to request for payment of debts and wages to a company that is under reconstruction as that would defeat the whole purpose of trying to restore it. The first respondent further submits that section 28(2) is a necessary exception under section 86 (2) of The Constitution.

With regards to the second leg of the argument, that is, the one hinged on equal protection of the law as provided in s 56 of the Constitution, is the first respondent's position avers that the right to equal protection under the law does not equate to "blind" equality as circumstances may, as they often do, arise justifying distinction between persons. In this regard it was submitted that equality is available to persons who are in the same class of circumstances. Former employees of a company which is under reconstruction and financial dire straits cannot expect the same as former employees of a company in a healthy financial position. Accordingly, so the argument goes, while the applicants are guaranteed to equal protection and benefit of the law, they must not lose sight of the fact that the right is applicable to them as it is to other employees of a company under reconstruction.

The third respondent's Position

The third respondent filed an opposing affidavit deposed to by its current administrator, Afaras Gwaradzimba. For all intents and purposes, he echoed the sentiments expressed by the first respondent particularly with regards to the contention that the abridgement of the applicants' labour rights is justified. However, Gwaradzimba further averred that the interpretation given to the impugned provision by the applicant was erroneous if regard is had to the Act as a whole. In this regard he contended that in interpreting the provision of law, care must be taken to avoid a partial interpretation but to adopt a holistic interpretation. In other words, the provisions of a statute should be interpreted such that that they remain clear and stand without absurdity. He urged the court to give due cognizance of the principle that

interpretation of a statute must be so as to make business sense. In the latter regard the third respondent in its heads of argument reliance was given by the third respondent to the case of *Prenn* v *Simmonds* 1971 (1) WLR 1389 HC wherein it was held that interpretation could be tested by considering whether it would correspond with commercial good commercial sense.

It was accordingly submitted that the correct interpretation of the Reconstruction act read wholly together does not infringe the rights of former employees to fair wages and salaries. According to the third respondent, the Act simply provided that packages for employees fell to be governed by the Insolvency Act and that s 28 of the Act only defers the calculations and principles to the Insolvency Act. Therefore, so the argument goes, there is nothing amiss about having the affairs of distressed employees governed by the Insolvency Act.

As far as the limitation leg of the argument is concerned it was the third respondent's contention that the Applicants had failed to establish that the limitations are unfair. It also contended that section 6b of the Reconstruction Act allows the Applicants to seek leave to sue notwithstanding section 28(2). Therefore, their rights under section 65 of the Constitution have not been completely infringed, such that there is nothing unconstitutional about section 28. It was submitted that the applicants should simply follow domestic remedies before seeking the section to be declared unconstitutional.

The issues

The main issues for determination are:

a) Whether or not section 28 (2) of the Reconstruction of State Indebted Insolvent Companies Act abridges the applicants' right to labour rights as enshrined in s 65 (1) of the Constitution.
b) If the answer to a) above is in the affirmative, whether the limitation imposed by s 28 (2) of the Act is fair, reasonable, necessary and justifiable as envisaged in s 86 of the Constitution.
c) Whether or not s 28 (2) of the Act violates the applicants' rights to equal protection and benefit of the law as enshrined in s 56 of the Constitution.
d) If the answer to c) above is in the affirmative, whether the limitation imposed by s 28 (2) of the Act is fair, reasonable, necessary and justifiable as envisaged in s 86 of the Constitution.

The interpretation of s 65 of the Constitution.

The very first step to take in determining the constitutional validity of a provision is to interpret the relevant provisions of the Constitution. The remarks by MAKARAU JCC in *Diana Eunice Kawenda* v *Minister of Justice, Legal and Parliamentary Affairs Ors* CCZ11/21MAKARAU JCC are instructive:

> "In interpreting the constitutional provisions, the ordinary rules of interpretation of statutes apply. The Constitution is but a statute. It is however settled that in interpreting constitutional provisions, the preferred construction "is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose". (See *Rattigan and Others v The Chief Immigration Officer and Others* 1994(2) ZLR 54. See also *Smythe v Ushewokunze and Another* 1997(2) ZLR 544(S)). In particular, when interpreting provisions that guarantee fundamental rights, the widest possible interpretation is adopted to give each right its fullest measure or scope."

Gladly, the Constitutional provision *in casu* is not one that is too difficult to interpret. It reads:

> **"65. Labour rights**
>
> (1) Every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage."

It is therefore basically a "three in one" provision. It guarantees every employee the following – first, the right to fair labour practices and standards, second, the right to safe practices and standards, and third the right to be paid a fair and reasonable wage.

It can hardly be controverted that the right to fair conditions and terms of employment extends to entitlement to terminal benefits at the end of one's employment. The employer's obligation to pay the same arise either *ex lege* or by virtue of the contract of the employment but usually both. Any enactment of provision in an enactment that appears to derogate from any of these rights, as the impugned provision purports to do is it discordant with this constitutional imperative. This much was correctly conceded by the first respondent.

This explains in part why s 13 of the Labour Act in s 13 obligates an employer to pay such terminal benefits and even prescribes criminal sanctions for failure to do so.

Dealing with the presumption of Constitutional validity

In the Kawenda case, (*supra*) the court had this to say:

> "After interpreting the appropriate provisions of the Constitution, one then presumes that the impugned law is constitutionally valid. The presumption of constitutional validity serves firstly to place the onus on whoever is alleging invalidity to prove such invalidity and, secondly and, equally important, to guide the court in interpreting the impugned law in favour of validity where the piece of legislation is capable of two meanings. The presumption holds that where a piece of legislation is capable of two meanings, one falling within and the other falling outside the provisions of the Constitution, the court must perforce uphold the one that falls within.
>
> The presumption in favour of constitutionality is entrenched in our law."

In this regard, the respondents relied on s 6 (b) and subsection 3 of s 28 of the Reconstruction Act to argue that s 28 (2) does not infringe s 65 of the Constitution.

Section 6 (b) of the Reconstruction Act relied upon by the third respondent, in my view, however, is irrelevant to the issues at hand. It only relates to the requirement for one to obtain leave of Administrator before instituting any claim against it (i.e., the third respondent). As stated earlier, what is challenged by the applicants is not the restriction imposed by the Act to institute a claim against the third respondent, rather it is the denial of former employees from accessing the provisions of the labour Act. Therefore, even if a former employee in the position of the applicants were to obtain leave in terms of s 6 (b) of the Act to so institute proceedings against the latter, he would still be unable to surmount the hurdle posed by s 28 (2) of the Act.

The impact of s 103 of the Insolvency Act.

The first respondent heavily relies on s 28 (3) of the Act as read with s 103 of the Insolvency Act, [Chapter 6:04]

Section 28 (3) of the Reconstruction Act reads:

> "(3) For the avoidance of doubt, it is declared that section 103 of the Insolvency Act [*Chapter 6:04*] shall apply to the salary or wages of any employee of the company under reconstruction whom the administrator retrenches, dismisses or does not retain in the employment of the company."

Meanwhile the relevant part of s 103 of the Insolvency Act [*Chapter 6: 04*] provides as follows:

> **"103 Surplus to be paid into Guardian's Fund**
>
> (1) If after the confirmation of a final account there is a surplus in an insolvent estate that is not required for the payment of claims, costs, charges or interest, the liquidator must after the confirmation of that account deal with the surplus in the manner provided for in this section.

> (2) In the case of a debtor who is a natural person, the liquidator must pay the surplus over to the Master who must deposit it in the Guardian's Fund and after the rehabilitation of the insolvent pay it out to the debtor at his or her request.
>
> (3) In the case of a debtor which is a trust, the liquidator must pay the surplus over to the trustees of the trust or, if there are no trustees, to the Master who must deposit it in the Guardian's Fund and upon application by the capital beneficiaries as determined by the trust deed, pay it out to them:
>
> Provided that if the conditions for the capitalisation of the trust as determined by the trust deed have not yet been satisfied the Master may, after having appointed new trustees in the trust in question, pay such funds to the new trustees so appointed."

According to the third respondent, a holistic interpretation of the Act reveals that s 28 (2) does not infringe the applicant's right to a fair wage. According to the third respondent all that it does is to command that the terminal benefits of former employees stand to be governed by a different statute, namely the Insolvency Act. Reliance was placed in part on the case of *Africa Resources Limited & Ors* v *Gwaradzimba & Ors* SC 2-11, where the following was said:

> "At the heart of the Act – in particular s 4 of the Act - is a scheme, not to provide for the temporary or permanent acquisition of property, but rather to provide for the change of management of a company by providing for the removal of management that has failed to successfully manage the company to enable it to discharge its liabilities. Section 4 of the Act provides for the appointment of the administrator to manage the affairs of the company placed under reconstruction."

What the third respondent probably overlooked was that s 103 of the Insolvency Act should be read in the context of Part XVIII of that Act as a whole. The provisions falling under that part prescribe a roadmap that must be followed by the liquidator in winding up an insolvent estate. Most significantly, unlike the Reconstruction Act which does not spell out the period within which reconstruction must be concluded, under the Insolvency Act, the liquidator is given six months from the date of his appointment to lodge a liquidation and distribution account. It is from the surplus that creditors are to be paid.

Before addressing the all-important question of whether or not the limitation imposed by s 28 (2) of the Reconstruction Act can be justified in terms of s 86 (2) of the Constitution, the alleged violation of s 56 of the Constitution will be discussed.

The interpretation of section 56 of the Constitution.

Section 56 (1) of the Constitution provides as follows:

> **56. Equality and non-discrimination**
>
> (1) All persons are equal before the law and have the right to equal protection and benefit of the law.

Section 56 (1) of the Constitution therefore guarantees three separate but related fundamental rights, these are: the right to equality before the law; the right to equal protection of the law; and the right to benefit of the law.

On the face of it, therefore, the limitation imposed by s 28 (2) of the Reconstruction Act effectively denying, as it does, the applicants' access to the protection afforded to employees to the protection of employee rights under s 13 of the Labour Act attenuates their right to the protection and enjoyment of the latter law. However, that is not the end of the matter. Instances may arise, as they frequently do, where there is need to distinguish between persons in dissimilar circumstances. In other words, the law in this regard is not blind to the need to differentiate between persons who may be in disparate situations.

In *Greatermans Stores (1979) (Pvt) Ltd T/A Thomas Meikles Stores (2) Meikles Hospitality (Private) Limited* v *Minister of Public Service, Labour and Social Welfare & The Attorney-General* CCZ-2-18 the Constitutional Court had occasion to interpret this provision. The following was said:

> "Whilst s 56(1) of the Constitution requires respect and protection of human equality as a foundational value, it does not mean that identically the same rules of law should be applicable to all persons in every instance, regardless of differences of factual circumstances and conditions. Section 56(1) of the Constitution does not protect a right to identical treatment. The right to equality is violated when the State makes an unjustified distinction between people or situations. Section 56(1) of the Constitution is not about formal equality, as formal equality is already part of the Constitution. The fundamental principle of the rule of law to the effect that all State power is bound by law and that everyone is bound by law means that there is equal application of law since the very nature of law demands universal application. Section 56(1) of the Constitution speaks to substantive equality".

The same court in *Nkomo* v *Minister, Local Government, Rural & Urban Development & Ors* CCZ-6 - 2016 reiterated the same when it held that;

> "The right guaranteed under s 56 (1) is that of equality of all persons before the law and the right to receive the same protection and benefit afforded by the law to persons in a similar position. It envisages a law which provides equal protection and benefit for

> the persons affected by it. It includes the right not to be subjected to treatment to which others in a similar position are not subjected. In order to found his reliance on this provision the applicant must show that by virtue of the application of a law he has been the recipient of unequal treatment or protection that is to say that certain persons have been afforded some protection or benefit by a law, which protection or benefit he has not been afforded; or that persons in the same (or similar) position as himself have been treated in a manner different from the treatment meted out to him and that he is entitled to the same or equal treatment as those persons".

From the above the right to equality, equal protection and benefit of the law is only available to persons who are in the same position and circumstances.

In this regard the third respondent submitted that the applicants in the present case cannot claim equal treatment with former employees of a company that is performing financially well and that which is under reconstruction. While this may be true, what this argument neglects to address is whether s 28 (2) of the Reconstruction Act places persons such as the applicants in the same position as employees of other companies than are in distress. What sets the limitation in s 28 (2) of the Reconstruction Act apart is its failure to provide a cap within which former employees affected by it are barred from accessing their terminal benefits. As has been noted earlier, there are specific time frames within which former employees of similarly distressed companies are to be paid under the insolvency Act.

Ultimately, however, the issue converges on whether the limitation in s 28 (2) of the Reconstruction Act is justified in terms of s 86 (2) of the Constitution to which I now revert. Focus will be placed on its abridgement of the rights enshrined in 65 (1) of the Constitution as it is the one directly relevant. Further, the applicants in their draft order appear not to seek an order declaring the impugned provision as being a violation of s 56 of the Constitution.

The effect of the limitation in s 28 (2) of the Reconstruction Act and whether it is justified in terms of s 86 (2) of the Constitution

Having established that indeed section 28 (2) of the Reconstruction Act infringes on the rights of the Applicants as set out in section 65 (1) of the Constitution, the final and last stage is to examine whether the infringement or inconsistency is permissible in terms of section 86(2) of the Constitution. Is the infringement fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom?

The Applicants contend that s 28 (2) of the Reconstruction Act cannot be justified on the basis of s 86 (2) of the Constitution. They argue that the limitations brought about by the former fail the criteria set out in the latter as they are neither fair, reasonable, necessary nor

justifiable. They point out in this regard that because the period of reconstruction is indeterminate and because the period within which the third respondent is shielded from paying their terminal benefits is equally indefinite, they may never lay their hands on those benefits. They aver that as a consequence the impugned provision has practically wreaked havoc to their lives with no solution in sight.

Per contra, the third respondent while conceding that s 28 (2) of the Reconstruction Act is inconsistent with section 65 (1) of the Constitution avers that the rights provided for in s 65 (1) are limited by operation of section 86 (2) of the Constitution. It is the third respondent's contention that the Reconstruction of State Indebted Insolvent Companies Act is a law of general application hence it falls within the purview of the operation of the limitation clause.

Section 86(2) of the Constitution provides:

"86. Limitations of rights and freedoms.

(1) …

(2) The fundamental rights and freedoms set out in this Chapter may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors including-

(a) the nature of the right or freedom concerned;

(b) the purpose of the limitation, in particular whether it is necessary in the interests of defence, public safety, public order, public morality, public health, regional or town planning or the general public interest;

(c) the nature and extent of the limitation;

(d) the need to ensure that the enjoyment of rights and freedoms by any person does not prejudice the rights and freedoms of others;

(e) the relationship between the limitation and its purpose, in particular whether it imposes greater restrictions on the right or freedom concerned than are necessary to achieve its purpose; and

(f) whether there are any less restrictive means of achieving the purpose of the limitation.

Section 86 (2) of the Constitution therefore sets the minimum requirement for the limitation of a fundamental right. A proper reading of the section points to the fact that only a law of general application may limit a right enshrined in Chapter 4 of the Constitution. The limitation section is premised upon the fundamental tenet of the rule of law, which reinforces the idea that public authority may only be exercised where the law clearly provides for it.

In *Chimakure & Ors* v *Attorney-General of Zimbabwe* 2013 (2) ZLR 466 (S), the Court reiterated the position that the rights enshrined in Chapter 4 of the Constitution can only be limited in terms of the law. The Court held as follows at pp 495F-496A:

> "It is a fundamental principle of constitutional law that any restriction which hinders the enjoyment of a fundamental right must be introduced by a legal provision. The grounds for the justification of the restriction must be found in the law by which it is imposed. Fundamental rights and freedoms and other constitutional values are protected by the fundamental law which is the supreme law of the land. Restrictions imposed on them must be consistent with the fundamental law otherwise they are void. The requirement that the restriction on the exercise of the right to freedom of expression must be contained in law is expressive of and consistent with the principle of the rule of law. The principle is to the effect that every governmental action which adversely affects the legal situation of persons in a free and democratic society must be justifiable by reference to an existing law."

See also *Affordable Medicines Trust & Ors* v *Minister of Health & Ors* 2006 (3) SA 247 (CC); *S v Makwanyane* 1995 3 SA 391; *In re Munhumeso* 1994 (1) ZLR 49 (S) & *Diana Eunice Kawenda* v *Minister of Justice, Legal & Parliamentary Affairs* (*supra*).

Against the backdrop of the above principles and using the six factors (or such of their number as may be relevant) listed in s 86 (2) of the Constitution, an attempt will now be made to determine whether the threshold for a limitation to be acceptable, set in that provision is met, namely fair, reasonable, necessary and justifiable in a democratic society.

Whether the limitation is fair

The question of fairness of the limitation brought about by the impugned law is adjudged from mainly its effects. See the *Munhumeso* case (*supra*). The practical effects wrought by the limitation are on full display. Thanks to s 28 (2) of the Reconstruction Act, the applicants have not accessed their terminal benefits two decades after the third respondent was placed under reconstruction, and more than a decade after the applicants were laid off. The uncontroverted averments by the applicants are that some of the potential recipients of the terminal benefits have since died, while the rest eke out a pitiable existence in the small mining towns where the third respondent owns some mines. Most have been condemned to destitution are resigned to the fact that they may never lay their hands on the terminal benefits. Meanwhile the third respondent, without any care whatsoever to their fate or welfare, is on a crusade to evict them from the houses they once occupied by virtue of their employment with it. They have been left to their own devices. They have no one or nothing to turn to. I do not see how

that can be said to be fair. If s103 of the Insolvency Act was the applicant's solution, the obvious question is why then has the same not been invoked to salvage the applicant's dire situation?

Whether the limitation is reasonable

It has already been established that a state can limit a right if there is an objective and reasonable justification and the justification has to be evaluated taking into account its goal, as well as its effect, assessed against the background of the principles inherent in democratic societies. The limitation has to have a legitimate aim and there must be a reasonable and proportional relationship between this aim and the means used to limit the right. The required proportionality is evaluated using the basic values of a democratic society such as tolerance, diversity and broadmindedness as envisaged in the cases of *Tanase v Moldova* ECHR (27 April 2010) 41-44 and *Animal Defenders International v United Kingdom* ECHR (22 April 2013) 39-43.

The proportionality principle is considered as central to a constitutional democracy as argued by DM Beatty *Ultimate rule of law* (2005) 163 that:

> 'The fact is that proportionality is an integral, indispensable part of every constitution that subordinates the system of government it creates to the rule of law. It is constitutive of their structure, an integral part of every Constitution by virtue of their status as the supreme law within the nation state.'

In the same vein, *S v Makwanyane* 1995 3 SA 391 established that the limitation of constitutional rights for a purpose that is reasonable in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. I equally do not see how an indefinite suspension of an employee's right to terminal benefits can be said to be reasonable or proportionate. It may mean that in reality the affected employee may never get to realise that benefit.

Is the limitation necessary?

More appropriately, the question is whether an open ended, indeterminate moratorium on the payment of employees in applicants' position necessary? This question requires the interrogation of the relationship between the limitation and its purpose. This factor requires that there be a good reason for the infringement of a right. The court should make a factual inquiry on whether or not there is proportionality between the harm done by a limitation of right and the benefits that the limiting law seeks to achieve. If the limiting law does not or barely contribute to achieving the purpose of limitation, such law will not be regarded as a reasonable and justifiable limitation of a right.

In *casu*, there no evidence was adduced by the third respondent to demonstrate that the embargo on the payment of the applicant's terminal benefits has benefited the respondent. In other words, there is no evidence to show that the third respondent is in a better financial position because of the limitation. Conversely, there is no evidence demonstrative of the notion that had the applicants been paid the terminal benefits the third respondent would have been in greater financial distress.

While the idea to protect an ailing debt-ridden company is noble, during the time that it is being nursed back to viability, it is the failure to stipulate a time frame for which such protection operates that is problematic and cannot stand up to constitutional scrutiny.

My view is therefore that it is not necessary to impose an indefinite embargo on the payment of terminal benefits on the pretext of the need to nurse the ailing entity in question to financial health. A line must be drawn in the sand when the protection must be lifted.

Is the limitation justifiable?

One of the key determinants here is whether there are less restrictive means of achieving the purpose of the limitation. This requires courts to assess whether the means used to restrict a right is the best possible ones to achieve the purpose of a limitation or there are other means that can be used to achieve that purpose. To be legitimate, a limitation of a fundamental right must achieve benefits that are in proportion to the costs of limitation. It follows therefore that a limitation of a right can be deemed not proportionate if the State could employ other means to achieve the same ends.

Needless to say, in *casu*, the limitation could have been justified had there been a cap on the duration on the moratorium to pay terminal benefits.

DISPOSITION

From the foregoing I find that the limitation brought about by s 28 (2) of the Reconstruction Act effectively barring the applicants for an indeterminate period from accessing and enjoying their labour rights under s 65 (1) of the Constitution is not defensible when assessed against the touchstone of s 86 (2) of the Constitution. It is neither fair, reasonable, necessary nor justifiable.

Accordingly, it is ordered as follows:

1. The application be and is hereby granted with no order as to costs.
2. It is declared that section 28(2) of the Reconstruction of State Indebted Insolvent Companies Act [*Chapter 24:27*] is constitutionally invalid, in that it violates labour rights as enshrined in section 65 (1) of the Constitution by suspending for an indeterminate period the operation of the Labour Act [*Chapter 28:01*] particularly section 13 of the same.
3. As a result of the declaration in paragraph (2) above, the legislature is enjoined to amend section 28 (2) of the Reconstruction of State Indebted Insolvent Companies Act to include a time frame or limit in which it will be in operation or in which a company may be reconstructed.
4. The operation of this order is suspended pending its confirmation by the Constitutional Court.

Ndlovu & Hwacha; The applicants' legal practitioners

Civil Division of the Attorney General's office: The first & second respondents' legal practitioners.

Dube Manikai & Hwacha; The third respondent's legal practitioners

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