



# **YOUNG LAWYERS ASSOCIATION OF ZIMBABWE JOURNAL**

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INTERIM EDITOR

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# Introduction

Young Lawyers Association of Zimbabwe [YALZ] is seeing a rapid increase in its membership base and audience recently. This growth is greatly attributable to the growing active involvement by YALZ in matters of public concern (one such being the recent High Court Application on the unconstitutional extension of tenure of the Chief Justice, which YLAZ won). YLAZ continues to engage and collaborate with other related institutions to promote the interests of its members and those of the public and to ensure respect for the rule of law, respect for Human rights and raising public awareness on many areas of the law and the Constitution of our great nation. To this end, it becomes critical that we grow a culture of scholarship amongst our members, to allow the expression of ideas on the interpretation of the law, law reform, critique of case law, the interdisciplinarity of the law and to bridge the gap between the law and the ordinary legal subject.

This Issue, composed of short piece articles is the first of its kind for YLAZ. It is an effort towards the establishment of a Journal for the Association where full-length Journal Articles can be published regularly. We hope that this initiative will provide a platform to the many legal scholars amongst our members and that it will endure the test of time in building a timeless scholarship legacy. The very minute details for the Journal and the *modus operandi* will be availed to members in due course. This shall include a call for volunteer reviewers and editors whilst sponsorship is being sought to sustain the Journal.

Thank you !!!

## **Interim Editor**

Mr E. James

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## The International & Domestic Law protections of Minority Groups against Forced Evictions: Reflecting on the Chilonga Eviction Case in Zimbabwe - “It is not over yet”.

**Evidence James**

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“Forced eviction” refers to the removal of individuals, families and/or communities, permanently or temporarily, against their will from the homes or land they occupy, without the provision of, and access to, appropriate forms of legal or other protection such as alternative housing, schools, sanitation, and health facilities.

On 26 February, the Local Government, Urban and Rural Development Minister, July Moyo, published a legal notice (Statutory instrument 50 of 2021 Communal Lands (Setting Aside of Land) (Chiredzi) 2021, for Lucerne production) ordering thousands of people on 12,940 hectares of Chilonga communal land in Chiredzi to leave immediately. The land clearing was meant for the production of lucerne grass by Dendairy, the second-largest dairy producer in Zimbabwe.

Chilonga people who are residents of the location targeted by the SI, are strongly opposed to the attempted evictions that were to be effected in the execution of the SI. The government did not provide reasonable notice for relocation, plans to pay compensation, and provision of alternative land with infrastructures like schools, clinics, hospitals, and roads. Chilonga community is dominated by the Shangaan people who have lived in the area since the 1830s. The Chilonga community on March 5, filed two

urgent High Court applications in Masvingo for SI 50 to be declared unconstitutional and invalid. Human Rights watch established that between 2012 and 2014 about 20,000 people were displaced from the Tokwe-Murkosi dam basin and relocated to Chingwizi with no consultation or compensation. Thousands of people forcibly moved to the Chingwizi camp were left destitute, relying on food from international aid agencies.

Due to public outcry and the pressure from litigation the government initially amended SI 50 of 2021 with SI 63A of 2021 and later repealed SI 50 replacing it with SI 72A of 2021. However, the threat of eviction is not over yet as SI 72A/2021 now seeks to establish an irrigation scheme with consequences that evictions may continue.

The eviction attempts on Chilonga people are reminiscent of the state-wide campaign of organized, systematic, and violent eviction of the Rohingya people by the Myanmar government beginning in August 2017. In the African context, the threat of eviction of the Chilonag people echoes the deprivation of the Ogiek community ownership and use of their ancestral land over which they depend on “for their social, economic and cultural existence in the Mau Forest Complex and forced evictions by the Kenyan government. The African Court on Human and Peoples’

Rights ruled in favour of the Ogiek in *African Commission on Human and Peoples' Rights v. Republic of Kenya*, ACtHPR, Application No. 006/2012 (2017).

In *Ben Djazia and Bellili v. Spain* (E/C.12/61/D/5/2015) the **Committee on Economic, Social and Cultural Rights** underlined “the obligation of State Parties to provide, to the maximum of their available resources, alternative accommodation for evicted persons who need it includes the protection of the family unit, especially when the persons are responsible for the care and education of dependent children.” (para. 15.4).

Domestically, the intended evictions violate provisions of the Zimbabwe Constitution of 2013 including the national objectives on Children – Section 19 and elders – section 21. In the Chapter 4 Declaration of Rights, the evictions threaten s51 (Dignity), s52 (personal security), s53(Cruel and inhuman treatment), s56 (Equality and non-discrimination), s80 (Rights of women), s81 (Children`s rights) & s83 (people with disabilities).

Regionally, the rights of the Chilonga people protected by the African Charter on Human and Peoples' rights and that is under threat from the intended evictions include Article 14 - the right to property, Article 2 - freedom from discrimination, Article 17(2) and (3) -

the right to culture, Article 22- the right to development, and Article 1 – the provision which obliges all member states of the Organization of African to uphold the rights guaranteed by the Charter.

Internationally, the intended evictions violate the obligation of States to refrain from, and protect against, forced evictions from home(s) as provided by the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights (art. 11, para. 1), the International Covenant on Civil and Political Rights (art. 17, 23 and 27) the Convention on the Rights of the Child (art. 27, para. 3), article 14, paragraph 2 (h), of the Convention on the Elimination of All Forms of Discrimination against Women.

#### ***Reforming land tenure is the solution.***

A sustainable solution to preventing forced evictions at the instance of the State is to align the Communal lands Act (1981) (Chap 21: 05) with the 2013 Constitution to give Zimbabweans in rural areas land titles. In the short term, the government must consult, compensate and/or provide alternative land and housing before evicting families and communities in line with the country`s supreme law and international law.

# The advent Cyber Law in Zimbabwe: A Survey of Cyber Crimes

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Cybercrime is generally defined as a computer-related crime. It is any illegal conduct directed by means of electronic operations that targets the security of computer systems and any data processed by them.<sup>1</sup> Cybercrimes fall within the Cyber law realm which is a relatively new area of law, particularly in Zimbabwe. Cyber law has emerged out of the advancements of technology among other socio-economic reasons. The rate at which people are exposed to risk of attacks, direct or indirect through the internet and technology is ever increasing. The more people access cyberspace and actively engage or indulge in activities through the use of the internet and technology the more vulnerable they are to cyber-attacks. As a developing country, Zimbabwe does not rank high in terms of technological advancement. However, individuals and organizations within the country still find themselves exposed to cyber-attacks. Cybercrime usually manifests in the form of scams, cloning hacking, and phishing. The most common cybercrimes in Zimbabwe of late have been social media hacking (such as hacking someone's Facebook or WhatsApp account) and credit card cloning. As a result of cloning and

hacking, many have lost their hard-earned money and their private information is exposed. However, there is usually little to no legal recourse to the aggrieved parties in the current legal framework.

The major challenge with cybercrime is that there is no physical being or scene to attach to the crime. A criminal can easily hack into an innocent person's account for the sake of committing a crime. In such circumstances, the trace will not lead to the actual perpetrator but to another victim of cybercrime. Cybercrime is not limited by space or distance. It can be committed from anywhere in the world by anyone. There is usually no conclusive traces to be followed for investigations to be efficiently and promptly carried out, no identified natural person, no physical address. The identity of the perpetrator is always hidden behind the web. These limitations make it almost difficult to bring perpetrators to justice. Worse still there is no law in Zimbabwe that specifically speaks to issues to do with cybercrime, unfortunately. Cybercrime is an inversion of the right to privacy<sup>2</sup> and personal security<sup>3</sup>. It is a highly organized crime with devastating and usually irreversible consequences. The rapid spread of cybercrime does not correlate to the

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<sup>1</sup>M Gercke *Understanding Cybercrime, Phenomenon, Challenges and Legal Response* (2012) 19.

<sup>2</sup> See section 57(a), (d) of the Constitution of Zimbabwe (amendment no 20 of 2013)

<sup>3</sup> See section 52(a) of the Constitution of Zimbabwe (amendment no 20 of 2013)

development of the Cyber law targeting cybercrime in the country. The Law Development Commission of Zimbabwe in collaboration with the Ministry of Justice, Legal and Parliamentary Affairs and the Ministry of Information Communication Technology, Postal and Courier Services embarked on a programme meant to introduce new forms of admissible electronic evidence to deal with the potential challenges that may arise in trying to prosecute and investigate cybercrimes as a result of the rapid sophistication of cybercrime.<sup>4</sup> Three bills have been drafted in this regard. The ***Computer Crime and Cybercrime Bill*** criminalizes various cyberspace activities and other traditional crimes committed using computers and the internet. The ***Data Protection Bill*** regulates the processing of data by private and public bodies and protects the rights of data subjects. The ***Electronic Commerce and Electronic Transactions Bill*** provides regulations, legal certainty, and enforceability of electronic transactions<sup>5</sup>. The bills when eventually passed into law have the potential to

curb the challenges of cybercrime. Currently, cybercrime under Zimbabwean law is covered in the Criminal Law Codification and Reform Act<sup>6</sup> in an abstract and very narrow sense. It is hoped that once these bills become law they will help in the control of crime and bringing the perpetrators to justice.

## Corporates violating Human rights in Africa – Chilonga and Dinde case studies: Assessing Policy Response options.

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The global shift of momentum towards sustainable development demands more diligent business practices. Instead, most corporates are palpably involved in human rights abuses instead of spearheading sustainable development without

profiteering. The significance of the corporate world to the global economy and efforts to eradicate poverty especially in developing countries cannot be overstated. However, the burden of human rights violations is becoming heavier in the global

<sup>4</sup>Law Development Commission, Position Paper (2016) page 2

<sup>5</sup> Law Development Commission Position Paper, page 2.

<sup>6</sup>Criminal Law Codification and Reform Act Chapter [9:23] see sections 162 – 168 of the Act.

south, particularly in the extractive and agricultural industries. This article highlights a few cases of human rights violations by corporates in Africa.

Numerous communities in Zimbabwe are facing the consequences of corporate impunity. Civil society has called Chinese investors out for abusing locals working in Chinese mines and has petitioned for the investigation of human rights violations in these mines. Locals have been tortured, exposed to unfavourable working conditions and some shot for demanding their rights.

Currently, there are two unfolding cases of corporate activities related to chaotic displacements in Zimbabwe, in Chiredzi (Chilonga) and Dinde. The government issued SI 50 of 2021 effecting the eviction of the Chilonga people from their land for Dendairy's Lucerne grass project. The government, after being taken to court, amended and later repealed SI 50 of 2021 as it was found to be unconstitutional. However, Chilonga remains of interest with irrigation scheme prospects. The Dinde community is at the brink of displacement to make way for the proposed Chinese Beifer Investments coal-mining project. Despite displacement, the looming threats to the livelihoods of the people in the Dinde area include negative environmental impacts, such as land degradation and pollution of water sources.

Both cases have been criticized for the government's failure to take proper measures in engaging and compensating the communities, and in so doing has violated local and international provisions, s74 of the Constitution of Zimbabwe which provides for freedom from arbitrary eviction.

### ***The Cause***

Inequalities of bargaining power, weak institutions and lack of accountability measures, judicial capture and state capture

have resulted in agreements between African states and big corporations without taking into consideration human rights implications, knowing they can go scot-free.

In the *Okpabi v the Royal Dutch Shell* case, the Dutch court in February 2021 ordered Shell to compensate for harm done to Nigerian farmers due to oil spills. It was held that Shell would now face lawsuits in the British courts for violations by its Nigerian subsidiaries. However, this is just one of the numerous lawsuits filed against Shell dating back to the late 90's Wiwa family lawsuits, undoubtedly Shell has been progressively notorious.

The UN declared 2021 as the International Year for the Elimination of Child Labor, intending to end all forms of child labour by 2025. However, in western African cocoa farms, child labour has spiralled, particularly in Ghana and Ivory Coast. In February 2021, former child workers from Ivory Coast filed a claim in the United States against Nestle, Mars and Hershey, the leading chocolate manufacturers, for child slavery. The litigation is still pending.

A reflection on the *Okpabi* case gives hope that the outcome of the child workers' claim will set a precedent that allows the filing of child labour claims in the US. This precedent offset futile litigation in African courts and draws to reality the 2025 goal to free millions of children from child labour in supply chains. In *Wiwa v The Royal Dutch Shell*, it was found among other factors determining jurisdiction, that Nigerian courts had no effective remedies for the plaintiff's claims hence the US court assumed jurisdiction.

### ***Global policy response***

The policy is still developing, with the current discussion on the Treaty on Business and Human Rights at the international level.

Presently, BHR issues are regulated by the United Nations Guidelines on Business and Human Rights. However, these guidelines are non-binding, therefore ineffective. The UN has urged countries to adopt National Action Plans on BHR. Despite the urgency, not many African countries have developed these NAPs, yet Africa is an attraction to

many corporates both local and transnational. Binding guidelines specifically regulating BHR are a need, not only at the international level but regionally and nationally to curb violations before, during and after any business operations, in addition, providing victims with effective remedies.

## The uncertainty with labour internal appeals: Reviewing SI 15 of 2006.

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Legal certainty is a fundamental element of the principle of legality. Within the context of labour law in Zimbabwe, any legal uncertainty may prejudice an employer and infringe on the constitutional rights of an employee involved in a labour dispute. However, legal uncertainty remains in our labour law. This article examines legal certainty issues relating to internal labour appeals and provides recommendations for law reform.

The objective of the Labour (National Employment Code of Conduct) Regulations, Statutory instrument 15 of 2006 is to provide clear machinery and procedure for internal disciplinary action that can be taken against employees charged with misconduct.

Section 6 of the Regulations provides for the disciplinary procedure, while section 8 provides for the procedure for internal appeals.

Section 8(1) of the regulations read “Depending on the size and circumstances of an establishment, an employer may appoint a person in his or her employment as an Appeals officer or with the agreement of his

or her employees or workers representatives and Appeals Committee to preside over and decide an appeal.”

Several issues arise for a disgruntled employee who wishes to appeal their disciplinary hearing. Firstly, it is unclear whether an Appeals officer or an Appeals Committee should be in perpetual existence or should be constituted on an *ad hoc* basis. If an employer does not have an Appeals officer or committee, a disgruntled employee does not have a clear path forward. Would they need to request the employer to set up such an officer or committee or should the employer do so automatically after a hearing?

An aggrieved employee also faces further stumbling blocks. The provision in section 8(1) is clearly discretionary and dependent on the size and circumstances of the employer. The use of the word “may ” in section 8(1) gives the employer the ability to outrightly refuse to appoint an Appeals officer or committee. In *Air Duct Fabricators (Pvt) Ltd v A.M. Machado & Sons (Pvt) Ltd* [2016] ZWHHC 54, Chigumba J noted that “when the legislature uses the word “may” in statute... the intention is to confer the power

only, without a duty to exercise it.” Such a proviso construction leaves the employee stranded in cases where an employer refuses to cooperate, which is a great possibility due to the conflict nature of the proceedings.

It was previously believed that the appeal in terms of section 8, where no internal system existed, should be handled by a labour officer. However, in *Makumire v Minister, Public Service, Labour and Local Well fair [2020] ZWCC 0*, the labour officer correctly declined jurisdiction to hear the appeal as it had been referred to him from the Disciplinary Authority and not an appeals officer or committee as envisioned in section 8(6) of the code of conduct. The Labour officer advised the Applicant to appeal to the Labour Court in terms of section 92D of the Labour Act [Chapter 28:01]. The Labour Court subsequently refused to hear the matter as the Appellant had failed to exhaust internal remedies. The facts of the case give light to the chaos caused by the lack of clarity provided by section 8 and still, no clear path exists for the employee.

This legal uncertainty inherent in section 8 is problematic considering that labour matters require both the exhaustion of internal remedies before appealing to the courts and further, strict time bars leave little room for error when a party decides to appeal. It is not the duty of the courts to rectify this defect in the law, rather, the legislature must revisit the provision of section 8 to bring legal certainty.

Two steps are recommended to provide clarity. Firstly, the last two words of section 8(1) should be amended from “an appeal” to “appeals.” Therefore, ensuring that an Appeal officer or Appeals committee exists for all appeals and an employee may be directed to such after a disciplinary hearing.

Secondly, in addition to the amendment. A provision must be added stating, “Where no Appeals officer or Appeals committee exists in terms of section 8(1), the appeal shall lie with the labour officer who may dispose of the matter in terms of section 93 of the Act.” Thereby giving the labour officer explicit jurisdiction to hear such matters.

## The Chilonga eviction Scandal – A violation of the right to Administrative Justice: Reflecting on the Administrative Justice Act and the 2013 Constitution.

**Tawanda Gonzi**

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On the 26<sup>th</sup> of February 2021 and 10<sup>th</sup> of March 2021, the Zimbabwe government issued two Statutory Instruments namely, SI 50 of 2021 and SI 163A of 2021, respectively. The SIs ordered the people occupying the Chilonga Communal lands to depart the area permanently on the day of publication of the SIs. These SIs contravened section 68 of the Constitution of Zimbabwe

of 2013, which provides that every person has a right to administrative conduct that is...substantively fair, in that the government did not give the Chilonga people reasonable time to put together their property so that they can vacate. The government later repealed the SIs. It must be noted that both SIs were in violation of S68 of the Constitution of Zimbabwe of 2013 and S3(1)(a) of the

Administrative Justice Act [Chapter 10:28] (AJA).

It must be noted that the issuance of SIs which are delegated legislation was an administrative action and as such they must have complied with S68 of the Constitution by being procedurally and substantively fair. S332 of the Constitution defines an administrative action as any decision of a person performing a function of a public nature, and a failure or refusal of such a person to reach such a decision or to perform such an act. S2(1)(c) of AJA provides that administrative action is any action taken or decision made by a Minister or Deputy Minister of the State. The AJA in paragraph 1 of the first part of its Schedule excludes executive functions of the Cabinet as an administrative action. However, *Du Plessis* (in *Du Plessis LM "Interpretation of Statutes and the Constitution" in Bill of Rights Compendium* (1998, 19), argues that broadly speaking the enactment of SI can be seen as an administrative action. Any administrative action must be tested against S68 of the Constitution.

The government's order to make the Chilonga people depart their land of more than four centuries on the day of publication of the SI was substantially unfair especially without providing an alternative place and housing. S3(1)(a) of AJA provides that administrative action must be lawful, reasonable, and fair. Unlike South Africa's Promotion of Administrative Justice Act 3 of 2000, AJA does not provide whether fairness must be procedural or substantive or both. This gap, however, is filled by S68 of the Constitution which provides that administrative action must be both substantively and procedurally fair. In being fair, the SIs must have, in respect of section 2 of AJA, given the Chilonga people adequate

notice of the nature of the action they intended to take.

The court in *Zinyemba v Minister, Lands & Rural Settlement & Another* (CCZ 3/2016 CCZ 123/13) [2016] ZWCC 03 stated that, since section 68 is broadly modelled on basis of S33(1) of the Constitution of the Republic of South Africa, 1996, it is important that South Africa's jurisprudence be applied. In being fair also, as pointed out by Sachs, J, in the case of *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), evictions are done without considering all relevant circumstances must be abhorred. Some circumstances that need to be taken into consideration are the rights and needs of children, the elderly and the disabled members of the communities targeted by evictions. All these were not considered.

This scandal has put to bare the lacunae in the current AJA and one has been discussed in *para 3* and this Chilonga case must push the government to speed up or begin the alignment of AJA with the Constitution. The Constitution must always be supreme, and any Act must be consistent with it as per section 2. Currently, AJA is unconstitutional. AJA must, in terms of section 68(3) of the Constitution, give effect to the rights contained in the Constitution but unfortunately, it contains lacunae. Such a disparity creates confusion thus must be abhorred. *G. Feltoe* (in *G. Feltoe Aligning the Administrative Justice Act with the Constitution* (2019) has lamented that AJA is not a reflection of the provisions in the Constitution in that section (3)(1)(a) of AJA emits words which are encapsulated in the Constitution such as prompt, efficient, proportionate, impartial and *substantively* and called upon the inclusion of such words.

Therefore, the government, by ordering evictions without any consideration of the needs of the vulnerable members of the

Chilonga people and the apparent lack of reasonable notice, acted arbitrarily and in violation of the highest law in the land.

### ***Recourse***

Section 4(2)(b) of AJA provides for better relief. As what happened without a high court application, the matter was sent back to the administrator. AJA must also be aligned with the Constitution.

## The Patriotic Bill - Is it the final nail to the coffin of democracy in Zimbabwe? Interrogating the Intention, Philosophy, and Construction.

**Ashley Makwara**

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“Authority without wisdom is like a heavy axe without an edge, fitter to bruise than polish” - *Anne Bradsett*

The above quote is descriptive of the Zimbabwean political landscape where men with power, abuse it to the detriment of the Zimbabwean populace, signifying an era of decay. The Patriotic Bill currently under debate is a case in point, flawed both on philosophy, intention, and construction.

In March of 2021, the now late Honorable Mpfu, a former Zanu-PF Member of Parliament moved the motion for the enactment of a law which “prohibits any Zimbabwean citizen from willfully communicating messages intended to harm the image and reputation of the country on international platforms or engaging with foreign countries with the intention of communicating messages intended to harm the country’s positive image and/or to undermine its integrity and reputation”.

The motion was directly birthed out of the Zim-lives Matter movement that trended

from mid-year of 2020. At face value, the purpose of the proposed enactment seems noble as other jurisdictions such as the U.S and Egypt have related counter-terrorism legislation. Considering the September 11 attacks, the government of the United States enacted the U.S.A Patriotic Act of 2001, to uproot any acts of domestic terrorism before they even materialize. The Act conferred extensive powers to various entities responsible for state security to increase surveillance and monitor communications of citizens. This was out of necessity as the government was exercising its mandate to provide state security and not as an act of declaration of war against outspoken citizens who criticize poor governance. Thus, the timing and the wording of the proposals are beyond doubt the cementing of the iron fist rule of the current administration.

First, the proposed bill, both in its draft state and any revision that may be – due to the complex dimensions of the subject matter (patriotism) intended for legislative prescription, does not comply with the

principles of legality. This Bill fails to comply with the *ius certum* principle, which requires that crimes be formulated clearly. The wording in the proposal is “void-for-vagueness” which renders it difficult for courts to classify what exactly is the punishable act in question. The purpose of any law is to regulate human behaviour and if the law is unclear on what acts are unlawful then the legislature would have failed in delivering its mandate, and citizens become victims of injustice.

The first problematic word used in the Bill is “willfully” - it means that there must be intention on the part of the accused to know and will an unlawful act. If one sends a message which apparently “harms” the country’s reputation to a friend or relative on WhatsApp or Facebook how exactly will that element of willfulness be proven? If the Bill is passed with such obscurity, there is a real risk that citizens can be targeted for freedom of speech, the right to freedom of conscience and the right to the privacy of communications which are constitutionally embedded rights alluded to in the preamble as well as section 61 (1)(d), section 60 (1)(b) as well as section 57 (d) respectively of the Constitution of Zimbabwe Amendment (No.20) Act, 2013.

Secondly, another controversial word that appears in the Bill forming the core definitional element of the supposed crime is the word “harm”. What exactly constitutes harm? Can a tweet that says Zimbabweans are hungry constitute “harm” to the image of the country? Can a video showing the dilapidated state of our health care system be classified as “harm”? Does pointing out a gross violation of human rights not constitute patriotism? Can such conduct be said to be

unpatriotic? Can we legislate patriotism? These are questions which the proposed bill fails to consider in its apparent aim to oppress the citizenry to hold the government to account as contemplated by the democratic constitution of the country. If there is no clear scope of what constitutes “harm” then the bill is void as it will be unclear on what conduct is punishable.

Thirdly, an issue of concern is the definition of “country”. Section 3(2) (a) read together with section 67(4) of the Constitution allows for a multi-party state and this is parallel to the definition of Zimbabwe as not being synonymous to Zanu-PF. However, the bill is treading on a thin line with great potential of the term “country” confused for a synonym of the Zanu-PF administration. In short, this could imply that any form of criticism of the ruling party such as a tweet saying “Zanu-PF must go” and not specifically criticism to the country will be seen as an act of de-campaigning the country. That on its own is detrimental to the State as not only have we created a one-party state and created ample ground for dictatorship but is a spit on the very founding values of the Constitution. The constitutional scheme contemplated the imperative of checks and balances from the citizenry hence the right to vote, the freedom of speech, freedom of the media and freedom of conscience.

Should this Bill and its subterfuge clauses succeed, and the seeds of dictatorship would have been sown with irreparable damage to our constitutional democracy and the future of generations to come. Therefore, the Patriotic Bill must stay until such time that provisions can be made in future after wide public debate and out of national interests than partisan interest as is the case now.

## Reforming our Unjustified Enrichment Law.

**Bethel Negato**

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Our Civil Law recognizes unjustified enrichment (UE) where questions of duties and obligations of parties to a civil agreement arises. The concept exists as a remedy to a party who has been impoverished in a scenario where the other party would have been unduly enriched at the expense of the impoverished party, and both the enrichment and impoverishment arising out of the same act (contract). There must be no other avenue for redress to the impoverished party.

### ***Requirements for the action to succeed.***

In *Industrial Equity v Walker*,<sup>7</sup> it was held that an Unjustified Enrichment claim must satisfy the following:

- (a) Enrichment
- (b) Unjustifiedly
- (c) At the expense of the
- (d) Impoverished party
- (e) Causation and
- (f) The absence of another remedy.

N.B No rule of law must refuse the action to the impoverished.

### **‘At the expense of’ as the basis for Law Reform and the *negotiorum gestio*.**

There are scenarios where one would have been enriched by the services of another but

not pursuant to any agreement. The enrichment would not be at the expense of the enriched or the owner whereas the Unjustified Enrichment action then fails for want of the requirement. The same applies where the owner of a *res* is unduly enriched by improvements to his *res* by a contractor pursuant to an agreement with a 3rd party who has misrepresented himself as the owner because those improvements were *sine causa*.<sup>8</sup> The question becomes whether the 3rd party can get redress. Our law is not satisfactory in that regard, there is a plethora of case law that suggests that such claims must fail. It is hereby submitted that the rule in the *Zvandasara* case<sup>9</sup> suggests possible reform in as far as it recognizes the *negotiorum gestio* Principle which entails that the Impoverished is treated as a generous actor who must not be paid remuneration but compensation. The essential requirement for this principle is that the service must be strictly necessary. The task is hereby submitted to our Courts and Parliament to further develop the rule and confirm it for practical application.

In conclusion, *negotiorum gestio* must be polished in our jurisprudence as an Unjustified Enrichment remedy.

<sup>7</sup> 1996 (1) ZLR 269 (H). See - *Walker v Industrial Equity Ltd* 1995 (1) ZLR 87 (S). See - also *Dube v Khumalo* 1986 (1) ZLR 103.

<sup>8</sup> *Gouws v Nestor Pools (Pty) Ltd* 1968 (3) SA 563. See also *Buzzard Electrical v 158 Jan Smuts Avenue Investments* 1996 (4) SA 19 (A).

<sup>9</sup> HH 260 15

