LABOUR & EMPLOYMENT

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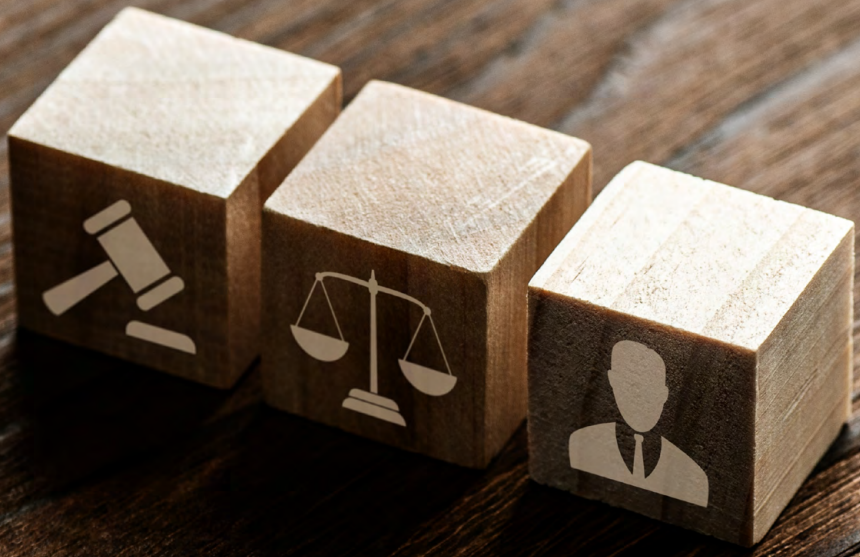

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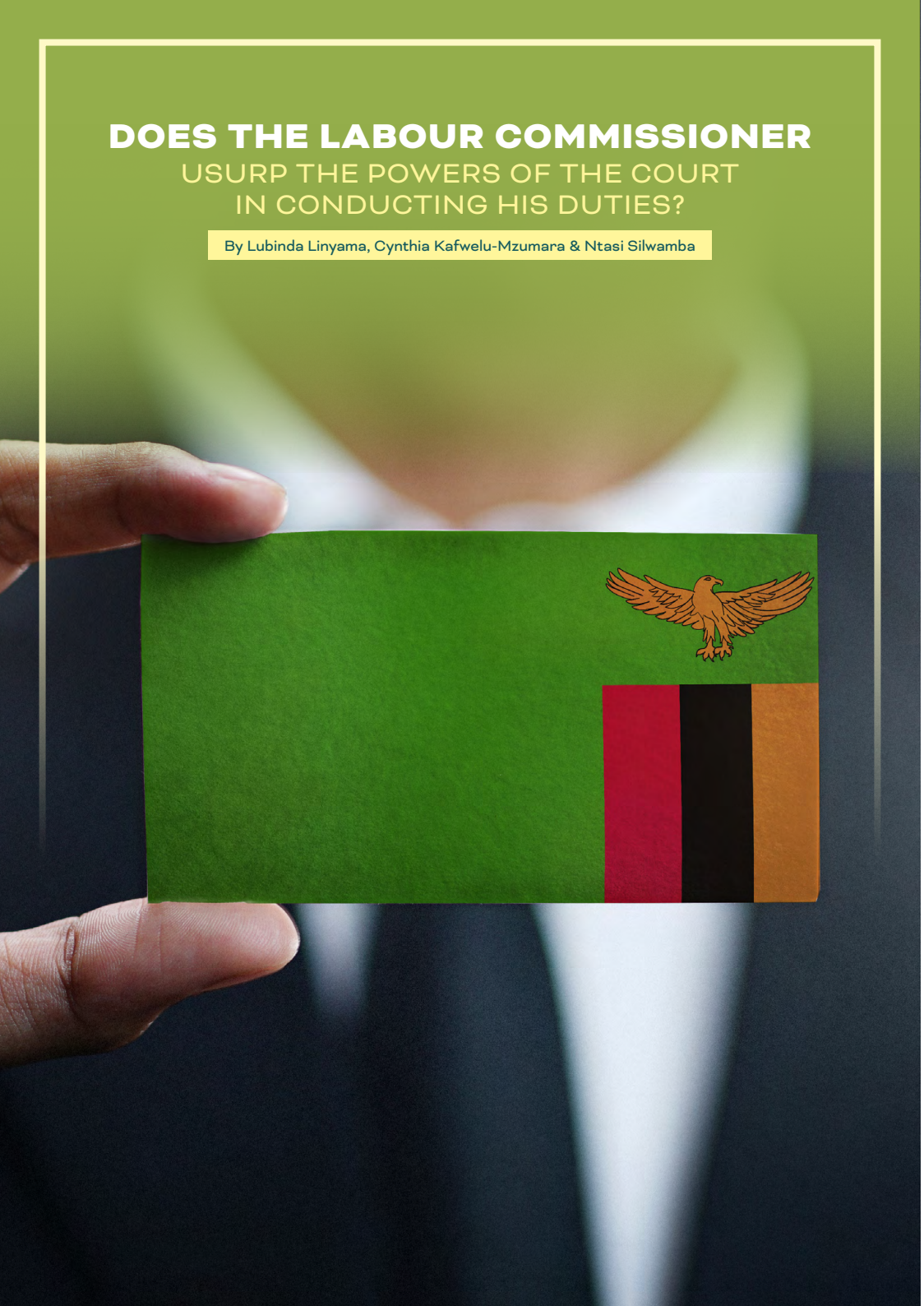


DOES THE LABOUR COMMISSIONER USURP THE POWERS OF THE COURT IN CONDUCTING HIS DUTIES?

By Lubinda Linyama, Cynthia Kafwelu-Mzumara & Ntasi Silwamba

This article is an assessment[1] of the newly enacted Employment Code Act No. 3 of 2019 in Zambia relative to the powers of the Labour Commissioner and the enforcement mechanisms thereto. Recent developments seem to suggest that there has been a duplication of the dispute resolution platform in employment matters as the office of the Labour Commissioner, and the Minister of Labour and Social Security have taken a proactive role akin to a judicial function.

Powers of the Labour Commissioner

The office of the Labour Commissioner is established pursuant to the provisions of Section 9 of the Employment Code Act and is appointed by the President upon a recommendation of the Civil Service Commission. The Labour Commissioner is responsible for the administration of the Employment Code Act No. 3 of 2019 (ECA)[2] and is clothed with jurisdiction to delegate his functions to a labour officer, labour inspector or any person as may be necessary for the administration of the ECA[3] because of the National character of the role of the office as it deliberates on all labour matters nationwide.
According to the ECA, the following are the powers of the Labour Commissioner[4]:

- enter freely at any reasonable time, whether by day or by night to inspect, any premises or conveyance where the Labour Commissioner reasonably believes persons are employed;
- enter by day any premises in order to carry out any examination, test or inquiry that the Labour Commissioner considers necessary in order to determine if the provisions of this Act are being complied with;
- interview, whether alone or in the presence of a witness, an employer or employee on any matter concerning the application of a provision of this Act;
- question a person who the Labour Commissioner considers has useful information, except that the person shall not be required to answer any question that may tend to prejudice or incriminate that person;
- require the production for examination of any book, register, account or other document, the keeping of which is prescribed by this Act;
- make copies of documents or to take extracts of documents that the Labour Commissioner may consider;
- remove a book, register, account or other document that the Labour Commissioner may consider necessary; and
- enforce the posting of notices in a place and manner that may be prescribed.

(2) The power under sub-section (1)(a) shall, in relation to a private dwelling house or any land or building occupied as a private dwelling, be exercised during the day with a warrant.

(3) Where the Labour Commissioner removes a book, register, account or other document under sub-section (1)(g), the Labour Commissioner shall give a receipt in respect of the book, register, account or other document to the employer or the employer's representative and return the book, register, account or other document as soon as is practicable after achieving the purpose for which it was removed.

(4) The Labour Commissioner shall, on the occasion of an inspection or visit, notify the employer or the employer's representative of the Labour Commissioner's presence, unless the Labour Commissioner considers that the notification may be prejudicial to the performance of the Labour Commissioner's duties.

(5) Where the Labour Commissioner has reason to believe that a provision of this Act is likely to be or has been contravened, the Labour Commissioner may:

(a) issue a written notice specifying the contravention and the preventative or remedial measure to be undertaken within a specified period; and
(b) if necessary, order suspension of further work, except that an employee shall be on full pay, until

1. Please note that our conclusions, together with the observations, proposals and recommendations, are based on information and documentation acquired during our research and experiences with the Ministry of Labour and Social Security.
2. Section 9 of the Employment Code Act
3. Section 9(3) of the ECA
4. Section 10 of the ECA

the preventive or remedial measure referred to in paragraph (a) is undertaken and approved by the Labour Commissioner.

(6) An employer who is directed to prevent or rectify a contravention under sub-section (5) may:

(a) where the period within which the preventative or remedial measure is to be carried out is specified, appeal to the Minister against the direction, within seven days before the expiry of the period specified in the notice; or
(b) where no period is specified, appeal to the Minister no later than seven days from the receipt of the direction.

(7) The Minister shall, determine an appeal lodged under sub-section (6) within 30 days.

(8) An employer who fails to comply with a directive of the Labour Commissioner under sub-section (5) commits an offence and is liable, on conviction, to a fine not exceeding 200,000 penalty points (~ZK60,000) or imprisonment for a term not exceeding two years, or to both.

(9) An employer who is aggrieved with the decision of the Minister under this section may, appeal to the High Court.

(10) The powers conferred or imposed on the Labour Commissioner in this section are in addition to any other powers conferred or imposed on the Labour Commissioner by or under any other written law.

(11) The powers conferred on the Labour Commissioner under this section may be exercised by a labour officer or labour inspector.

From the foregoing it is noted that the Labour Commissioner is mandated to resolve disputes that arise between employees and employers. However, careful perusal of the ECA reveals that the law tilts towards the protection of employees and does not envisage protective mechanisms for employers. This, in our considered view exposes employers to unwarranted actions by employees which may result in adverse effect to the business for example illegal work stoppages. At this stage we wish to opine that the traditional role of the Labour Commissioner has always been the preservation of industrial harmony in order to promote both the interests of the employee and that of the employer.

What is the procedure of resolving an employee's complaint?

The procedure of resolving an employee's complaint is as follows:

- The employee will lodge complaint by writing a letter to the Labour Commissioner;
- The Labour Commissioner will assess the contents of the letter and conduct further investigations;
- Once the Labour Commissioner establishes that the complaint is legitimate the Labour Commissioner will then write a letter to the employer to rectify the purported infringement; and
- If the employer does not adhere to the directive of the Labour Commissioner, the Labour Commissioner has the power to suspend the employer from further work.

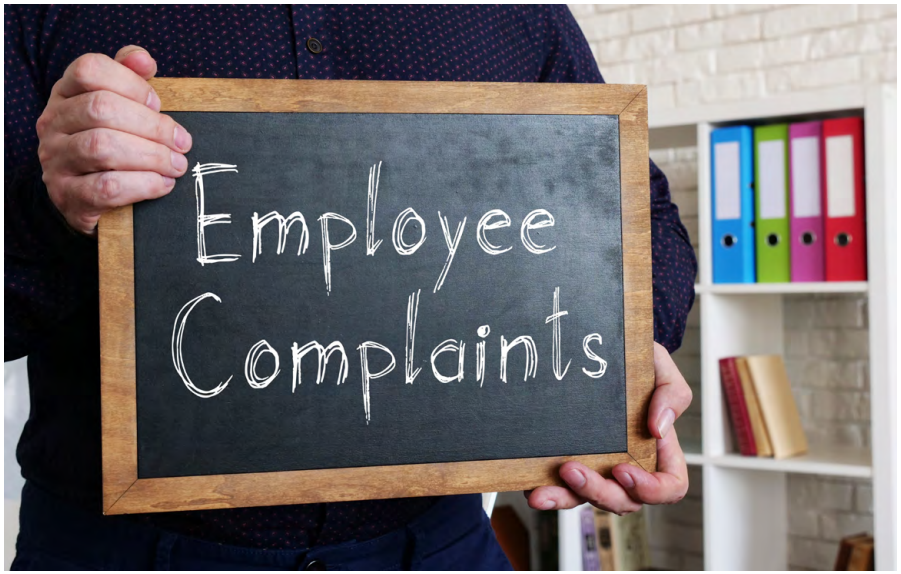
An employer aggrieved by the decision of the Labour Commissioner may appeal to the Minister of Labour and Social Security within seven days before the expiry of the preventive or remedial period directed by the Minister.

If the employer is still aggrieved by the decision of the Minister then the employer can appeal to the High Court within 30 days of receipt of the decision of the Labour Commissioner.[5]

Role of the Labour Commissioner in the Employment Act Chapter 268, Volume 15, of the Laws of Zambia ("Repealed Act"): A comparison

The Labour Commissioner's role in the Repealed Act was that of an impartial and independent officer whose intention was to encourage parties to reach a common understanding in settling their matters ex-curia.

5. Section 126 of the ECA



The Labour Commissioner was not clothed with requisite jurisdiction to issue written notices specifying the contravention and preventative or remedial measures to be undertaken within a specified period. An appeal against the decision of the Labour Commissioner was to the High Court for Zambia. The repealed Act provided for an Appeal period of 30 days of receipt of the decision of the Labour Commissioner.

Our critique of the appeal procedure from the Labour Commissioner

The Decisions of the Labour Commissioner may prejudice the decision of the Minister and the Court in as much as proceedings before the Labour Commissioner are private and confidential. This does not, however, preclude the Minister or the Complainants from referring to the proceedings in arriving at a decision or when lodging a complaint before Court. Additionally, it is worth noting that the office of the Minister heavily relies on the office of the Labour Commissioner for professional advice in Labour matters therefore it is practically not possible for the Minister not to be influenced by the Labour Commissioner in exercise of the appellate jurisdiction. This in our considered view renders the appellate process redundant. In as much as the appellate process presumes that the Minister will exercise an independent judgment there is a perception of undue influence by the Labour Commissioner as the Minister does not have the expertise within the Ministry to determine labour disputes independent off the advice of the Labour Commissioner.

The Appeal and Remedial process is impractical

Appeals to the Minister are impractical as an aggrieved party is required to appeal within seven days from delivery of a decision by the Labour Commissioner. This stringent timeframe may affect an aggrieved party to adequately prepare for the Appeal which may include retaining Counsel's opinion on the matter, financial resources in retaining Counsel's advice etc. which cannot all be achieved within the prescribed timeframe.

With regards to the remedial process, through experiences, the Labour Commissioner had directed an international manufacturing company to pay redundancy packages to its six ex-employees within a period of eight days. This was economically impractical for the employer knowing well that the redundancy packages were large sums and required internal approvals from management based out of jurisdiction.

In a more recent case, the Labour Commissioner directed a logistics company who underpaid its 400 employees to pay the accrued payments within a period of seven days. We must say that was impractically untenable for an employer to pay 400 employees within a period of seven days bearing in mind the financial constraints on the employer.

Can the Minister determine all appeals that are lodged?

Unlike the Labour Commissioner, the Minister's role encompasses policy formation and strategic direction of a Ministry, Department or other State Institution as assigned by the President. Due to the Minister's busy role, the Minister will not efficiently review and determine labour appeals independent or give "fresh eyes" away from the Labour Commissioner causing a danger to the Appellants who may not be accorded a fair and independent decision. Moreover, the Minister may delegate this role to other personnel.

Case study scenarios

Scenario 1:

The Labour Commissioner closed our Client's factory resulting in loss of business. We contended that the closure was illegal as it was contrary to the provisions of the ECA which gives an employer the liberty to exercise the statutory right of appeal against any decision of the Labour Commissioner's office.

Our Client duly lodged an appeal to the Honourable Minister of Labour and Social Security and never received any minute or letter from the Minister indicating that their appeal was dismissed or that there were directives that had been issued by the Minister.

We further contended that the Minister was yet to determine the appeal in accordance with the provisions of the ECA. Therefore, the Labour Commissioner's directive to enforce a decision which was subject of a challenge on appeal was illegal.

Invoking the provisions of Section 10(5) of the ECA in matters which are yet to be determined and still pending decision of the Minister is ultra vires and a breach of the Labour Commissioners statutory duty which is premised on principles of fairness and maintaining industrial harmony. Our Client found the decision to close its factory and yet direct it to continue paying wages to its employees most unfair.

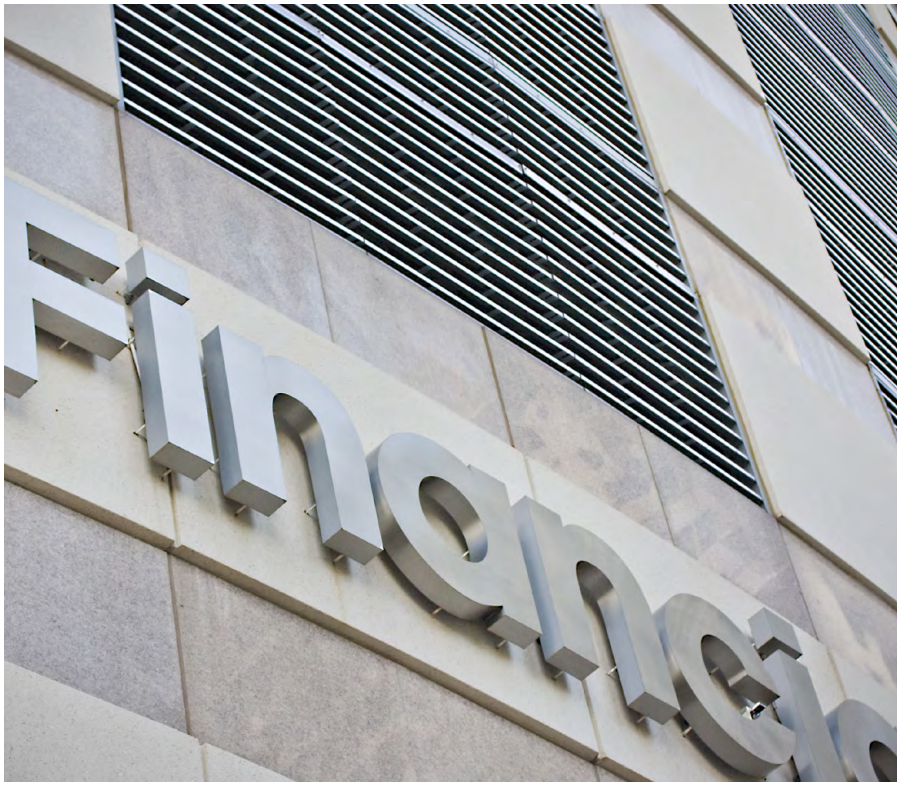
The Labour Commissioner thereafter responded via letter informing us that they had withdrawn their decision and conceded to the fact that they acted ultra vires.

The above scenario is an example of how the Labour Commissioner may abuse their powers and usurp the powers of the Court. It is evident that such decisions are not good for business as our client suffered financial loss due to unjustified suspension by the Labour Commissioner.

Scenario 2:

This involved a Financial Institution which had decided to have two different conditions of employment run simultaneously. Employees who had consented to the new conditions where guided by those new conditions and enjoyed certain perks whilst employees who had rejected the new conditions remained on the new conditions. The issue raised inter alia, was that the Financial Institution in running the two different conditions of employment did discriminate against those on old conditions of employment. The Labour Commissioner proceeded to hear the complaint by the Financial Institution's employees and without according the Financial Institution the opportunity to exculpate itself, the Labour Commissioner issued a directive to the Financial Institution under section 10 and failure to adhere to the directive would result in the Financial Institution being fined.

It is regrettable that in order to avoid bad publicity, most employers end up settling and the Labour Commissioner's decision goes unchallenged. This scenario buttresses our observation that the Labour Commissioner role tilts more to employees' rights as opposed to being impartial and preserving industrial harmony in order to promote both the interests of the employee and that of the employer.



Scenario 3:

This involved a petroleum company. The Labour Commissioner issued summons for a hearing to an employer and the summons contained a caution that the employer would be held criminally liable if they did not attend the hearing. An excerpt of the said caution is as follows:

> *"be cautioned in advance that, it is an offence under Section 128(1)(g)and (h)of the above statute for any legal and natural person/s to willfully obstruct, hinder or delay an Authorised Officer in the exercise of any of the above powers conferred on an authorised officer respectively. NOTE that should you fail to comply with this directive, we shall penalise you with financial penalties under Section 133 (f) of the above Act and we shall also report you to Zambia Police in line with Sections 127 of the Penal Code Act Chapter 87 of the Laws of Zambia for disobeying Lawful directives from a Public Officer."*

It is inconceivable that a party should be subject criminal penalty for not attending a hearing.

A comparative analysis in different commonwealth jurisdictions:

Namibia

In Namibia the case of *Smith v Desert Fruit Namibia (Pty) Ltd & Another* (HC-MD-LAB-MOT-REV 271 of 2019) [2021] NALCMD 13 held that a reviewable irregularity occurs if an arbitrator fails to exercise the statutory functions entrusted to him by the Labour Act 2007, the result of which is to deny a party the right to a fair hearing. In casu, the arbitrator failed to deal with the case before him in accordance with the functions and objects of the Labour Act which require the expeditious and cost-effective resolution of labour disputes and which impose on arbitrators the duty to assist in this regard and to 'live up to that mandate'.

ARBITRATORS EMPLOYED AT THE OFFICE OF THE LABOUR COMMISSIONER ARE DUTY BOUND TO ASSIST IN A FAIR AND IMPARTIAL MANNER WITH THE RESOLUTION OF LABOUR DISPUTES AND TO ENSURE THAT IS DONE IN THE MOST COST-EFFECTIVE AND EXPEDITIOUS MANNER.

Arbitrators employed at the Office of the Labour Commissioner are duty bound to assist in a fair and impartial manner with the resolution of Labour disputes and to ensure that is done in the most cost-effective and expeditious manner. When, in the circumstances of this matter, the arbitrator did not do so and abdicated his jurisdiction and the functions entrusted to him by the Labour Act this resulted in a situation in which the applicant was denied the right to a fair hearing. Such conduct thus amounted to a prejudicial miscarriage of justice, resulting in a reviewable irregularity decision of arbitrator set aside on review.

South Africa

The majority judgment in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (CCT 85/06) [2007] ZACC 22 made it clear that the Commission For Conciliation, Mediation And Arbitration ('CCMA') is not a court of law, although there are similarities the court must defer to it. The Judge held as follows:

> *"in evaluating the reasoning of the commissioner what must be borne in mind is that commissioners are not expected to give detailed and impeccable reasoning for their awards. They are required to 'deal with the substantial merits of the dispute with the minimum of legal formalities.' This has regrettably resulted in unsubstantiated statements being made in awards. And without substantiation, it is often difficult to determine whether the statements made have any basis in the evidence or whether they demonstrate that material factors were ignored. This is often compounded by the fact that some statements are capable of more than one meaning. In these circumstances, the reviewing court must first ascertain what the statement intended to convey before embarking upon the task of determining whether these statements demonstrate that a gross irregularity occurred in the proceedings or that the commissioner exceeded his or her powers. While cognisance should properly be taken of the circumstances under which commissioners' work, this is no excuse for making unsubstantiated statements or reasons for a conclusion. At the bare minimum, an award should set out facts found and the reasons for the finding, the conclusion based on those facts and the reasons for the conclusion. It should not be necessary for the reviewing court to ask, 'what did the commissioner mean by this statement?' A reviewing court should not be left to speculate on what the commissioner had in mind. Statements made may be fully justified, but if left unexplained a statement may be easily misunderstood. Such statement may easily fall prey to an attack based on gross irregularity in the conduct of the proceedings."*

The above cases illustrate the Court's constant review and determination as to whether the Labour Commissioner acted ultra vires and usurped their powers. It is evident that this is an area of the law that will continue to produce uncertain decisions due to the nature of how the procedure is structured.

Conclusion/recommendation

We appreciate that the ECA is new legislation, however, there is room for improvement and our recommendations are as follows:

- In practice as alluded to above, the Labour Commissioner's role tilts more to employees' rights as opposed to being impartial. It is therefore our recommendation that the Labour Commissioner adheres to its role of preserving industrial harmony in order to promote both the interests of the employee and that of the employer.
- There is a need to introduce a guide on the Appellate system as there is no express procedure to stay a directive of the Labour Commissioner where one intends to appeal against the said decision or directive;
- There is a need to extend the timeframe within which to appeal against the decision of the Labour Commissioner and the said appeal should be overseen by the courts of competent jurisdiction; and

There is a need to expressly state an economically realistic time period within which to remedy the matter as opposed to the Labour Commissioner coming up with timeframes which are economically unrealistic.

Lubinda Linyama has vast experience in diverse areas of litigation, commercial law, mining law and general business law. He is a corporate advisory in major areas of company law, secretarial services for both local and multinational companies operating in Zambia. He has represented multinational companies in issues relating to employment and labour matters. He is equipped with negotiating skills and was part of the main and sub-committees of the negotiations between the Republic of Zambia and Chinese investors.

Cynthia Kafwelu-Mzumara is a commercially minded lawyer specialised in legal advisory and transactional work across mergers & acquisitions (M&A), banking and finance, commercial law, employment & labour, legal compliance, corporate services and conveyancing. Cynthia is skilled in negotiations and unlocking business development opportunities for both local and multinational clients.

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