A CRITICAL ASSESSMENT OF EMPLOYMENT LAW
RELATING TO REDUNDANCY IN ZAMBIA.

BY

MSANIDE PHIRI

UNZA 2012
DECLARATION

I, Msanide Phiri, do hereby declare that this essay represents my own authentic work and to the best of my knowledge, information and belief, no similar piece of work has previously been produced at the University of Zambia or any other Institution for the award of Bachelor of Laws Degree. All other works in this essay have been duly acknowledged.

I therefore bear the absolute responsibility for the contents, errors, defects, and any omissions therein. No part of this work may be reproduced or copied in any manner without the prior authorisation in writing of the author.

Signature

11 May 2012
Date
DEDICATION

To my loving and hardworking Wife **Cythia Kapampe Kaoma**, am forever grateful and thankful to you for the unwavering support and encouragement throughout my studies.

To **My ever loving Children**, Tiyamika, Zipo, Chacha, Melise and Muzo, it is my sincere hope and prayer that this will be a beacon to inspire you achieve more than this in your lives.

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I am also extremely grateful to the Learned Counsels, Mr. Andrew Musukawa, Chishimba Mwansa and Munasangu, the partners at AMC Legal practitioners during the period of my attachment as a leaner legal, who always showed belief in my potential and accorded me an opportunity to apply my skills to the living law. I certainly could not have understood the field of study without the aid of their vast knowledge and experience in the legal practice.

My gratitude also goes to all my lecturers especially Retired Judge Kabazo Chanda and class mates in the School of Law at the University of Zambia, your immense knowledge, jokes and support during the entire period of my study made my university life a worthwhile experience. I thank you for your tolerance and unfailing kindness. Indeed I would fail in my duties if I fail to acknowledge the support and counsel from the School of law administration support staff, Mr Musukwa, Ms Phiri, Mr Sitwala, Mr Zimba, Mr Daka, and Patience. May the almighty God bless you All.
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ABSTRACT

The relationship between the employee and employer falls under the ambit of contractual Law. However, this relationship is also guided by a number of statutes and other common law principles. It is important to note that the contract of employment is terminated in several ways such as resignation, death, mutual consent and indeed redundancy.

In Zambia, the concept of redundancy is provided for in section 26(B) of the Employment Act Chapter 268 of the Laws of Zambia and the two statutory Instruments No.1 and 2 of 2011. Through various precedents, the Supreme Court of Zambia has also added another important limb to this definition. The objective of the study was to access and analyze whether employees in Zambia have adequate legal provision and recourse in Zambia. The study endeavored to investigate the weaknesses inherent in the existing legal provisions and in order to achieve this it became imperative to similarly examine the relevant case law.

The methodology used involved analyzing section 26(B) of the Employment Act and the two statutory No.1 and No.2 of 2011. This is entailed undertaking a critical analysis and review of a plethora of case law in order to determine whether employees in Zambia have adequate legal protection under redundancy.

It has been observed from this study that these laws are discriminatory in nature and narrow in application. This is going by the fact that Section 26(B) which was meant to cater for all employees was placed under Part Four of the Employment Act, this section that only applies to oral contracts. Invariably, this means that employees with written contracts have no legal protection under the Employment Act because this is the only section in the Employment Act that provides for redundancy. On the hand the two relevant statutory instruments No.1 and 2 of
2011 are not adequate because they only provide for a specific group of employees. Thus, this position has left employees with written contracts who form the majority of the workforce in the country without any legal protection when it comes to redundancy. Presently, they have to rely on the terms in their contracts of employment and collective agreements. However, it is important to note that in most cases the contracts of employment and collective agreements do not always provide for redundancy. In any case employees find themselves in weak bargaining positions such that redundancy is never envisaged in most employment contracts.

In view of the foregoing the author has observed that there is urgent need to review or enact laws that will adequately cover for employees with written contracts. Other notable recommendations made by the author include the need for the Minister to issue a statutory instrument to put in place a concise mechanism for calculation of redundancy packages.

Addressing these recommendations would enhance legal protection and certainly provide adequate recourse to employees with written contracts and those not covered by statutory instruments.
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Chapter One

1.0 Introduction

The employer and employee relationship is, according to common law, a voluntary relationship which the parties may enter into on terms laid by the parties within limitations imposed only by the general law of contract.¹

The law of employment was developed under common law principles as an application of the law of contract. This relationship is commonly referred to as a “Contract of employment”. It is noteworthy that this phrase is not specifically defined by the Employment Act.² In the absence of a statutory definition of the expression “contract of employment,” a working definition may be that a contract of employment is an agreement whereby one party, the employee, undertakes to render to the other party, the employer under the latter’s direction for a determined or predetermined time services for a consideration which the employer undertakes to pay the employee. The agreement is supposed to include terms negotiated by the two parties to the contract.

The legal regulation of the individual employment relationship in Zambia is composed of a body of law which, while it still has as its core the common law principles of the contract of employment, today consists largely of provisions contained in statutes and statutory regulations.

There are a host of statutes enacted by the Zambian legislature dealing with specific areas of employment law. These statutes include the Constitution of Zambia³, the Employment Act,⁴ the Industrial and Labour Relations Act,⁵ the Minimum Wages and Conditions of Employment Act,⁶ and the Employment of Young Persons and Children Act⁷.

¹The LAZ Journal volume1, March 2010 p.3
²Chapter 512 of the Laws of Zambia
³Chapter 1 of the Laws of Zambia
⁴Chapter 268 of the Laws of Zambia
⁵Chapter 269 of the Laws of Zambia
It is important to note that in the absence of statutory provisions, courts have to resort to common law principles to settle any matter not so provided. The English Law (Extent of Application) Act\textsuperscript{6} provides, in section 2, for the application of English common law, doctrines of equity and certain English statutes. Section 3 of the Interpretation and General Provisions Act\textsuperscript{9} defines ‘common law’ as the common law of England.

In Zambia redundancy is one of the several ways of terminating the employment contract. The law of redundancy has since its beginning developed steadily but nevertheless in a discriminatory manner. Only certain sections of employees have benefited from the legislation on redundancy. With the foregoing it is necessary to briefly examine the concept of redundancy.

1.2 The Concept of redundancy

Like any other contract, a contract of employment invariably has to come to an end at one time or the other. A contract of employment may come to an end through termination of contract; dismissal, resignation, redundancy, retrenchment, retirement, frustration of the contract or indeed the death of the employee.\textsuperscript{10}

With the aforesaid, redundancy is a mode through which a contract of employment comes to an end. The concept of redundancy is highlighted in statute law, judicial precedents, and a number of legal literatures by renowned authors on employment law.

Hence, the unfolding discussion will briefly review and examine the concept of redundancy by briefly reviewing the relevant statutory provisions, judicial precedents, and indeed the legal literature on the subject.

\textsuperscript{6} Chapter 276 of the Laws of Zambia \\
\textsuperscript{7} Chapter 274 of the Laws of Zambia \\
\textsuperscript{8} Chapter 11 of the Laws of Zambia \\
\textsuperscript{9} Chapter 2 of the Laws of Zambia \\
\textsuperscript{10} Winnie Mwenda, Employment Law in Zambia Cases and Materials: (Lusaka: UNZA Press, 2004), 33
1.2.1 Statutory interpretation

The Employment Act Chapter 268 of the Laws of Zambia, Section 26(B) which is under Oral Contracts of Service states the following:-

1) The contract of service of an employee shall be deemed to have been terminated by reason of redundancy if the termination is wholly or in part due to-

(a) The employer ceasing or intending to cease to carry on the business by virtue of which the employee was engaged; or

(b) The business ceasing or reducing the requirement for the employees to carry out work of a particular kind in the place where the employee was engaged and the business remains a viable going concern provides the statutory definition of redundancy.

3) An employee whose contract of service has been terminated by reason of redundancy shall-

(a) be entitled to such redundancy payment as agreed by the parties or as determined by the Minister, whichever is the greater.

From the above, it is important to note that section 26(B) of the Employment Act as amended by Act No. 15 of 1997, is found in part IV of the Act. This part applies to oral contracts because it falls under section four of the Employment Act which specifically covers for employment contracts under oral contracts.

Section 26(B) of the Act contains detailed provisions on termination by redundancy. In enacting this provision Parliament intended to safeguard the interests of employees who were employed on oral contracts of service which by nature would not have any provision for termination of employment by way of redundancy. The provisos of this part shall apply to oral contracts. In enacting this provision parliament intended to safeguard the interests of employees who are
employed on oral contracts. It is important to note that section 26(B) of the Employment Act is the only provision in the Employment Act dealing with termination of employment by redundancy. Invariably, by holding that section 26(B) of the Employment Act applies to written contracts would lead to absurdity and uncertainty in the law as regards redundancy vis-à-vis written contracts.

Courts in Zambia have taken a strict interpretation of this statutory provision by not allowing section 26(B) to apply to written contracts. This has recently been illustrated in the case of *Barclays Bank Zambia v. Zambia Union of Financial Institution and Allied Workers*, where the Supreme Court of Zambia vehemently held that; in enacting section 26(B) of the Employment Act Parliament intended to safeguard the interests of employees who were employed on oral contracts of service by which nature would not have any provision for termination of employment by way of redundancy. This proposition was also elucidated in the case of *Chilanga Cement v. Singogo*, were the court categorically stated that Section 26(B) of the Employment Act does not apply to employees with written contracts.

With the aforementioned, it is well established that section 26(B) is now settled law which is only applicable to oral contracts. However, in Zambia the majority of employees have written contracts, this implies that, employees facing redundancy with written contracts cannot invoke the statutory provision of section 26(B) of the Employment Act. It is important to note that this is the only provision in the Employment Act which provides for procedure and payment for redundancy. In effect, employees with written contracts have no legal recourse and stand to lose out when it comes to the issue of redundancy. As such employees in Zambia will have to rely on their individual contracts of employment, conditions of service and collective agreements to provide for redundancy.

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11 Supreme Court Judgment No. 12 of 2007
12 Supreme Court Judgment No. 13 of 2009
In most cases redundancy is never envisaged in these aforesaid documents. Moreover, since contracts of employments fall under the ambit of general contractual agreements, Courts will be reluctant to introduce redundancy in employment contracts in cases of disputes between the employer and employee.

Naturally, employees do not share equal bargaining powers with their employers. In most cases employees ordinarily stand in weak bargaining positions with their employers, hence they require the protection of the law in securing their economic interests deriving from the employment relationship. It is for this reason that the law seeks to protect employees’ interests by setting certain minimum standards applicable to contracts of employment, and putting in place effective mechanisms of regulating such essentials as wages and other terms and conditions of employment.\textsuperscript{13}

In this case were Section 26(B) excludes the majority of the workforce in Zambia, this position has greatly disadvantaged these employees because they are excluded from enjoying the benefits of the statutory provisions bestowed in this Act.

\textbf{1.2.2 Statutory Instrument No. 1 of 2011 – The Minimum Wages and Conditions of Employment (Shop Workers) order, 2011.}

Section 2, of this statutory instrument specifically applies to employees employed in any shop or in connection with the business of any shop. Section 9 provides for redundancy benefits and states as follows:

"Where an employee’s contract of service is terminated by reason of redundancy, the employee shall be entitled to at least one month’s notice and redundancy benefits of not less than two month’s basic pay for each completed year of service."

\textsuperscript{13} Ibid, p. 5
This provision only covers a specific category of employees who do not even form the majority of the workforce in Zambia. Therefore, a big number of employees have no statutory protection when declared redundant.


Section 10 provides for a payment of one month’s notice and redundancy benefits of not less than two months basic pay for each completed year of service. However, according to section 2 this benefit does not cover the following categories of employees:

(a) of the Republic of Zambia

(b) of a local authority

(c) engaged in domestic service

(d) in any occupation where wages and conditions of employment are regulated through process of collective bargaining

(e) in management

(f) in a sector for which the Minister, by statutory instrument, has prescribed the minimum wage

As noted above, the law is selective in that the majority of employees in Zambia do not have statutory protection with regard to the issue of redundancy. This defeats the whole purpose of formulating laws because the purpose of labour law is principally to “regulate, support and to restrain the power of management and the power of organised labour." In this regard, employees not covered by these statutory instruments have no legal recourse. Thus, they lose out on redundancy benefits if they were not stipulated or provided for in their respective conditions of

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service or their employment contracts. Worse still, they have no legal recourse because of the lack of legislation in the area of redundancy for employees with written contracts.

Seen in this light, legislation is an instrument for creating standards to be observed by both employer and employee as well as for imposing duties and obligations on the same. When such law exists, it is most beneficial if the standards it sets and the duties and obligations it imposes are of general application. It is but of little help, to have legislation that excludes the majority categories of employees from its application. Therefore, the law on redundancy in Zambia is not beneficial because it only protects a small section of employees in the country.

Notwithstanding that workers and employers, as actors in the industrial arena should be left to bargain, the legislation on redundancy in Zambia should play a greater role in regulating industrial relations than it currently does by recognising that employees do not possess equal bargaining strength. The relevant legislation on redundancy should come in and set minimum conditions to protect employees who are in a weaker position compared to employers. This legislation should be of general nature so that it benefits the majority of workers regardless of whether one has a written contract or not.

Needless to say, although the Employment Act has provided for the procedure in dealing with redundancy, it is not explicit on the calculation of the redundancy package. Section 26(B) (3) provides that an employee whose contract of service has been terminated by reason of redundancy shall-

"Be entitled to such redundancy payment as agreed by the parties or as determined by the Minister, whichever is the greater."

In order to give legal effect to this provision, it was contemplated that the Minister would issue a Statutory Instrument prescribing the redundancy package. This research undertaken by the author
has revealed that, the relevant Statutory Instrument has not been issued by the Minister thus making the law desuetude.

On the other hand Statutory Instrument No. 1 of 2011 - the Minimum Wages and Conditions of Employment Act (Shop Workers) Order, according to section 2 only applies to employees employed in any shop or in connection with the business of any shop. Section 9 provides that:

Where an employee’s contract of service is terminated by reason of redundancy, the employee shall be entitled to at least one month’s and redundancy benefits of not less than two months’ basic pay for each completed year of service.


“Where an employee’s contract of service is terminated by reason of redundancy, the employee shall be entitled to at least one month’s notice and redundancy benefits of not less than two months basic pay for each completed year of service.”

Again, this provision applies only to a specific group of employees specified in the schedule of this same mentioned statutory instrument.

As noted above the procedure and calculation of the redundancy package is only applicable to a specific group of employees. The majority of employees in Zambia especially those with written contracts do not have any legal provision for the procedure and calculation of redundancy package.

This attitude of the law towards redundancy has prompted an inquiry into the approach that the law and Courts have taken regarding this issue. That inquiry constitutes the main thrust and aim of this paper and throughout this research the question seeking to be answered is “how has the legislation
and the courts of law approached the question of redundancy which only covers a selected group of workforce in Zambia.”

1.2.4 Judicial precedents

Courts in Zambia and English jurisdiction have had an opportunity to adjudicate on several cases dealing with redundancy. The Supreme Court of Zambia in *Mike Musonda Kabwe v. BP Zambia*,\(^{15}\) held that;

“If an employer varies a basic condition or basic conditions of employment without the consent of the employee then the contract of employment terminates and the employee is deemed to have been declared redundant on the date of such variation and must get a redundancy payment if the conditions of service provide for such payment.”

This principle of the law was also couched in the case *National Milling Company Limited v Grace Simataa and Others*,\(^ {16}\) where it was firmly held by the court that, if an employer varies in an adverse way a basic condition or basic conditions of employment without the consent of the employee, then the contract of employment terminates and the employee is deemed to have been declared redundant. The court has been very consistent on this issue and this has been the holding in the recent case of *Lawrence Muyunda Mwalye and Bank of Zambia*\(^ {17}\) where the Court firmly held that the choice to go on redundancy lay with the plaintiff after his conditions of service were substantially altered without his consent following the abolition of the post of Coordinator in charge.

\(^{15}\) (1997) SJ, 13  
\(^{16}\) SCZ Judgment No. 21 of 2000  
\(^{17}\) SCZ Judgment No. 22 of 2010
Moreover, in the case of *Peter Ng’andwe and others and Zamox Limited and Zambia Privatisation Agency*\(^\text{18}\) the Supreme Court of Zambia has firmly upheld the decision in *Mike Musonda Kabwe and B.P Zambia Limited*\(^\text{19}\) that if an employee varies the basic conditions of employment without the consent of the employee, then the contract of employment terminates and the employee deemed to have been declared redundant on the dates of such variation and must get a redundancy payment if the conditions of service do provide for such payment. If the conditions of payment provide for early retirement and not redundancy, then the employee should be deemed to be placed on early retirement.

Similarly, in *Herwitt Chola and 154 others v. Dunlop Zambia Limited*\(^\text{20}\) the court held that the reduction in the labour force was referred to as redundancy. The court have also sought to contend that where the employer reduces their workforce for ‘economic necessity’, that could be said to be redundancy.\(^\text{21}\) Moreover, if an employer dismisses his employees and replaces them by the same number of self-employed persons the employees have been dismissed for redundancy. Therefore, dismissal of one employee to make room for continued employment of another whose job has disappeared is dismissal for redundancy.

Furthermore, in *Robinson v. British Island Airways Ltd*\(^\text{22}\) Robinson was employed as Flight Operations Manager reporting to the General Manager. Reorganisation involved replacing the position by the Operations Manager who absorbed the duties of the Flight Operations Manager. The plaintiff considered not to have qualifications for Operations Manager was so dismissed for redundancy. It was held by the Court that the work involved in the combined post was different in

\(\text{18} \) SCZ Judgment No.13 of 1999
\(\text{19} \) SCZ Judgment No. 115 of 1996
\(\text{20} \) SCZ Appeal No. 108 of 2001 (unreported)
\(\text{21} \) Hindle v. Percival Boats [1969] 1 W.L.R 12
\(\text{22} \) [1978] I.C.R. 304
nature from that involved in the previous two posts. Therefore, redundancy had taken place and the employee was entitled to a redundancy package.

These judicial precedents have clearly revealed that where an employer varies conditions of service unilaterally, the employee’s termination of employment will amount to redundancy. In many instances the Supreme Court of Zambia has upheld this legal principle. This was clearly demonstrated in the case of Mike Musonda Kabwe’s which set an undertone in other similar precedents. The Court has been unwavering in this regard by maintaining that if an employer varies the basic conditions without the consent of the employee then the contract of employment terminates.

However, it is not easy sometimes to tell whether redundancy has occurred or not. As such, Courts will look into a lot of factors in order to determine and establish whether redundancy has occurred or not. Among others, they will consider the following; the diminution requirement, work of a particular kind, the place where the employee was employed, self induced Redundancy, alternative offers just to mention but a few.

1.2.5 Legal Literature

Mwenda, W.S., Employment Law in Zambia. (2004), in her book defines redundancy as a situation where the employer decides that the employee’s services are no longer needed. In such a case, the employee is said to have become redundant. From the definition, Mwenda gives an impression that redundancy is equivalent to termination under common law, where an employer has the right to terminate a contract of employment for any reason or for none and without applying the rule of
natural justice. This proposition takes a different view from other authors who do not place redundancy on the same footing with termination.

The author also adds that that redundancy arises by the operation of the law as cited in section 26B of the Employment Act.

In the same vein the learned Author, Rideout is of the view that redundancy is where an employee is taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to:

1. The fact that his employer has ceased, or intends to cease, to carry on the business for the purposes of which the employee was employed by him, or has ceased, or intends to cease, to carry on that business in the place where the employee was so employed. This applies when a worker’s employer completely closes the business in which the employee was employed. Business, by statute, includes any trade or profession or activity carried on by a body of persons.

2. The fact that the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish.

The author goes on to argue that, thus there two fairly simply defined situations:

(a) Total cessation, either actual or prospective, of the business, either entirely or in the place of employment.

(b) Cessation or diminution of a particular kind of work, actual or prospective, generally or in the place of employment.


Bowers, J.B., *Employment Law.* (1990), has espoused the concept of redundancy in two discrete parts to the definition of redundancy. The first limb is total cessation of the employer’s business and this applies when a worker’s employer completely closes the business in which the applicant was employed. Secondly, it is under the heading of cessation of business at place of employment.

*Thomas Kibling and Tamara Lewis* the authors of the Book entitled *Employment Law* have not argued any different that redundancy is the closure of the business as whole, closure of the particular workplace where the worker was employed and the reduction in the size of the workforce.

From the above it is noteworthy that the learned authors have laid a common understanding on the definition of redundancy. Three circumstances have been identified as a basis of redundancy namely closure of the business as whole, closure of a particular workplace and reduction in the size of workforce.

1.3 Statement of the problem

Since the liberalisation of the economy in the early nineties, Zambia has experienced a lot of job losses through redundancies. With the emerging of multinational and Chinese companies most of the local companies, especially parastatals have not been able to compete on the local and international market. This has resulted in job losses especially through redundancies.

With the recent pronouncements to review the minimum wage by the new Patriotic Front Government, the issue of job losses through redundancies is very imminent and will continue to affect our society for many years to come. Most companies will not afford to pay the revised salaries hence will have to cut their costs through redundancies.

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26 P.83
However, in most cases the situation of redundancies is never envisaged or provided for in employment contracts. Moreover, Section 26(B) of the Employment Act only covers employees with oral contracts, and the two statutory instruments which provide for redundancy namely; The Statutory Instruments No. 1 of 2011/ No. 2 of 2011 of The Minimum Wages and Conditions of Employment Act respectively, only covers for employees employed in any shop or in connection with the business of any shop. Whilst, statutory No. 2 excludes the following categories of employees; those engaged in local authority, domestic workers, those whose wages and conditions are regulated by collective bargaining, employees in management and in a sector for which the Minister, by statutory instrument has prescribed the minimum wage.

From the foregoing, it is important to note that the majority of the workers in Zambia are not protected by law by virtue of having written contracts. This poses a major weakness and challenge because the main thrust of labour law is principally to “regulate, support, and to restrain the power of management and the power of organised labour”. Effectively, this leaves the majority of employees without any statutory protection in their contracts of employment.

Needless to say, although the Employment Act has provided for the procedure in dealing with redundancy it is not explicit on the calculation of the redundancy package. Section 26(B) (3) provides that an employee whose contract of service has been terminated by reason of redundancy shall-

(a) Be entitled to such redundancy payment as agreed by the parties or as determined by the Minister, whichever is the greater. In order to give legal effect to this provision, it was contemplated that the Minister would issue a Statutory Instrument prescribing the redundancy package. However, this has not been implemented thus making the law desuetude.

In view of the foregoing deficiencies in the law, this paper attempts to highlight the extent and adequacy of protection provided by legislation and Courts.

1.4 Objectives of the study

The overall aim of the research has been to explore the issue of redundancy as a mode of termination in employment contracts. The research has attempted to look at various legal interpretation of the concept of redundancy. In doing so, reference has been made to the relevant statutory provisions, appropriate case law and the theoretical interpretation by some selected renowned authors on the topic.

In spirit of the foregoing, the research has endeavored to assess whether the prevailing principles employed by the courts in determining redundancy confer legal protection and benefits to an employee with written contracts or those not covered by the relevant statutory instruments.

Therefore, this study delved into judicial pronouncements on employees with written contracts, and those not covered by the relevant statutory instruments. In this regard it has been the interest of this research to critically evaluate the substantive legal provisions and provide answers to whether the law sufficiently covers the majority of employees in this matter.

Moreover, this research has also explored the legal recourse available to the same affected employees.

The study has in this respect concluded with a thorough examination of the court’s attitude with regard to the issue of redundancy for this particular group of employees highlighted above, in which regard weaknesses have been identified and recommendations given.
1.5 **Significance of the study**

The research is very important as it has sought to address the lacuna in the statutory provisions in Section 26(B) of the Employment Act Chapter 268 of the Laws of Zambia Statutory Instrument No. 1 of 2011 and Statutory Instrument No. 2 of 2011 of the Minimum Wages and Conditions of Employment only which only covers selected few employees and leaves the majority of employees without any legal cover.

More also, this study is important as it has sought to address the weaknesses in the calculation of redundancy package. The issue of calculating the redundancy package remains unresolved because the Minister has not issued any statutory instrument to make this law effective.

However, it is important to note that on face value it is not easy to determine the concept of redundancy hence the research has undertaken a critical review on this issue. It is with this understanding that this research has endeavored to review some of the tests formulated by the courts in interpreting the gray areas with regard to this subject matter.

1.6 **Methodology**

The study has mainly been carried out in the Library, though both primary and secondary sources have been resorted to. The primary sources consulted are mainly interviews with relevant institutions while the secondary sources include a thorough review of literature such as textbooks, journals, articles, and case law.

The research has also undertaken academic visits to relevant institutions primarily to observe and acquire first hand information on the subject under review. Using the foregoing methods, the objectives of the study have been achieved.
Conclusion

This chapter has given a general introduction and synopsis of the concept of redundancy. The chapter has introduced the subject, and outlined the general overview of the conditions of service prevailing in the country with particular focus on the issue of redundancy.

It has briefly analysed the current law pertaining to redundancy and a plethora of case law has also been reviewed. This chapter includes the statement of the problem, objectives and significance of the study, the methodology and the chapter lay out.

Having reviewed the law and concept on redundancy it now remains for the author to examine the statutory provisions and case law on the prevailing conditions of employment with particular focus on the issue of redundancy.

Chapter Two

2.0 Introduction

In the preceding chapter the author reviewed the law and concept on redundancy. This chapter thus, undertakes a brief review of the contract of employment. Thereafter, a critical review of the legal framework will be highlighted. Perhaps, before the issue of redundancy is dwelt on it would be logical to give a brief synopsis of what is meant by the phrase “contract of employment.”

2.1 The nature of the employment contract

An employment contract is a voluntary consensual relationship recognised by civil law. A contract of employment, is one of the most important of all legal agreements, and takes various forms. This would be written, oral or implied.
The relationship is one of subordination, partially or wholly – forced acceptance of the employer’s terms if the employee wants the job, except where he has a strong bargaining position due to high status or qualifications.²⁸

Most workers do not bargain individually at all; they have to take what terms are offered to them. On the other hand the employee and employer relationship is also guided by the general principles of the law of contract, which must therefore comply with the rules, such as that requiring consideration. Although these general principles are relevant, there is often no genuine bargaining between the parties to the individual contract of employment, since the terms are frequently settled by collective agreements and sometimes by statutory regulation. The terms are often not negotiated by the individual employee, and the contract is thus a “contract of adhesion”: the prospective employee must take employment on the preferred terms if he wishes to obtain any employment in that section of industry.²⁹ Like all other contracts, the contract of employment is constituted by offer and acceptance supported by consideration.³⁰

An employee is an individual who has entered into or works under a contract with an employer, whether the contract is expressed or implied, and oral or in writing.³¹ A contract of employment or service is an individual contract between the employer and employee that regulates their symbiotic relationship. Legally, it is an agreement from which the rights and duties of the employer and employee are derived. Whatever the circumstances under which a person is employed, they will invariably constitute a contract.

Any contracts whether written or oral will consist of at least three separate elements:

(a) Any express terms which may have been agreed upon between the employer and the employee;

²⁸ Bowers, Employment Law, p.29.
³⁰ Re Walker [1944] 1 All E.R. 61, 616

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(b) Terms which are implied by common law such as the implied duties of good faith and confidentiality which every employee owes to his employer...the implied right by either part to terminate the contract of employment on notice; and,

c) Terms that are imposed by statute, it should be noted that terms of employment could also be imputed into the contract through collective agreements with trade unions.\textsuperscript{32}

Every worker has a contract of employment, which consists of a number of terms and conditions, some of which are express terms, some implied and some statutory. Express terms are those agreed between the employer and worker whether in writing or orally, implied terms are not expressly agreed but are implied into the contract of employment by the courts.

However, like any other contract, a contract of employment invariably has to come to an end at one time or the other. A contract of employment may come to an end through termination of contract; dismissal, resignation, redundancy, retrenchment, retirement, frustration of the contract or indeed the death of the employee.\textsuperscript{33} Therefore, as noted above redundancy is a mode through which a contract of employment comes to an end. Thus, the following discussion will delve into a brief overview of the concept of redundancy.

### 2.2 The concept of Redundancy

The Compact Oxford English dictionary defines redundancy, as a mode of terminating a contract of employment, as not or no longer needed or useful, no longer employed because there is no more work available.

On the other hand, redundancy is statutorily defined by section 26(B) of the Employment Act under the following circumstances:-

\textsuperscript{32} Mwenda, Employment Law in Zambia Cases and Materials, p.2

\textsuperscript{33} Mwenda, Employment Law in Zambia: p. 2
(1) The Contract of service of an employee shall be deemed to have been terminated by reason of redundancy if the termination is wholly or in part due to-

(a) the employer ceasing or intending to cease to carry on the business by virtue of which the employee was engaged; or

(b) the business ceasing or reducing the requirement for the employees to carry out work of a particular kind in the place where the employee was engaged and the business remains a viable going concern.

Similarly Tamara argues that redundancy occurs under the following situations:

1) Closure of business as a whole;

2) Closure of the particular workplace where the employee was employed; and

3) Reduction in the size of the workforce.

Besides, the Supreme Court of Zambia has added another dimension to the jurisprudential meaning of redundancy in Zambia. This definition has been highlighted in the landmark, and historic case of Mike Musonda Kabwe v. BP Zambia, where the Supreme Court of Zambia was very categorical by holding that;

“If an employee varies a basic condition without the consent of the employee then the contract of employment terminates and the employee is deemed to have been declared redundant on the date of such variation.”

It is important to note, that this definition is not inculcated in our statutes but the precedent has contributed greatly to the definition of redundancy in Zambia.

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34 Tamara, Thomas Kibling and Lewis. Employment Law: An advisers Handbook. (Britain: Kerrpress, 1994), 244
35 (1997) SJ, 13
The law of redundancy has since its beginning developed steadily but nevertheless in a discriminatory manner. Redundancy has been a common feature and an ongoing exercise initiated by the Zambian government since 1991 in the wake of privatization.

Thus, in this chapter the author undertakes to provide a critical review and analysis of the legal framework, pertaining to redundancy. In this regard section 26(B) of the Employment Act Chapter 286 of the Laws of Zambia, Statutory Instrument No. 1 of 2011 – The Minimum Wages and Conditions of Employment (Shop Workers) order, 2011 and Statutory Instrument No.2 of 2011, The Minimum Wages and Conditions of Employment (General) order, 2011, are the main pieces of legislation that will be dealt with in this regard.

2.3 The Legal framework of Redundancy

2.3.1 The Employment Act Chapter 268 of the Laws of Zambia

The Employment Act Chapter 268 of the laws of Zambia is the principal Act for all employment matters in Zambia. Section 26(B) of this Act defines redundancy under the following:-

(1) The Contract of service of an employee shall be deemed to have been terminated by reason of redundancy if the termination is wholly or in part due to-

(a) the employer ceasing or intending to cease to carry on the business by virtue of which the employee was engaged; or

(b) the business ceasing or reducing the requirement for the employees to carry out work of a particular kind in the place where the employee was engaged and the business remains a viable going concern.

Section 26(B) of the Employment Act Chapter 268 provides a comprehensive definition of redundancy. Therefore, it is the interest of this Chapter to undertake a comprehensive study on the legal obligations that go with redundancy.
In this regard, section 26(B) (2) of the Employment Act Chapter 268 of the Laws of Zambia, highlights some of these obligations. It thus provides that whenever an employer intends to terminate a contract of employment for reasons of redundancy, the employer shall-

(a) Provide notice of not less than thirty days to the representative of the employee on the impending redundancies and inform the representative on the number of employees to be affected and the period within the termination is intended to be carried out;

(b) afford the representatives of the employees an opportunity for consultations on-

(a) the measures to be taken to minimize the terminations and the adverse effects on the employees;

(ii) the measures to be taken to mitigate the adverse effects on the employees concerned including finding alternative employment for the affected employees;

(d) not less than sixty days prior to effecting the termination, notify the proper officer of the impending terminations by reason of redundancy and submit to that officer exercise.

On the other hand, Section (3) of the Employment Act Chapter 268 of the Laws of Zambia highlights a number of rights that accrue to an employee during redundancy. This section states as follows:- that, an employee whose contract of service has been terminated by reason of redundancy shall-

(a) be entitled to such redundancy payment as agreed by the parties or as determined by the Minister, whichever is the greater; and,

(b) be paid the redundancy benefits not later than the last day of duty of the employee. Provided that where an employer is unable to pay the redundancy benefits on the last day of duty of the employee, the employer shall continue to pay the employee full wages until the redundancy benefits are paid.
However, even though Section 26(B) has outlined comprehensive procedures and guidelines on redundancy, this section is discriminatory in nature because it excludes the majority of employees in Zambia. This is going by the fact that in terms of the scope of application, Section 26(B) only applies to oral contracts by virtue of falling under Part IV of the Employment Act Chapter 268 of the Laws of Zambia.

This position has been settled and affirmed by the holding of the Supreme Court of Zambia in *Barclays Bank (Z) Ltd v Zambia Union of Financial Institution and Allied Workers*\(^\text{36}\) wherein it was held in respect of the application of Section 26B (which equally falls under Part IV of the Employment Act) that "section 26(B) of the Employment Act Chapter 268 as amended by Act No. 15 of 1997, is found in Part IV of the Act [sections 16-27]. Section 16 of the Act provides that the provisions of this part shall apply to oral contracts..... In enacting this provision Parliament intended to safeguard the interest of employees who were employed on oral contracts of service which by nature would not have any provision for termination of employment\(^\text{37}\)."

The above proposition has been re-affirmed by the Supreme Court of Zambia in a number of judicial precedents including the recent case of *Chilanga Cement v. Kasote Singogo*.\(^\text{38}\)

From the foregoing, it is trite law that section 26(B) of the Employment Act Chapter 268 of the Laws of Zambia only applies to oral contracts. However, in Zambia it is a notorious fact that most employees have written contracts. In this regard, when it comes to redundancy employees with written contracts cannot invoke the statutory provisions of section 26(B) of the Employment Act Chapter 268 of the Laws of Zambia. Apparently, this is the only provision in the Employment Act which articulates the law on redundancy. In effect, employees with written contracts have no legal

\(^{36}\) SCZ Judgment Number 12 of (2007)

\(^{37}\) (2007) Z.R. 106

\(^{38}\) Supreme Court Judgment No. 13 of (2009)
recourse and tend to lose out when it comes to the issue of redundancy. As such, it remains for the contracts of employments or indeed the collective agreements to make provisions for redundancy. It is worth noting, that redundancy is not envisaged in most of the employment contracts and later on the collective agreements. Moreover, since contracts of employments fall under the general category of the law of contract, courts are neither any legal obligation to neither introduce any term nor impute redundancy in employment contracts if it was not agreed between the employer and employee.

In this case the legislature should have enacted another law on redundancy to provide a legal framework for employees with written contracts. It is of no use to have a law that only protects a selected few while the majority of employees are left without any legal recourse. The law should be of general applicability so that it benefits the majority of employees without any segregation or discrimination.

It is cardinal that employees with written contracts have the protection of the law because, naturally, an employer and an employee do not have equal bargaining powers in an employment relationship: an employee ordinarily stands in a weaker position in relation to his employer, hence employees require the protection of the law in securing their legal and economic interests deriving from this relationship.

It is not fair and justifiable that employees with written contracts should not be compensated for the years spent in employment. It is for this reason that Bowers\(^{39}\) argues that a worker of long standing is now recognised as having an accrued right in his job, and his right gains in value with the years. So much so, that if the job is shut down, he is entitled to compensation for loss of a job – just as a Director gets compensation for loss of office.

\(^{39}\) Bowers, \textit{Employment Law}, p.34
2.3.2 Statutory Instruments No.1 and No.2, of The Minimum Wages and Conditions of Employment Act, 2011.

The law in Zambia has set minimum standards for the protection of employees, especially those not adequately covered by any effective mechanism of regulating wages and other terms and conditions of employment. That law is the Minimum Wages and Conditions of Employment Act. Under this Act, the Minister of Labour is empowered to make regulations and orders with respect to minimum conditions of employment for any group of workers. By virtue of those powers, the Minister has made a number of regulations in this regard. The latest sets of regulations being the Statutory Instruments No.1 and No.2, 2011 of the Minimum Wages and Conditions of Employment Act which will form a major part of our discussion and analysis in this Chapter. In general, these Statutory Instruments apply to those areas outside the scope of Collective bargaining or where trade unions do not exist, or technically, where the bargaining unit has failed to agree on a particular issue.

2.3.3 Statutory Instrument No. 1 of 2011 - The Minimum Wages and Conditions of Employment Act (Shop Workers) Order, 2011

2. This Order shall apply to employees employed in any shop or in connection with the business of any shop, but shall not apply to-

(a) a person employed in, or in connection with, the motor trade industry or the petroleum industry;
(b) a person employed in-

(1) a bazaar or sale of work for charitable or other purposes from which no private profit is derived;
(2) the hawking of newspapers;
(3) the running of coffee stores; or

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40 Chapter 276 of the Laws of Zambia
(4) the sale of agricultural produce on behalf of a bona fide farmer or market gardener on any land occupied by the farmer or market gardener or in the hawking of agricultural produce on behalf of the farmer or market gardener;
(c) a person who holds a hawker’s license;
(d) a person employed in-
(1) the manufacture of bread or bread stuff;
(2) the reception, storage and treatment of fresh milk products;
(3) the reception, storage and treatment of fish, meat, poultry, game, fruit and other perishable foodstuff;
(4) the printing of newspapers;
(5) the delivery of ice to hospitals and nursing institutions during the day or at night; or
(6) the sale, before midnight, of any programmes, catalogues or refreshments in a theatre, concert hall or other place of amusement during any performance.
9. Where an employee’s contract of service is terminated by reason of redundancy, the employee shall be entitled to at least one month’s notice and redundancy benefits of not less than two months’ basic pay for each completed year of service.

2.3.2 Statutory Instrument No. 2 of 2011

The Minimum Wages and Conditions of Employment Act (General) Order, 2011

2. (1) This order shall apply to employees as specified in the schedule but shall not apply to employees:-
(a) of the Government of the Republic of Zambia;
(b) of a local authority;
(c) engaged in domestic service;
(d) in any occupation where wages and conditions of employment are regulated through process of collective bargaining conducted under the Industrial and Labour Relations, or where employee-employer relationships are governed by specific employment contracts attested by a proper officer, and such conditions shall not be less favourable than the provisions of this Order;

(g) in management; and

(h) in a sector for which the Minister, by statutory instrument, has prescribed the minimum wage.

10. Redundancy benefits – Where an employee’s contract of service is terminated by reason of redundancy, the employee shall be entitled to at least one month’s notice and redundancy benefits of not less than two months’ basic pay for each completed year of service.

In view of the foregoing, the chapter will review and analyse how these aforesaid statutory instruments apply in our country. Firstly, it is important to note that there is no legal definition of the term ‘redundancy’ in the two Statutory Instruments. It is critical for the Statutory Instruments to provide for the legal meaning because the one highlighted in the Section 26(B) of the Employment Act Chapter 268 of the Laws of Zambia, is of narrow application, and very restrictive as it only applies to oral contracts. Just like the Employment Act Chapter 268 of the Laws of Zambia, the aforementioned Statutory Instruments are discriminatory in nature. For example, Statutory Instrument No.1 of 2011 is only applicable to Shop Workers, whilst Statutory Instrument No. 2 of 2011, which is supposed to be of general application, excludes a huge section of employees, especially those engaged in Government and local authority that form the majority of employees in the country. The Statutory Instruments also exclude domestic servants, who are vulnerable and greatly affected by redundancy.

Another notable group excluded by the Statutory Instruments worth noting are, employees with employment contracts, in management and those covered by collective agreements. These groups of
employees are also outside the scope of Section 26(B) of the Employment Act. The question that needs to be resolved is how such employees would attain justice, in cases where there is no provision for redundancy clauses in their employment contracts, and collective agreements? The only foreseeable solution at the moment is to revert to common law principles under frustration. Frustration is some “outside event or extraneous change of situation”.42 The legal effect of frustration is that it brings the contract to an end “forthwith.”43 At common law frustration does not rescind the contract ab initio: it brings the contract to an end forthwith, without more and automatically,44 in the sense that it releases both45 parties from any further performance of the contract.46

Ultimately there is no legal protection and recourse at common law for such employees. There is no justice in this because after working for so many years they cannot seek the hand of the law or indeed the common law principles for compensation.

It is important to note that Section 2(a) to (b) of the substantive Act (Section 26(B) of the Employment Act), has clearly outlined the procedures and guidelines for redundancy. These procedures have not been replicated in the two Statutory Instruments. The Statutory Instruments should clearly undertake to provide for such procedures, because redundancy, if not carefully handled may lead to industrial unrest and culminate in other social and economical vices. These procedures are also important because they enhance transparency and accountability in the whole process. In this respect, the Employment Act Chapter 268 of the Laws of Zambia, has promulgated

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44 Hirji Mulji v. Cheong Yue SS. Co. Ltd [1926] A.C 497, 505
46 B.P Exploration Co. (Libya) Ltd v. Hunt (No. 2) [1983] 2 A.C. 352, 372
these procedures and thus section 26(B) (2), provides that whenever an employer intends to terminate a contract of employment for reasons of redundancy, the employer shall-

(a) Provide notice of not less than thirty days to the representative of the employee on the impending redundancies and inform the representative on the number of employees to be affected and the period within the termination is intended to be carried out;

(b) afford the representatives of the employees an opportunity for consultations on-

(a) the measures to be taken to minimize the terminations and the adverse effects on the employees;
(ii) the measures to be taken to mitigate the adverse effects on the employees concerned including finding alternative employment for the affected employees;

(c) not less than sixty days prior to effecting the termination, notify the proper officer of the impending terminations by reason of redundancy and submit to that officer information on-

(i) the reasons for the termination by redundancy;

(ii) the number of categories of employees likely to be affected;

(iii) the period within which the redundancies are to be effected; and

(iv) the nature of the redundancy package.

The above statutory provisions place mandatory legal obligations on an employer to undertake certain steps during the redundancy exercise. These steps ensure smooth transition, accountability and transparency during redundancy. On the other hand, the provisions outlined in Section 26(B) of the Employment Act, on finding alternative employment and the subsequent consultations with the employees in the whole process plays a pivotal role in addressing employee’s welfare and interests. Furthermore, the notification by the employer to the proper Officer person being an independent person plays a critical role in ensuring transparency and accountability in the whole process.
Section 26B (3) of the Employment Act is not explicit on the calculation of the redundancy package. Thus, provides that an employee whose contract of service has been terminated by reason of redundancy shall-

(b) Be entitled to such redundancy payment as agreed by the parties or as determined by the Minister, whichever is the greater.

In order to give legal effect to this provision, it was contemplated that the Minister would issue a Statutory Instrument prescribing the redundancy package. However, this has not been implemented hence making the law desuetude. Furthermore, Section 26(B) (3) provides that an employee whose contract of service has been terminated by reason of redundancy shall... be paid the redundancy benefits not later than the last day of duty of the employee. The Section goes on to state that,

“Provided that where an employer is unable to pay the redundancy benefits on the last day of duty of the employee, the employer shall continue to pay the employee full wages until the redundancy benefits are paid”.

Even though the provision to continue paying employees their salaries while waiting for redundancy packages works to the advantage of employees, this could prove costly to employers in the long term because these wages are not matched by any production.

On the other hand, the two Statutory Instruments do not have any express provision regarding the timeframe for the payment of redundancy payments and, there is no provision which compels employers to pay employees whilst waiting for their redundancy benefits. This oversight could lead to serious social and economical ramifications.

Even though redundancy works to the benefits of employees, most companies perceive redundancy to be a costly undertaking, because under the two Statutory Instruments, a company that declares its
workers redundant must pay each worker two months basic salary for each year of completed service, this is in addition to a repatriation package and a month’s pay in lieu of notice.

As a result, most companies prefer to hire casual workers due to high level of uncertainty in the investment climate, even when they have the capacity to engage pensionable employees. Investors believe it is safer and less costly to engage casual labour, as pensionable jobs may prove costly when the business is no longer profitable. At the same time, companies are failing to restructure operations due to the huge compensation packages associated with redundancy. As a result, redundancy becomes a hindering block to the effective and efficient operations of several companies.

While it has remained important that employee’s interests have been taken care of, it is also important to bear in mind that the Act, as it exists currently, will lead to business failure now and in the future.

Conclusion

This chapter has revealed that the statutory provisions in Section 26(B) and the subsidiary laws in terms of Statutory Instruments No.1 and No.2 of 2011 are not adequate. As noted above, they are discriminatory in nature in that Section 26(B) of the Employment Act only applies to oral contract, whilst the two Statutory Instruments are only applicable to specific categories of employees who do not even form the majority of workers in Zambia. Employees with written contracts and collective agreements without redundancy clause have no legal protection, and have no recourse at common law.

Ultimately, this paper has mainly attempted to argue for the proposition that the law in Zambia is not playing a satisfactory role in the area of redundancy. Furthermore, the common law proposition
under frustration does not compel an employee to compensate employees under the common law principle of frustration.

Another significant short coming worthy noting is with regard to section 26(B) of the Employment Act. Under this provision, the calculation of redundancy benefits has been left at the hand of the Minister who has not issued any statutory instrument to consummate this provision of the law. Thus, rendering the law non effective and non operative.

It is noteworthy, that there are no procedures or guidelines in the two Statutory Instruments for redundancy; these are serious shortcoming that needs to be addressed by the legislature to safeguard the interests of employees and avoid unnecessary industrial unrests in the Country.

In view of the above, chapter three and other following chapters will endeavor to review the application and the growth of the jurisprudence on the law of redundancy in the country.

Chapter Three

2.0 Introduction

The previous Chapter undertook to review and analyse the relevant statutory provisions pertaining to redundancy. For this purpose the main pieces of legislation reviewed were Section 26(B) of the Employment Act Chapter 268 of the Laws of Zambia, Statutory Instruments No.1 and 2 of 2011 of the Minimum Wages and Conditions of Employment Act.

The in-depth analysis and critical review of Chapter two, has revealed that the relevant statutory provisions on redundancy are not adequate. Moreover, it was worth noting that these legal provisions are discriminatory in nature with regards to redundancy. Section 26(B) of the Employment Act Chapter 268 of the Laws of Zambia, which was meant to provide for employees with written contracts only provides for a small section of employees in Zambia. The Section
specifically covers employees with oral contracts. On several instances the Supreme Court of Zambia has upheld the legal provision of this section. Recently, the Supreme Court vehemently upheld the sacrosanct provisions of Section 26(B) in the recent case of *Barclays Bank Zambia PLC v Zambia Union of Financial Institution and Allied Workers*,47 where it was held that in enacting section 26(B) Parliament intended to safeguard the interest of employees who were employed on oral contracts of service by which nature would not have any provision for termination of employment by way of redundancy. Suffice to say that the effects of this section cannot be much emphasized as it formed a major part of our discussion in the previous Chapter.

However, it is noteworthy that most employees in Zambia have written contracts, and in most cases these written contracts do not provide for redundancy. On the other hand, Section 26(B) of the Employment Act of The Laws of Zambia, Statutory Instruments No.1 and 2 of 2011 of the Minimum Wages Act do not cover for the majority of employees with written contracts. Therefore, the question that needs to be addressed is how this particular group of employees would seek legal redress in the Courts of law? This is going by the fact that most employees are excluded by the relevant legal provision that deal with redundancy. Moreover, redundancy is rarely provided for in most employment contracts.

Therefore, the main focus of this Chapter is to provide a critical review on the jurisprudence regarding redundancy in Zambia, with a view of determining whether courts have provided the necessary legal redress, and sufficient safeguards to employees not covered by the relevant legal provisions cited above. In this regard, the Chapter will look at the judicial interpretation of redundancy. Firstly, the Chapter will undertake to review the common law proposition of redundancy before proceeding to review and analyse the appropriate judicial precedents.

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47 SCZ Judgment Number 12 of 2007
3.1 Common Law position of Redundancy

The position at common law is that a contract for personal service cannot be assigned by one party without the consent of the other. Thus, where two companies are amalgamated under an order of the court, the employer’s rights under a contract of employment cannot be assigned to the new company without the consent of the employee.\(^{48}\) Similarly, the sale by a receiver (appointed by the debenture-holders) of the company’s business as a going concern may operate to terminate the contracts of employment of all the company’s employee’s.\(^{49}\) Where there is a \textit{de facto} transfer of a contract of employment from one employer to another, it may be possible to protect the statutory rights of the employee, such as his rights under the redundancy payments legislation.\(^{50}\)

At common law a contract of employment is personal, so a change in employer would amount to a termination of the first contract and the entering of a new one. Such a change could not be forced on an employee against her will because it would offend the general principle of forced labour. At first sight then, this would suggest that the employees would be dismissed by reason of cessation of business and would thus be redundant. Redundancy law used to deal with this situation by providing that the employee would not be entitled to a redundancy payment if the new employer was prepared to keep her on. Thus, although the employee did not have to agree to a change in employer, there was a financial incentive for her to do so. The new owner of the business had a choice about whether to take on the employees; if they were not taken on, they could claim a redundancy payment from their former employer.\(^{51}\)

\(^{48}\) Nokes v. Doncaster Amalgamated Colliers [1940] A.C. 1014
\(^{49}\) Re Forster Clark Ltd’s Indenture Trusts [1966] 1 W.L.R
\(^{50}\) Chitty on Contracts, p.884
*Nokes v Doncaster Amalgamated Collieries Ltd* 52 is a case concerning the common law position that decided that a change in employer could not result in a burden being placed on an employee without his consent. The brief facts of this case are that, Mr Nokes had worked for the Hickleton Main Co Ltd until 4 June 1937 when the Chancery Court gave an order for the business to be transferred under the Companies Act 1929 section 154(1) on arrangements and reconstructions to Doncaster Amalgamated Collieries Ltd. Mr Nokes was absent and would be liable to pay damages to the new business under the Employers and Workmen Act 1875 section 4 if he had a service contract with the company. He denied this, but the Divisional Court and the Court of Appeal ordered him to pay 15s in damages and 10s in costs. He appealed to the House of Lords.

The House of Lords held by a majority that Mr Nokes did not have to pay the fee because his employment could not be transferred without his consent. Viscount Simon LC said that:

"it is 'a fundamental principle of our common law... that a free citizen, in the exercise of his freedom, is entitled to choose the employer whom he promises to serve, so that the right to his services cannot be transferred from one employer to another without his assent.'"

In the same case this point was expressed forcibly by *Lord Atkin*:

"My Lords, I confess it appears to me astonishing that, apart from overriding questions or public welfare, power should be given to a court or to anyone else to transfer a man without his knowledge, and possibly against his will, from the service of one person to the service of another. I had fancied that ingrained in the personal status of a citizen under our laws was the right to choose for himself whom he would serve, and that this right of choice constituted the main difference between a servant and a serf. Going so far as to say he regarded any automatic transfer rule would be tainted with oppression and confiscation."

52 [1940] AC 1014
From the foregoing, it is clear that at common law an employee would not be transferred from one employer to the other. The common law rule was that a change in the identity of an employer terminates a contract of employment. However, this common law position has been altered by various judicial precedents. This Chapter will endeavor to provide the jurisprudential meaning of redundancy and how it has altered the common law position.

3.2 Judicial interpretation of redundancy

Besides, the statutory definition highlighted in Section 26(B) of the Employment Act Chapter 268 of the Laws of Zambia, the Supreme Court of Zambia, has followed various precedents in English Courts by adding another limb to this definition. This has been postulated by the Supreme Court of Zambia in the case of Mike Musonda Kabwe v. BP Zambia\(^{53}\), where the Court was very categorical by holding, that if an employee varies a basic condition without the consent of the employee then the contract of employment terminates and the employee is deemed to have been declared redundant on the date of such variation. It is important to note, that this definition is not inculcated in our statutes but the precedent has contributed greatly to the definition of redundancy in Zambia, and has subsequently been held to be good law in Zambia.

A contract of employment is one of the most dynamic agreements, changing frequently during its course as circumstances alter. Even so, any variation in contractual terms still requires the assent, express or tacit, of both parties and should be supported by consideration. If, however, the employer unilaterally enforces a variation without active consent or acquiescence, he repudiates the contract of employment and the employee is put to his election whether to accept the fundamental breach, and resign, or to carry on working and seek damages.\(^{54}\)

\(^{53}\) (1997) SJ,13

\(^{54}\) Burdett-Coutts v Hertfordshire CC [1984] IRLR 91

36
The landmark case in this connection is the case of *Marriot v Oxford and District Co-operative Society Limited*,\(^{35}\) which clearly postulates the above proposition. The brief facts of the case are that the appellant had been employed by the respondents as an electrical supervisor for two years when they found that there was insufficient work for him. They were prepared to offer him another post at three pounds per week and he took this under protest, worked for three or four weeks but then terminated his contract by notice. In response to his claim for a redundancy payment, the respondents claimed that they had not terminated the agreement by insisting on his taking the new job (as was necessary for him to claim his statutory rights), but had merely varied it. However, about three or four weeks later he left and claimed a redundancy payment. The court of Appeal held that the employee was nevertheless dismissed by reason of redundancy. The dismissal was from the old job. Essential to this reasoning was that the unilateral wage reduction (which was undoubtedly a repudiatory breach of contract) automatically determined the contract. *Lord Denning MR* was insistent that;

"He never agreed to the dictated terms. He protested against them. He submitted to them because he did not want to be out of employment. By insisting on new terms to which he never agreed, the employer did, I think, terminate the old contract of employment."

While a contract of employment – just like any other contract – can be varied, any unilateral variation to an important term which is non-consensual and which is unacceptable to the workers would justify the aggrieved workers treating the same as a repudiation and breach of the contract by the employer which terminates the employment and which warrants the payment of redundancy or other terminal benefits, as appropriate.

\(^{35}\) (No.2) [1970] 1 QB 186
The decision by the Supreme Court in *Mike Musonda Kabwe v. BP Zambia*,\(^5\) followed the holding in *Marriot’s* case. The *Mike Musonda* case is a historic and landmark case in the jurisprudence of redundancy in the country. The case has added a significant ramification to the law of redundancy in Zambia. In this case the respondent had reversed a general salary increase, which resulted in the appellant’s salary being reduced to the level prior to the increase. He applied for early retirement and the respondent offered him a retirement package which was based on his salary prior to the increase. In an appeal against the dismissal of the appellant’s claim for a declaration that he was entitled to a package calculated on his increased salary the Court held that if an employer varies a basic condition or basic conditions of employment without the consent of the employee then the contract of employment terminates and the employee is deemed to have been declared redundant on the date of such variation and must get a redundancy payment if the conditions of service provide for such payment. The appellant’s contract of employment was therefore terminated on the date his salary was decreased and his benefits ought to have been calculated on the increased salary applicable to him then. The Supreme Court was categorical on the fact that in the event of an employer varying the contract of employment without the consent of the employee, the employee is deemed to have been declared redundant on the date of such variation and must get a redundancy payment. In other words, the unilateral variation of a contract of employment by an employer brings the contract to an end. The Supreme Court held that:

“if an employer varies a basic condition or basic conditions of employment without the consent of the employee then the contract of employment terminates and the employee is deemed to have been declared redundant on the date of such variation and must get a redundancy payment if the conditions of service provide for such payment”.

\(^5\) (SCZ Judgment No. 10 of 1997)
In this case the Supreme Court of Zambia made this decision in support of the *Marriot’s* case where the Court held that even where the appellant continued working after his salary was reduced cannot be said that he accepted new conditions. The thrust of the holding in the *Kabwe* case, which cited with approval the decision in *Marriot v Oxford and District Co-Operative Society Limited*\(^{57}\) was that if an employer varies in an adverse way a basic condition or basic conditions of employment without the consent of the employee then the contract of employment terminates and the employee is deemed to have been declared redundant or early retired – as may be appropriate – as at the date of the variation and the benefits are to be calculated on the salary applicable then.

*Gwyneth*,\(^{58}\) argues that any variation must be agreed between the parties as with any other contract, should the employer insist on unilateral variation, it will be a breach of contract, usually a fundamental breach.

In the same vein, in *Zambia Consolidated Copper Mines Limited and Ndola Lime Company Limited v Emmanuel Sikanyika and others*\(^{59}\) the respondents were unionised employees of the second appellant which is a wholly-owned subsidiary of the first appellant. The workers launched proceedings in the Industrial Relations Court against their employer and the holding company requesting for a declaratory relief that they are entitled to payment of terminal benefits prior to transferring their contracts of employment to those that would buy the second appellant under the privatization programme. It was held by the Supreme Court of Zambia that while a contract of employment – just like any other contract – can be varied, any unilateral variation to an important term which is non-consensual and which is unacceptable to the workers, would justify the aggrieved workers treating the same as repudiation and breach of the contract by the employer.

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\(^{57}\) CC (1984) IRLR 91

\(^{59}\) SCZ Judgment No. 24 of 2000
which terminates the employment and which warrants the payment of repudiation or other terminal benefits, as appropriate.

Similarly, in National Milling Company Limited v Grace Simataa and Others\textsuperscript{60} it was firmly held by the Supreme Court of Zambia that, if an employer varies in an adverse way a basic condition or basic conditions of employment without the consent of the employee, then the contract of employment terminates and the employee is deemed to have been declared redundant. Thus, the unilateral suspension by the employer has been held to constitute a repudiatory breach of contract by the employer.

Again in Newstone Siulanda and 36 others and Foodcorp Products Limited\textsuperscript{61} the Supreme Court did not hold any different, inter alia the Court said the following:

"We repeat what we have said in a number of cases in the past: Disadvantageous and unilateral alterations to a basic condition entitles the aggrieved employee to treat the same as a breach and repudiation of the employment contract by the employer, thereby entitling the employee to the appropriate separation package".

The sale of a business from one owner to another frequently results in workers of one or both business undertakings becoming redundant, In the run-up to and aftermath of an acquisition or merger there is frequently a period of restructuring and rationalisation, which again can mean that employees lose their jobs, employees who are dismissed in these circumstances are usually entitled to a redundancy payment from their former employer\textsuperscript{62}.

Lord Denning observed in the case of Lloyd v Brassey\textsuperscript{63} that;

\begin{itemize}
  \item \textsuperscript{60} SCZ Judgment No. 21 of 2000
  \item \textsuperscript{61} SCZ Judgment No. 9 of 2002
  \item \textsuperscript{62} Pitt Gwyneth, \textit{Cases and Materials on Employment Law}, p. 461
  \item \textsuperscript{63} [1968] 2 QB98
\end{itemize}
"If the new owner takes the business as a going concern so that the business remains the same business but in different hands and the employee keeps the same job with the new owner, then he is not entitled to redundancy payment".

The vast majority of business operations are conducted through the medium of a company registered under the Companies Act. A registered company is recognised in law as a legal person with pretty well the same capacities as a human person, but it is owned by human persons, the shareholders. If a company is being sold, the normal way of doing it is for a majority of the shares to be transferred from the seller to the buyer. So far as the employees of the company are concerned, however, this kind of deal has no legal implications for their employment. The company itself is their employer, and the identity of their employer does not change because the share ownership changes.\(^{64}\)

The above proposition was also repeated in the case of *Anthony Khetani Phiri v. Workers Compensation Control Board*,\(^ {65}\) in this case the Court was called upon to determine whether an employee of one board taken into employment of another board, with assurance that his employment would be continuous—whether employee continuously employed by the second board is declared redundant. The Court held that the "transfer" does not connote a break in employment. The Court went on to state that the word "transfer" persuades us to agree that employment in this case was continuous. In arriving at this decision the Court referred to the case of *Secretary of State for Employment v Globe Elastic Thread Co. Ltd.*,\(^ {66}\) where it was held that, "a person's employment during any period should be presumed to have been continuous unless the contrary was proved".

\(^{64}\) P. Gwyneth, *Cases and Materials on Employment Law*, p. 461
\(^{65}\) SCZ Judgment No. 2 of 2003
\(^{66}\) [1979] 2 All ER 1077
The rationale behind this is that a company is distinct in law from its members, the identity of the employer in such a situation remains the same: the company.

Lord Browne-Wilkinson also noted that on the transfer of a business, the employees of the transferor become the employees of the transferee.\(^{67}\)

In the same vein, in *Phiri v Workers Compensation Control Board*,\(^ {68}\) it was held that the new Board in as far as the former Workers Compensation Fund Control Board was concerned, was in the same business and the appellant maintained the same job since he was to be transferred laterally.

**Conclusion**

The chapter provided the judicial interpretation of redundancy. The case of *Nokes v. Doncaster Amalgamated Colliers Ltd*\(^ {69}\) is the case in point which established the common law position that a contract of employment is personal and could not be transferred to another employer without his consent.

However, this position has been altered through various precedents. The case of *Mike Musonda*\(^ {70}\) is worth noting in this regard, because it has been upheld in various decisions as good law, by holding that when an employer varies a term in the employment contract without the consent of an employee then the contract terminates and the employee is entitled to a redundancy package. This proposition has been supported by the case of *Marriot v. Oxford and District Co-operative*\(^ {71}\) in which it was held that the unilateral wage reduction automatically determined the contract. The unilateral variation to an important term which is non-consensual and which is unacceptable to the workers would justify the aggrieved workers treating the same as a repudiation and breach of

\(^{67}\) Berriman v Delabole Slate Ltd (1985) ICR 546 Court of Appeal

\(^{68}\) SCZ Judgment No.2 of 2003

\(^{69}\) [1940] A.C. 1014

\(^{70}\) [1997] SJ,13

\(^{71}\) [1984] IRLR 91
contract by the employer which terminates the employment contract and which warrants the payment of redundancy.

On the other hand, the Supreme Court of Zambia has held that the change in ownership of business does not terminate the contract of employment. The change in ownership of the business has no effect on employment contracts because the business is regarded as separate legal entity at law from the shareholders.

Chapter Four

4.0 Introduction

Redundancy is one of the several ways through which the contract of employment is terminated. The concept of redundancy is highlighted in section 26(B) of the Employment Act Chapter 268 of the Laws of Zambia and Statutory Instruments No.1 and 2 of 2011 of the Minimum Wages and Conditions of Employment. Besides, the theory of redundancy has also been propounded by a number of authors.

With the foregoing, this chapter thus endeavors to evaluate and analyse the decision by the Supreme Court of Zambia in Lawrence Muyunda Mwalye and Bank of Zambia,\(^2\) in light with the legal provisions and other judicial precedents.

4.1 The case of Lawrence Muyunda Mwalye and Bank of Zambia\(^3\)

The brief facts of the case are that, the Plaintiff joined the Defendant on the 8th of August, 1992 and rose to the position of Coordinator- in Charge at Director’s level. At the time he was declared redundant on the 21st March, 2006, he was still serving the Defendant at director’s level. Sometime

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\(^2\) SCZ Judgment No.22 of 2010 / Appeal No.33 of 2009

\(^3\) SCZ Judgment No. 22 of 2010 / Appeal No. 33 of 2009
in 1999, the Defendant bank embarked on a restructuring and reorganization exercise. The exercise was completed on the 5th of January, 2005. Under the new structure, the post of Coordinator-charge was abolished and the Plaintiff was given a new post of Assistant Director, Organization and Development under Human Resources. His salary remained the same.

Accordingly, the Plaintiff refused to take up the position and appealed against the decision to demote him but the appeal was never heard and determined one way or the other. As he awaited the outcome of the appeal, the Plaintiff was, on 21st of March, 2006, served with a letter of redundancy. The letter explained how the computation of the redundancy benefits were computed but the Plaintiff thought the computation was at variance with the Defendant bank’s staff handbook, which contained the terms and conditions that regulated his employment with the staff handbook.

Clause 13.4 of the conditions of service read as follows:- Redundancy

The Bank may be compelled to terminate an employee’s contract due to an inevitable requirement to reduce its workforce, arising from various factors including re-organization, responding to business environmental factors and other inevitable exigencies. As a matter of policy, the Bank will endeavour to avoid involuntary redundancy but when this is investable, it will follow the statutory provisions faithfully.

An employee declared redundant will be entitled to a ‘redundancy package’ which will embody the following minimum factors:

a) Recognizing the service period of the employee;

b) Taking into account the employee’s salary at the time of termination;

c) All accrued leave days.

According to the Appellant, it was misdirection for the trial Court to hold that the 1994 Collective Agreement signed between the Respondent and 30 claimants did not apply to the Appellant. He
further submitted that the Respondent not having produced the requisite formula, reliance must be placed on the last known formula applied to previous management staff who went on redundancy as contained in the memorandum of settlement between the Respondent and the Zambia Financial and Allied Workers (ZUFIAW) dated the 11th of August, 1994.

The Plaintiff also contended that the event that made the Appellant redundant was his demotion and that what the Appellant sought from the Respondent was an admission and or declaration that he had been made redundant in reference to the case of Mike Musonda v BP Zambia Limited74.

The Defendant, on the other hand, confirmed that the Plaintiff refused to take up the new position of Assistant Director and appealed against the decision to demote him and that the time the appeal was heard and before the communication could reach the Plaintiff the matter was already in Court. According to the Defendant, the decision to place the Plaintiff on redundancy was at his request through an appeal letter to the Deputy Governor in charge of Administration. Further, that in calculating the Plaintiff's redundancy package, the Defendant bank was guided by Clause 13.4 of the staff handbook and the Employment (Minimum Wages) Act. As far as the Defendant was concerned, the Plaintiff was fully paid his terminal dues.

The Supreme Court held that the wording of Clause 13.4 could not meet the various aspects of the Plaintiff's case. In such a case, it made provision for resort to be made to the Minimum Wages and Conditions of Employment (General) Order, 2002 published under Statutory Instrument No.2 of 2002. The Court was of the view that there was nothing wrong in the Defendant invoking Statutory Instrument No. 2 of 2002.

This decision by the Supreme Court of Zambia to resort to Statutory No. 2 of 2002 is plausible. However, this has not resolved the lacuna in a situation where there is no redundancy provision in

74 (1997) SJ, 13
the contract of employment or conditions of service, and the Statutory Instruments. As noted in the previous chapters, the majority of the contracts of service and conditions of service do not envisage for redundancy.

Moreover, section 26(B) excludes the majority of the employees in Zambia and Statutory Instruments No.1 and 2 of 2011 of the Minimum Wages and Conditions of Employment only applies to a specific group of employees.

The Supreme Court of Zambia also held inter alia, that the redundancy was initiated by the Plaintiff and all that the Defendant did was to formalize it.

This holding by the Supreme Court of Zambia is hard to conceive because it does not fit in any of the definitions of redundancy. Section 26(B) of the Employment Act Chapter 268 of the Laws of Zambia, outlines circumstances under which redundancy occurs:-

(1) The Contract of service of an employee shall be deemed to have been terminated by reason of redundancy if the termination is wholly or in part due to-

(a) the employer ceasing or intending to cease to carry on the business by virtue of which the employee was engaged; or

(b) the business ceasing or reducing the requirement for the employees to carry out work of a particular kind in the place where the employee was engaged and the business remains a viable going concern.

On the other hand the learned author Cyril Grunfeld defines redundancy in his book "the Law of Redundancy" Sweet and Maxwell 1971 Edition at page 76 as follows;

“A dismissed employee shall be taken to be dismissed by means of redundancy if the dismissal is attributable wholly or mainly to the fact that his employer has ceased or intends
to cease to carry on the business, for the purposes of which the employee was employed by him."

The learned author goes on to say:

"A dismissed employee shall be taken to be dismissed by reason of redundancy if the dismissal is attributed wholly or mainly to the fact that his employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed by him in the place where the employee was so employed."

Similarly, in Mike Musonda Kabwe v. BP Zambia, the court held that;

"if an employer varies a basic condition or basic conditions of employment without the consent of the employee then the contract of employment terminates and the employee is deemed to have been declared redundant on the date of such variation and must get a redundancy payment if the conditions of service provide for such payment."

With the foregoing, it is hard to comprehend the decision by the Supreme Court of Zambia by holding that the redundancy was initiated by the Plaintiff because it does not fit in any of the above definitions on redundancy. This decision is not sound at law because it lacks legal backing and the support of any judicial precedent. Moreover, the conditions of service of the Plaintiff's bank in section 13.4 clearly outlined to situations when redundancy occurs. Therefore, by holding that the employee was made redundant at his own request has no basis at law or otherwise. It is inconceivable that the Court could hold that the employee declared himself redundant because redundancy occurs at the instance of an employer and not employee. Therefore, it is inconceivable that the Supreme Court could hold that the redundancy was initiated by the Plaintiff when in fact the evidence shows that the Defendant embarked on a restructuring and reorganization exercise in

\( ^{75}(1997) SJ, 13 \)
which the post of the Coordinator was abolished. Following this exercise the Plaintiff was given a new post of Assistant Director. However, the Plaintiff declined the position and following these events the matter was brought to Court. Under the circumstances the facts do not support the decision of the Court that the Plaintiff declared himself redundant.

**Conclusion**

In view of the foregoing, The Supreme Court of Zambia needs to be vigilant and proactive in deciding redundancy matters especially for employees not covered by section 26(B) of the Employment Act and Statutory Instruments No1 and 2 of the Minimum Wages and Conditions.

The decision in *Lawrence Muyunda Mwalye and Bank of Zambia*\(^76\) of leaving the issues of redundancy to be resolved between the employee and employer in the condition of service works to the disadvantage of employees who are always placed in a weaker position when it comes to negotiating for conditions of service.

**Chapter Five**

5.0 **Conclusion and Recommendations**

With the economical and social changes of our country, the current statutory provisions of section 26(B) of the Employment Act chapter 268 of the Laws of Zambia, and the two statutory instruments are not beneficial to the majority of Zambian employees. We need laws on redundancy that will be of general applicability. The current legal provisions are discriminatory in nature hence making the law moribund.

\(^76\) SCZ Judgment No. 22 of 2010 / Appeal No. 33 of 2009
It is noteworthy, that redundancy is not envisaged in most employment contract and conditions of service. Therefore, an employee not covered under the Employment Act and the two statutory instruments stand to lose out because he has no redress before the courts of law. On the other hand, Courts in Zambia should be upheld for providing judicial interpretation of redundancy. The case of *Mike Musonda Kabwe v. BP Zambia*\(^7\) is the case in point. This is good law which has helped in ensuring that employee’s are not taken advantage of by employers whereby the conditions of service are unliterary varied. Workers are mostly placed in a weaker position hence they need the hand of the law to protect them.

However, Courts Zambia have not been vigilant in curing the lacunas in the law regarding redundancy. In the recent case of *Lawrence Muyunda Mwalye and Bank of Zambia*\(^8\) inter alia that;

> “While in employment, it is important for non-unionised employees to work hand in hand with their employers to ensure that the conditions of service they work under are properly formulated for their mutual benefit so that on severance of employment they are not made to grog in the dark for their entitlements.”

Courts in Zambia should be vigilant and proactive in protecting the interest of employers because in most cases employees are placed in weaker positions especially when it comes to negotiating conditions of service. With the high levels of unemployment employees will always take what is offered to them by their employers for the fear of losing their jobs.

### 5.2 Recommendations

In view of the handicaps and inadequacies of the law of redundancy in Zambia, and in light of the general purpose of this paper the recommendations and suggestions are made herein:

\(^7\)(1997) SJ, 13

\(^8\) SCJ Judgment No. 22 of 2010
Firstly, it would be imperative for the legislature to revise the statutory provisions of section 26(B) of the Employment Act chapter 268 of the Laws of Zambia, to cater for employees with written contracts and general application. In its current form the law excludes employees with written contracts who form the majority of employees in Zambia. The Country needs legislation that would cater for all categories of employees.

Secondly, The Minister should pass a statutory instrument to cater for a majority of employees. Presently, Statutory Instrument No.1 of 2011 is only applicable to Shop Workers, whilst Statutory Instrument No. 2 of 2011, which is supposed to be of general application, excludes a huge section of employees, especially those engaged in Government and local authority that form the majority of employees in the country. The Statutory Instruments also exclude domestic servants, who are vulnerable and greatly affected by redundancy.

Thirdly, the Minister should pass a statutory instrument which will clearly stipulate the calculation of the redundancy package. The current statutory provision in section 26(3) is desuetude because the Minister has not issued any statutory instrument to make this provision effective.

Fourthly, there should be a codification of the law of redundancy. It should answer the question 'what is redundancy.' The definition is only provided for in section 26(B) of the Employment Act Chapter 268 of the Laws of Zambia which is only applicable to employees with oral contracts.

Fifthly, the Courts in Zambia should be vigilant and proactive in the face of the lacunas with regards to the law on redundancy.

The foregoing recommendations, if promptly attended to, would go a long way in the fostering positive development of the law of redundancy in Zambia, and would ultimately enhance the levels of protection conferred on weaker employees thereby positively contributing to the national objective of mitigating poverty through prevention of loss of employment through redundancy.
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