Article

Speculum Juris

Vol 40 No 1 (2026)
Published 31 August 2026

ISSN 2523-2177

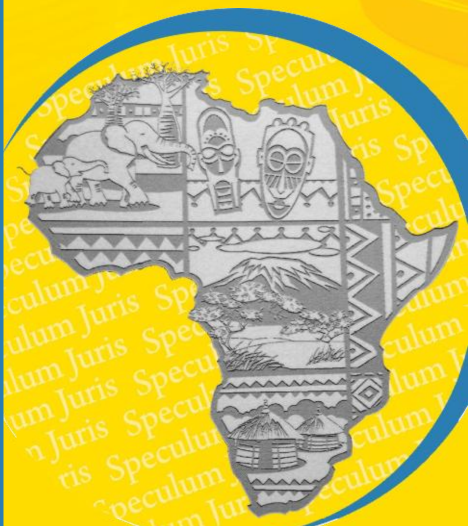
The Regulatory Mechanisms for the Protection of Employees During Merger and Takeover Transactions in Zimbabwe: Suggestions for Law Reform

Ashton Mufari*
LLD Candidate, North-West University
https://orcid.org/0009-0002-9535-0320

Friedrich Hamadziripi**
Senior Lecturer, University of Zimbabwe
https://orcid.org/0000-0002-7034-1279

Abstract

Mergers and takeovers have become prevalent around the world. As a result of globalisation, Zimbabwe has recently witnessed an upsurge in the number of merger and takeover transactions. Mergers and takeovers are believed to result in synergistic gains and are considered a major contributing factor in enhancing shareholder value. While mergers and takeovers tend to improve a company's profitability and productivity, they sometimes prejudice employees and undermine their rights and interests. Sometimes, the primary goal of a merger or takeover transaction, which is to increase shareholder value, is lost. Some of these transactions fail, resulting in a substantial loss of employment. Mergers and takeovers in Zimbabwe are regulated by two main instruments of legislation, namely the Competition Act [Chapter 14:28] and the Companies and Other Business Entities Act [Chapter 24:31].



Cite as: Mufari and Hamadziripi "The Regulatory Mechanisms for the Protection of Employees During Merger and Takeover Transactions in Zimbabwe: Suggestions for Law Reform" 2026 (40) Spec Juris 170–189

University of Fort Hare
Together in Excellence

---

* LLB (UZ); LLM Corporate Law (UNISA); MBA (UZ). Email: mufariash@gmail.com.

** LLB (cum laude) LLM; LLD (UFH). Email: fhamadziripi@law.uz.ac.zw.

However, these statutes do not provide meaningful insights into the rights and remedies available to employees before, during and after the merger or takeover process. Labour and employment-related aspects fall within the ambit of the Labour Act [Chapter 28:01], which, nevertheless, does not necessarily provide adequate clarity and satisfactory safeguards on the rights and remedies available to employees affected by merger and takeover transactions. Based on the history of mergers and takeovers in Zimbabwe, major transactions have failed, resulting in detrimental consequences to employees. By adopting a historical and legislative analysis approach, this article investigates the effects of mergers and takeovers on employment contracts in Zimbabwe. It concludes that the current legislative framework does not provide enough protection for employees affected by mergers and takeovers. Finally, it suggests ways in which employees can be better protected from the effects of mergers and takeovers in Zimbabwe.

Keywords: mergers; takeovers; employment contracts; Labour Act; Competition Act; COBE Act

1 INTRODUCTION

There is no doubt that mergers and takeovers are an important strategy in corporate expansion[1] and have, over the years, increased in Zimbabwe.[2] Globally the rate of mergers and takeovers have risen significantly in the early 2000s and reached a record level worldwide in 2007,[3] with further increases in 2015 and 2016.[4] Mergers and takeover transactions are an important means of transferring resources to where they are most needed and are a corporate restructuring and control tool.[5] Mergers and takeovers can facilitate fast growth for firms, increase shareholder value and are also a mechanism for capital market discipline, which, in turn, improves management efficiency and maximises private profits and public welfare.[6] Cassim *et al.* opine that mergers benefit the economy and corporate efficiency.[7] These business and economic advantages demand that legislation must consider the interests of all stakeholders, including employees.

1 Devos, Kadapakkam and Krishnamurthy "How Do Mergers Create Value? A Comparison of Taxes, Market Power, and Efficiency Improvements as Explanations for Synergies" 2009 *The Review of Financial Studies* 1780.

2 Between 1999 and 2001, there were twenty mergers: See Competition and Tariff Commission 2011 Report, 27. Between 2005 and 2007, the number rose to eighty one, while between 2016 and 2021 eighty-three mergers were notified and approved, see Competition and Tariff Commission Reports https://www.competition.co.zw/annual-reports/ (accessed 21-04-2025).

3 DePamphilis *Mergers and Acquisition Basics* 6 ed (2011) 1.

4 Gaughan *Mergers, Acquisitions and Corporate Restructurings* 7 ed (2018) 3. The rise in mergers during this period is attributed to globalisation and also, that this was the period soon after the 2000 economic recession and leveraged buyouts became popular during this period. See Junni and Teerikangas 'Mergers and Acquisitions' 2012 *Oxford Research Encyclopedia of Business and Management* 6.

5 DePamphilis *Mergers and Acquisition Basics* 6 ed (2011) 1.

6 Piesse *et al.* "Mergers and Acquisitions Definitions, Motives and Market Responses" (2013) *Encyclopedia of Finance* 541. Also see Tao, Shi and Zou "Research on the Impact of Merger on Capacity and Social Welfare in Different Market Environments" 2021 *Economic Research-Ekonomska Intrazivanja* 2237, whose research came to the finding that mergers increase public or social welfare.

7 Cassim *et al. Contemporary Company Law* 3 ed (2021) 21. On page 919, it is further argued that mergers and acquisitions assist companies in adapting to changing business conditions in the interests of economic growth and wealth creation.

If such legislation does not consider the interests of all stakeholders, the possibility of merger and takeover failure could be high. For mergers and takeovers to be successful, the human capital, which includes employees, must be treated equitably.

Mergers and takeovers sometimes invalidate contracts of employment.[8] When two or more companies merge, employees who used to work for either the acquirer or the target company automatically become employees of the newly formed entity, with or without their consent. This arises from the principle of transfer of an undertaking.[9] This position flouts the fact that the employee would not have been consulted and could not consent to the transfer. During the inception stages of a merger and takeover transaction, the combining entities may experience financial difficulties, which may result in the newly formed entity being placed under corporate rescue or in worst-case scenarios, under liquidation.[10] Where the formed entity is placed under corporate rescue, it may devise means to reduce costs, which may include retrenching employees. The employee's right to challenge the retrenchment or dismissal is suspended during the rescue process,[11] which is detrimental to the employee.

Merger and takeover control in Zimbabwe is mainly governed by the Competition Act.[12] The main goal of competition regulation is the protection of the market as a whole.[13] The objects of the Competition Act are to promote and maintain competition in the economy, to establish the Competition and Tariff Commission and its functions, to provide and control restrictive practices, the regulation of mergers, the prevention and control of monopoly situations and to provide for matters connected with or incidental to the foregoing.[14] The protection of employees during and after the merger and takeover process is not one of the expressly stated goals of the Competition Act.

In 2020, the Companies Act[15] was repealed and replaced with the Companies and Other Business Entities Act[16] (hereinafter called the COBE Act). Before the introduction of the COBE Act, mergers and takeovers (acquisitions) were largely regulated by the Competition Act, while some negligible regulatory provisions were found in the Companies Act.[17] Although mergers and takeovers were and are still largely regulated by the Competition Act, it does not provide for merger and takeover procedures. The now repealed Companies Act, which had been in

---

8 Ram "Impact of Mergers and Acquisitions on Employees" 2012 *CLEAR International Journal of Research in Management, Science and Technology* 120. However, legislation provides for what happens to contracts of employment where there is a merger or a takeover, as will be discussed in the article.

9 See s 16 of the Labour Act [*Chapter 28:01*]. Also see *Chipangura and Others v Kwekwe City Council and Anor* SC 27–21. See further *Aviation Union of South Africa and Anor v South African Airways (Pty) Limited and Ors* 2012 1 SA 321 (CC).

10 See the case of *Metallon Gold Zimbabwe Private Limited and Others v Shatirwa Investments Private Limited and Others* SC-107-21, where the Supreme Court stated that the placement of a company under corporate rescue has far-reaching effects on creditors, financial institutions, shareholders, employees and society at large. See further Nyoka "Banks and the Fallacy of Supervision: The Case for Zimbabwe" 2015 *Banks and Bank Systems* 11, who writes on the placement of Kingdom Bank under liquidation following the collapse of its merger with Meikles.

11 Section 126(1) of the Insolvency Act [*Chapter 6:07*]. Also see Krishnan and Park "The Impact of Workforce Reduction on Subsequent Performance in Mergers and Acquisitions: An Exploratory Study" 2002 *Journal of Business Research* 286, who submit that employee layoffs are likely to occur during mergers and acquisitions.

12 *Chapter 14:28*] of 1996.

13 See generally, the wording of the preamble to the Competition Act [*Chapter 14:28*].

14 *Ibid.*

15 [*Chapter 24:03*].

16 [*Chapter 24:31*].

17 Section 193 of the now repealed Companies Act contained provisions on mergers and takeovers. However, these provisions did not contain the merger procedure and the merger contract which is now found in the COBE Act.

operation since 1951, did also not provide for an effective merger and takeover procedure.[18] The incorporation of a more detailed merger procedure in the COBE Act is an innovation. The now repealed Companies Act had outlived its purpose and needed to be replaced.[19] The underlying principle is that legislation that has outlived its usefulness, that does not reflect the current needs of society and that is stifling the development of the economy must be repealed.[20] Thus, the introduction of the COBE Act and the inclusion of merger procedure and takeover processes have been long awaited.

Employees' interest in companies arise from their contracts of employment, which create a legal relationship between the employer and the employee. In terms of the contract of employment, the employee's benefits include job security and improved working conditions. However, it is noteworthy that employees' interests and rights are not always consistent and in agreements with those of the management and shareholders.[21] It is common cause that the employer decides on the range and scope of the adopted management philosophy, which does not always conform with the realisation and promotion of employee rights and interests. Mergers and takeovers have a major impact on the rights of employees. There is a general expectation that the newly formed entity or company will make its employees productive.[22] This is not always the case as the rights and interests of employees are often negated during mergers and takeovers. It is therefore essential that an effective regulatory mechanism should be in place to guard against the violation of employee rights and interests during mergers and takeovers.

This article explores the effects of mergers or takeovers on employees' contracts of employment. It provides an analysis of the concepts of mergers and takeovers. Attention will then turn to how mergers and takeovers impact contracts of employment. Thereafter, it analyses the relevant legislation and employee protection mechanisms provided in Zimbabwe's legal framework. It concludes with suggestions on possible law reform.

2 THE NATURE OF MERGERS AND TAKEOVERS

The starting point is to indicate that the terms "mergers and takeovers" are adopted in the COBE Act. The Competition Act employs the terms "mergers and acquisitions." Whereas the Competition Act is focused on the protection of the market as a whole,[23] the COBE Act focuses

18 The legislature recognised this gap and hence, the merger procedure was provided for in the COBE Act, which replaced the Companies Act.

19 This explains why the Companies Act was repealed and not amended.

20 Cassim *et al.* 4. Also see the case of *Zimnat Insurance Company Limited v Chawanda* 1990 2 (ZLR) 143 (S) where the court remarked that law in a developing country cannot afford to be static. The court also restated the role of the courts in interpreting the law in a manner which takes in account the needs of society.

21 Malgorzata and Bodak "Employee Interests in the Light of Human Resource Management Concepts" 2014 *Management Journal* 11.

22 Waddock and Graves "The Impact of Mergers and Acquisitions on Corporate Stakeholder Practices" 2006 *Journal of Corporate Citizenship* 95. However, this expectation certainly shifts in the wake of mergers and takeovers. There are grave consequences to employees such as downsizing. See also Rajand and Forsyth "Hostile Bidders, Long Term Performance and Restructuring Methods: Evidence from the UK" 2002 *American Business Review* 71. See further Gutknecht and Keys "Mergers, Acquisitions and Takeovers: Maintaining Morale of Survivors and Protecting Employees" 1993 *Academy of Management Executive* 34, who came to the conclusion that mergers and acquisitions' effects on employees are widespread and pervasive. Also see Ram 2012 *CLEAR IJRMST* 121, who opines that a merger or takeover in many ways invalidates the employment contract.

23 The purpose of the Competition Act is to maintain competition in the economy of Zimbabwe (as a whole), to provide for the prevention and control of restrictive practices, to regulate mergers, to prevent and control monopoly situations and prohibiting unfair trade practices. See the preamble to the Competition Act. All these objectives are intended to protect the market as a whole.

on the stakeholders as opposed to the market.[24] Mergers and takeovers have proved to be the most effective and efficient way to enter new markets or to increase distribution reach.[25] The words "merger' and "takeover" have been used interchangeably.[26] A merger is an amalgamation of two or more companies.[27] It is a combination of two or more businesses in which only one of the companies survives with a new name.[28] A merger has been described as a marriage between two companies.[29] This description ignores the fact that mergers can be entered into by more than two companies, in which case, it will be a misnomer to characterise the merger relationship as a marriage. The imperative theme is that a merger involves some change of status of the integrating entities as a result of such integration. A merger is an acquisition, direct or indirect, or an establishment of control in the business of a competitor, supplier, customer or any other person.[30] This definition encompasses an element of the attainment of interest by one entity in another entity. Thus, it is clear that a merger is an acquisition.[31]

A takeover is neither defined in the Competition Act nor the COBE Act. However, in sections 234 to 239 of the COBE Act, which provide for takeovers, the word "acquisition" is used. Phrases such as "acquisition of control" and "target company" are also used.[32] These phrases are associated with acquisitions, which have sometimes been described as mergers. A merger is sometimes referred to as an amalgamation. In Zimbabwe, no legislative distinction is made between a merger and an amalgamation, nor is there a legislative distinction between a merger and a takeover. Another view has been that mergers are conglomerates, and a conglomerate is just but one type of merger.[33] Although there are attempts to distinguish between mergers and takeovers,[34] some scholars concede that distinguishing mergers from takeovers is not an

---

24 This arises from a reading of s 228 of the COBE Act which provides for a merger procedure. the merger procedures are intended to protect shareholders by ensuring that shareholders are involved in the merger process and those who object to the proposed merger may exit from the company by pursuing dissenting shareholder remedies. Secondly, an intended merger is published to ensure that stakeholders with any objections can raise their objections to the proposed merger.

25 Sherman and Hart *Mergers and Acquisitions from A to Z* (2011) 6. Also see Karau and Khayanga "The Effect of Mergers and Acquisitions on a Firm's Competitive Advantage: A Case of Hewlett-Packard East Africa" 2018 *The International Journal of Business Management and Technology* 68 who submit that mergers and acquisitions increase value that would not have been achieved had it not been for the merger.

26 Varian "Symposium on Takeovers" *Journal of Economic Perspectives* 1988 3 5, who, in writing about takeovers, refers to the word "mergers." Also see Roberts, Wallace and Moles *Mergers and Acquisitions* 2010, who, in their text, use the terms "mergers" and "acquisitions" (takeovers) interchangeably. See further Piesse *et al.* "Mergers and Acquisitions Definitions, Motives and Market Responses" (2013) 542.

27 Section 226 of the COBE Act.

28 Section 2 (1) as amended by s 2 of the Competition Amendment Act 29 of 2001. Also see Aristos *et al.* "The Impact of Mergers and Acquisitions on Corporate Culture and Employees: The Case of Aegean and Loympic Air" 2018 *Academy of Strategic Management Journal* 2. Also see Horne and John *Fundamentals of Financial Management* 12 ed (2004) 331.

29 Weinberg and Blank *Takeovers and Mergers* (1971) 335. Also see Aristos *et al.* 2018 *Academy of Strategic Management Journal* 2.

30 Fouche *et al. Legal Principles of Contracts and Commercial Law* (2020) 298. For a detailed discussion on the control element, see Nzero "The Element of Control in the Statutory Definition of Mergers in Zimbabwe: Towards a Clearer Merger Definition" 2024 *Spec J* 1 14.

31 In mergers, there is a difference between the formation of a new company and combining through one company dissolving into the other. In the former scenario, two or more existing companies come together to create an entirely new entity, whereas with the later, one company survives, and the other company is absorbed and dissolved.

32 See sections 234 to 239 of the COBE Act.

33 See *Innscor Africa Limited and Anor v Competition and Tariff Commission* SC 52–18 where the Supreme Court, confirming the judgment of the High Court on appeal, held that a conglomerate is just but one of the three types of mergers.

34 Junni and Teerikangas 2012 *Oxford Research Encyclopedia of Business and Management* 1 35.

important academic debate.[35] Thus, the argument on the distinction will not be taken further in this article, but adopts the position that mergers and takeovers are analogous, as they mutually denote a synthesis of two or more entities or some exercise of control by one entity in the other.

3 THE INFLUENCE OF MERGERS AND TAKEOVERS ON EMPLOYMENT CONTRACTS IN ZIMBABWE

Economies and societies learn and develop from previous experiences. History is critical. Dependence on history may be helpful in today's corporate world because of the ever-changing landscape of economies. Although previous experiences are sometimes obscure, their ramifications can be severe. Often, previous experiences play a critical role in charting and carving the course for the future. Furthermore, history may prove instructive and useful in avoiding pitfalls that may plague the enforcement of the law. The most recent literature ignores historical developments of mergers and takeovers. As a result, many of the mistakes and types of failed merger and takeover transactions that occurred in earlier years tend to be repeated.[36] It is for this reason that one needs to trace the history and development of mergers and takeovers in Zimbabwe, and also focus on their influence on contracts of employment.

At the global level, mergers and takeovers are best traced by concentrating on phases popularly known as merger waves.[37] These waves were a result of economic changes and developments.[38] They were also caused by several regulatory and technological factors.[39] Merger waves were episodic.[40] Most of the available literature on the evolution of mergers and takeovers traces the evolution of mergers to the late nineteenth century in the United States of America.[41] Mergers and takeovers coincide historically with the origin of corporations, which itself was not accidental but deliberate.[42] This suggests that mergers and takeovers were essentially commercial decisions made by corporations and not a result of coincidental developments in the economy.

35 Piesse *et al. Mergers and Acquisitions Definitions, Motives and Market Responses* (2013) 542. Also see Stallworthy and Kharbanda *Takeovers, Acquisitions and Mergers: Strategies for Rescuing Companies in Distress* (1988) 68. See further Celenza and Rossi "The Efficient Market Theory and Mergers and Acquisitions Puzzle: Evidence from Italy" 2012 *Journal of Modern Accounting and Auditing* 1705, who submit that the majority of empirical research on the differences between mergers and acquisitions does not contribute to a clear conclusion.

36 Gaughan *Mergers, Acquisitions and Corporate Restructurings* 7 ed (2018) 41.

37 Bruner *Applied Mergers and Acquisitions* (2004) 69 opines that mergers and acquisitions appear in waves. Also see Letaifa "Mergers and Acquisitions: A Synthesis of Theories and Directions for Future Research" 2017 *Risk Governance and Control: Financial Markets and Institutions* 72. See further Kolev, Haleblian and McNamara "A Review of the Merger and Acquisition Wave Literature" in Faulkner *et al.* (eds) *Handbook of Mergers and Acquisitions* (2012) 21. Mergers occur in waves. See Black "The First International Merger Wave (and the Fifth and Last U.S. Wave)" 2000 *Univ of Miami LR* 799. See further Junni and Teerikangas 2012 *Oxford Research Encyclopedia of Business and Management* 5. Also see Kolev, Haleblian and McNamara 19–39.

38 Junni "Mergers and Acquisitions" 2019 *University of Turku Press* 4, who submits that each merger wave is unique in the sense that it is characterised by different motives, characteristics and outcomes.

39 Mitchel and Mulherin "The Impact of Industry Shocks on Takeovers and Restructuring Activity" 1996 *Journal of Financial Economics* 193–229.

40 Nelson *Merger Movements in American Industry 1895-1956* (1959) 4.

41 Cassim *et al.* 919 submit that South Africa borrowed mergers and acquisitions from the United States of America. Also see Bedier *Cross Border Mergers and Acquisitions: The Case of Merger Control v Merger Deregulation* (2018) 44, who also restricts his study on merger history to the United States because that is where information on mergers and acquisitions was reported.

42 Williston "History of the Law of Business Corporations before 1800" 2013 *Harvard LR* 113.

These waves were periods or phases through which mergers and takeovers passed during their development to date. They were temporary accelerations in the evolution of firm size due to combinations.[43]

Within the Zimbabwean context, the literature on this subject is scant.[44] However, several mergers took place in the then Rhodesia between the 1950s and 1960s.[45]The available literature on how mergers and takeovers have developed in Zimbabwe is not extensive and many records of this era can only be traced to the post-independence era. Upon attainment of independence in 1980, Zimbabwe inherited the Rhodesian government's legal frameworks, including that governing company law, which was operational until 2020, when the Companies Act was repealed and replaced with the COBE Act. The historical framework provided herein is within the context of post-independence merger and takeover developments.

The year 1980, when Zimbabwe attained its independence, marked the third to fourth international merger and takeover wave.[46] The available major documented merger and takeover literature began to appear in 2008, after the formalisation of competition law in 1996. It must nevertheless be noted that mergers and takeovers were witnessed in Zimbabwe even before the formalisation of competition law in 1996. Thus, before 1996, there was a regulatory gap. The formal regulation of mergers and takeovers came with the formal competition policy in 1996. The need for a formal competition policy arose when Zimbabwe adopted the International Monetary Fund-sponsored Economic Structural Adjustment Programme (ESAP) in 1992. One of the objectives of the ESAP was to increase recourse to free markets.[47] Amongst the commitments of the ESAP was the establishment of an authority to address the then existing monopolistic structures and the promotion of market competition.[48] By adopting this approach, Zimbabwe became the third African country to have a formal competition regulatory policy after South Africa and Kenya.[49] The business community was concerned about a lack of domestic competition because the country's industries were not competitive internationally.

---

43 O'Brien "Factory Size, Economies of Scale, and The Great Merger Wave of 1898-1902" 1988 *Journal of Economic History* 639 639. See also Bedier 45, who opines that waves begin at a certain time, booms, reaches a certain peak and slows down because of a recession or a financial crisis. See further, Gaughan *Mergers, Acquisitions and Corporate Restructuring* 3 ed (2002) 52. See further, DePamphilis, *Mergers and Acquisition Basics: All you need to know* (2011) 24–25.

44 One major contributor in this area is Nzero. See Nzero "The Standard for Merger Assessment in Zimbabwe: The Law and Practice" 2022 *THRHR* 21–32; Nzero *Corporate Restructurings in Zimbabwe: A Legal Analysis of the Regulation of Corporate Mergers and Acquisitions in Zimbabwe* (LLD-thesis, UP, 2013). See further, Nzero "Is There a Gap in the Definition of Corporate Mergers in Zimbabwe's Competition Act? Revisiting the Caledonia Holdings (Africa) Limited/Blanket Mine (1983) (Private) Limited Merger" 2015 *THRHR* 589–604; Nzero "Merger Regulation in Zimbabwe: A Critical Assessment of the Effectiveness of the Merger Regulatory Institutions" 2015 *Midlands State Univ LR* 30–52, and Nzero 2024 *Spec J* 1–14. In these studies, Nzero does not classify the merger development in Zimbabwe into phases. He does not dwell much on history.

45 Gwande "Federation, Factories, and Foreign Capital: Economic Growth in Southern Rhodesia, 1953–1956" 2019 *The International Journal of African Historical Studies* 241.

46 Aytac and Kaya "Contemporary Look on The Historical Evolution of Mergers and Acquisitions" 2016 *International Journal of Economics, Commerce and Management* 183 194, who opines that the third wave is known to have existed in the 1960s. they also submit that the fourth wave took place between 1984 and 1989.

47 See Kovacic "Competition Policy, Economic Development, and The Transition to Free Markets in the Third World: The Case for Zimbabwe" 1992 *Antitrust LJ* 253 254. See further Government of Zimbabwe *A Framework for Economic Reform 1991-1995* 18 January 1991.

48 See Chidzero *Economic Planning and Development Budget Statement* (1991) 8–9.

49 Kovacic 1992 *Antitrust LJ* 254.

From its onset, the merger regulation policy was more competition-centric and was deliberately intended to protect the market. It was not the express intention of the then available legislation to consider the interests and rights of employees as an objective of the merger and takeover policy.

Kububa opines that the ESAP prompted the establishment of a monopolies commission, whose objective was to monitor competitiveness and regulate restrictive business practices in the national economy.[50] Again, employee interests were not an express objective of the merger and takeover policy during the ESAP. In 1992 a study was carried out to investigate the nitty-gritty of how to establish what was then called a Monopolies Commission.[51] Amongst the substantial findings of the study was that it was possible to exercise market power by entities, and further that there was ample indication and sufficient reason to believe that there were restrictive business practices in the country.[52] The findings of the investigation gave birth to the introduction of the Competition Act in 1996. This Act became a legal or regulatory framework for mergers and takeovers in Zimbabwe. It provided for procedures to be followed and notification requirements, among other issues. The findings of the report made no substantial findings on the influence of mergers and takeovers on employees but focused on the market.[53] It did not give much consideration to the rights of the employees in merger transactions, ignoring one of the post-independence government's dominant policies, which was to create and protect employment.[54]

With the introduction of the COBE Act in 2020, the procedures for mergers and takeovers have now been widened, but without any emphasis on the rights of employees, since employment-related matters rather be dealt with by the Labour Act. However, the Labour Act lacks sufficient provisions to protect the rights and interests of employees in mergers and takeovers, as will be demonstrated later in this contribution. Before the enactment of the COBE Act, the Labour Act had already made provision for the protection of the rights of employees in mergers and takeovers. One of these protections was section 16 of the Labour Act which was introduced in the Labour Act of 1985. This section provided relief for employees whose employer would have been sold or merged or otherwise transferred. The purpose of this provision was to protect employees from losing their rights simply because the ownership of the business had changed.

Between 1999 and 2001, twenty mergers and takeovers were witnessed in Zimbabwe.[55] Significant notable mergers which occurred during this period were the acquisition of Rothmans of Pall Mall by British American Tobacco in 2000,[56] the acquisition of Lyons Zimbabwe (Private) Limited by Dairiboard Zimbabwe Limited and the acquisition of Portland Holdings Limited by Pretoria Portland Cement Company (PPC),[57] among others. All these mergers and takeovers were horizontal and successful as the formed entities still exist today.

---

50 See Kububa "Overview of Competition Policy and Law in Zimbabwe" 2009 (3rd Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa, Pretoria, 3–4 September 2009).

51 Now Competition and Tariff Commission.

52 See Implementing Policy Change (IPC) Study of Monopolies and Competition Policy in Zimbabwe, March 1992.

53 *Ibid*.

54 See Nzero *Corporate Restructurings in Zimbabwe: A Legal Analysis of The Regulation of Corporate Mergers and Acquisitions in Zimbabwe* 49–50.

55 See CTC 2011 Annual Report 27.

56 *Ibid.*

57 *Ibid*.

Throughout these transactions, there were positive influences on the rights of employees, to the extent that there were no publicly known employment terminations during the merger and takeover process.[58]

Nevertheless, there were failed mergers which have seen employees' rights being trodden upon. In 2008, Kingdom Financial Holdings merged with Meikles Africa in a vertical merger. TN Holdings Limited acquired Pelhams Limited. These two merger transactions are evident failures in Zimbabwean mergers and takeover history. The idea behind the takeover or acquisition of Pelhams by TN Holdings was to complement TN Holdings' furniture and electrical retail operations. Although there were notable successes in the establishment of TN Harlequin Luxaire, the company has since closed all its outlets and failed to pay its employees.[59] It also faced a plethora of litigation from creditors, including employees.[60] The collapse of the TN Holdings Pelhams merger is attributed to several factors which include a lack of proper corporate culture, leadership changes and improper stakeholder mapping, among others.[61] History has shown that some of the mergers and takeovers in Zimbabwe have succeeded while some have dismally failed, with employees bearing the burden of either losing their employment or having had their contracts changed for operational reasons.

4 THE COMPETITION ACT AND THE COBE ACT ON EMPLOYMENT CONTRACTS

The starting point is to realise that a merger or takeover transaction, in many ways, invalidates the original employment contract.[62] This is because the employee will now be working for a new employer, but without having taken any prior steps to prepare for a change of employers,[63] which constitutes a major impact on employees. More often than not, employees are rarely consulted before a decision to merge or take over is made. The decision is usually taken by management. Neither the Competition Act nor the COBE Act provides meaningful insights on the rights and interests of employees during mergers and takeovers.

Section 3 of the Competition Act can be understood as an attempt to recognise the importance of the rights and interests of employees when mergers and takeovers take place. It provides for the application parameters of the Competition Act. In terms of this section, the Competition Act is applicable to all economic activities in and affecting Zimbabwe.[64] Added, the enforcement of the Competition Act cannot be seen to prevent trade unions or other representatives of employees from protecting their members' interests by entering into negotiations and agreements and other arrangements with employers or representatives of employers in terms of the Labour Act.[65] This section is important. Firstly, it recognises that employee rights have to be negotiated in some other fora. Such negotiations are obviously regulated by the Labour Act. Secondly, the

58 Records from the CTC do not show that there were any layoffs. CBZ Bank Limited remains one of the best employers to date.

59 See *TN Harlequin Luxaire Limited v Masvimbo and 14 Others* SCB-84-22 which was a dispute regarding failure to pay salaries. See also *Masvimbo and 14 Others v TN Harlequin Limited* HB-253-16.

60 See Mudzingwa *An Assessment of The Impact of Post Dollarisation Corporate Mergers and Acquisitions on Equity Value of Corporate Entities in Zimbabwe* (MBA-dissertation, University of Zimbabwe, 2015) 10.

61 See Vutete and Vutete "A Helicopter View of a Failed Corporate Strategy: Lessons from TN Diversification Attempts" 2016 *Journal of Business and Management* 5.

62 See also Bursey "Resources Available to Managers to Manage Employees Through Mergers" 2018 *International Journal of Business and Management Invention*7, who submits that employee welfare is affected in many ways once a merger is announced.

63 Ram 2012 *CLEAR IJRMST* 118 120.

64 Section 3(1) of the Act.

65 Section 3(1)(b) of the Competition Act. Notably, the Competition Act refers to the Labour Relations Act, yet the Act is called the Labour Act. There is a need for alignment on this aspect.

section acknowledges that during mergers and takeovers, employee rights may be violated, and hence the granting of trade unions and other employee representatives the right to protect their members' interests. Thus, the employees may, through their representatives, negotiate with the employers on possible ways to guard their rights.

The COBE Act also provides some merger and takeover provisions. Section 228 provides for the merger procedure. This is basically an outline of steps that should be followed by management when a decision to merge or acquire another business has been made. Section 229 enshrines the contents of a merger contract. The merger procedure provided in section 228 is a directorial process and does not involve employees. A reading of the merger procedure shows that it serves to protect the shareholders. Furthermore, section 229 of the COBE Act which provides for the contents of the contract of merger, makes no mention of the involvement and participation of employees. Even takeover provisions in sections 234 to 239 of the COBE Act are silent on the participation or involvement of employees.

The non-involvement of employees in the merger process and the merger contract is a concerning legal issue. Therefore, the COBE Act provisions fall short and are insufficient as far as the protection of the rights of employees is concerned. The employer enjoys significant leeway. This has always been the case in Zimbabwe, and originates in the nature of the relationship, which requires that an employee be submissive to an employer.[66] It is thus essential to focus on the constitutional foundations of employee protection in Zimbabwe and the provisions of the Labour Act.

5 THE CONSTITUTIONAL PROTECTIONS

The Constitution of Zimbabwe provides for employees' rights to fair labour standards. It states that every person has the right to fair and safe labour practices and standards and to be paid a fair and reasonable wage.[67] It also provides that every employee is entitled to just, equitable and satisfactory conditions of work.[68] The Constitution does not define fair labour standards or practices. The Labour Act defines an unfair labour practice as specified in Part III or declared to be so in terms of any other provision of the Act. It also provides for acts by the employer which constitute unfair labour practices.[69] Kasuso submits that there can be no doubt that an unfair labour practice must be specifically described as such by the Labour Act.[70] Supplementary to that, the Constitution does not provide a guideline on what can be considered a reasonable wage. It is submitted that the reasonableness of a wage is determined by looking at various factors such as the nature of work, the nature of employment, the industry, the employee's qualifications, among others. Usually, the reasonableness of the wages is determined by the relevant employment councils through Collective Bargaining Agreements (CBAs).[71]

In the context of mergers and takeovers, section 65 of the Constitution is crucial. It ensures that the employer recognises that the employees have the constitutional right to fair labour practices.

66 Ram 2012 *CLEAR IJRMST* 120 also delves into the one-sided nature of the contracts of employment. He posits that mergers and takeovers have sometimes been described as a legitimate means for breaking implicit contracts in order to restructure

67 Section 65(1) of the Constitution of Zimbabwe, 2013.

68 *Ibid* s 65(4).

69 Section 8 of the Labour Act.

70 Kasuso "Revisiting the Zimbabwean Unfair Labour Practice Concept" 2021 *PELJ* 7.

71 Collective bargaining agreements result in agreed minimum wages or salaries. Employers and employees representatives participate in the bargaining processes.

By constitutionalising the right to fair labour practices and standards, the right of cardinal importance, as the Constitution is the supreme law of the land. It also mandates the employer to treat employees fairly. This will involve giving the employees a platform to make representations as required in terms of section 25A of the Labour Act. The constitutional idea of fairness in the context of mergers and takeovers rests on the principle that neither employers nor employees should bear disproportionate burdens when corporate restructuring occurs. It recognises that employers need flexibility to reorganise, preserve competitiveness and protect investment, while employees require security, continuity of rights, and protection from arbitrary or harmful changes to their working conditions. Fairness therefore operates as a balancing mechanism. It obliges employers to act transparently, consult meaningfully and avoid decisions that unjustifiably undermine workers' rights, while also allowing businesses reasonable scope to adapt their structures and operations.[72] In practice, this balance ensures that economic efficiency is not pursued at the expense of human dignity, and that employee protections do not become so rigid that they stifle legitimate commercial evolution.

6 THE LABOUR ACT EMPLOYEE PROTECTION MECHANISMS DURING MERGERS AND TAKEOVERS

The Labour Act[73] is the umbrella legislation for all employment issues.[74] In all employment-related matters save for those in the disciplined force, the Act prevails over any other enactments inconsistent with it.[75] The purpose of the Act is to define the fundamental rights of employees.[76] The Labour Act creates a clear two-tier labour law regime in Zimbabwe by defining, in section 3, the specific categories of workers to whom the Act does not apply. While the Act governs the employment relationship for the vast majority of workers in the private sector and parastatals, it expressly excludes members of the disciplined forces[77] and public officials whose conditions of service are regulated by separate statutes.[78] This structure effectively divides Zimbabwe's labour framework into two layers, that is, a general regime under the Labour Act for ordinary employees, and a specialised regime governed by constitutional provisions and sector-specific legislation for security services and public officers. It is submitted that the result of this two-tier regime is a system that tailors labour protections and obligations to the unique operational demands of each group while maintaining clarity about who falls outside the Act's scope.

Further, the Act also seeks to give effect to the country's international obligations under the International Labour Organisation.[79] It regulates conditions of employment and defines unfair labour practices, as well as addressing all matters connected with or incidental to the employer-employee relationship.[80] It is therefore crucial to analyse some specific provisions of this Act and determine whether employees' rights and interests are protected during mergers and takeovers.

72 See generally, Kasuso "Transfer undertakings under section 16 of the Labour Act" 2014 *Midlands State Univ LR* 20–28.

73 [*Chapter 28:01*].

74 See preamble to the Labour Act.

75 Section 2A(3) of the Labour Act. See further s 3 on the limitations to the application of the Labour Act. Some instances where the Act does not apply include members of the disciplined force of the state, members of the disciplined force of a foreign state that are in Zimbabwe on a mission and employees designated by the President through a Statutory Instrument.

76 See preamble to the Labour Act.

77 Section 3(3)(a) of the Labour Act.

78 *Ibid* s 3.

79 *Ibid* preamble.

80 *Ibid.*

One of the key purposes of the Act is to advance social justice in the workplace[81] by giving effect to the fundamental rights of employees,[82] providing a framework for employers and employees to effectively bargain,[83] promoting fair labour standards[84] and the participation by employees in decisions affecting their interests in the workplace.[85]

6 1 Section 16 Protection Mechanism

Upon a merger or takeover, employees are automatically deemed to be employees of the new entity, that is, the acquirer.[86] It is therefore imperative that section 16 of the Labour Act be considered in relation to the plight of employees. Section 16 of the Labour Act regulates the employment-related consequences of a transfer of the whole or any part of a business. Section 16(1) of the Labour Act provides that whenever any undertaking in which any persons are employed is alienated or transferred in any manner, the employment of such persons shall, unless otherwise lawfully terminated, be deemed to be transferred to the transferor of the undertaking. The contract is automatically transferred on the terms and conditions which are not less favourable than those which applied immediately before the transfer, and the continuity of employment of such employees shall be deemed not to have been interrupted.[87] Upon the conclusion of a merger or takeover, the target company becomes part of the acquirer. There is a transfer or fusion of the business and its employees. In such situations, the commercial interests of the business are often in conflict with the employees' interests.[88]

Section 16(2)(a) goes further to provide that section 16(1) does not limit or prevent employees concerned from being transferred on terms and conditions of employment which are more favourable to them than those which applied immediately before the transfer from obtaining terms and conditions of employment which are more favourable than those which applied immediately before, or subsequent to the transfer. This essentially means that the new employer or acquirer, is free to vary the terms and conditions of employment as long as such variation is more favourable to employees. In such cases, logic and objectivity suggest that the employer does not need the employee's consent.

Further, section 16(2)(b) allows the employer and employees to vary the terms and conditions of employment, even in less favourable terms, as long as such variation is by agreement. In such scenarios, basic principles of the law of contract regarding offer and acceptance apply. However, this provision ignores the imbalance of power in the employer-employee relationship. The employer always holds more bargaining power,[89] which is the ability to provide or withhold valued resources or administer punishments.[90]

81 *Ibid* s 2A(1)(a).
82 *Ibid*.
83 *Ibid* s 2A(1)(c).
84 *Ibid* s 2A(1)(d).
85 *Ibid* s 2A(1)(e).
86 *Ibid* s 16.
87 *Ibid.*
88 Van Niekerk *et al. Law at Work* (2012) 325.
89 See the International Labour Organization (2003) *Collective Bargaining and Negotiating Skills* (a resource book for employers) 6 https://www.ilo.org/sites/default/files/wcmsp5/groups/public/@asia/@ro-bangkok/@ilo-jakarta/documents/publication/wcms_120206.pdf (accessed 15-01-2025).
90 Fousiani and Wolfegang "Effects of Power on Negotiations: A Comparison of Collaborative versus Competitive Approach" 2020 *International Journal of Conflict Management* 3.

Thus, the employer may withhold the resources for negotiations or, in some cases, threaten to administer punishments if the employee insists on some of their rights. In the current economy with high levels of unemployment, employees have limited negotiating power. The employee would rather accept a variation of their employment contract, even on less favourable terms and conditions, than lose their employment.

However, even though the Labour Act allows the employer and the employee to enter into a new contract by agreement, albeit in less favourable terms, the Labour Act prohibits the entering of agreements which would diminish rights relating to social security, pensions, gratuities or any other retirement benefits, without the written authority of the minister.[91] The minister's written approval must be obtained before entering such agreement. Thus, parties cannot enter the agreement first and then seek the minister's written approval. Such agreement will be unlawful as it cannot be backdated by law. It is also noteworthy that section 16(2)(c) entitles employees to pursue claims which could have been enforced against the target, against the acquirer before the merger or takeover. Such rights may also be enforced against the target. Finally, violation of any of the provisions of section 16 of the Act is considered an unfair labour practice.[92]

There are some concerns that arise from the import of section 16 of the Labour Act. Neither this section nor any other provisions of the Labour Act set out a definition of an "undertaking." The import of section 16 in Zimbabwe was considered in the case of *Mutare Rural District Council v Chikwenha.*[93] In this case, it was held that the word "undertaking" is of a variable meaning and is sometimes used to refer to the word "'business" or "enterprise." The case of *Dhege v Bell Medical Centre,*[94] is also apposite. In that case, the court stated that:

> As alluded to above, it is beyond dispute that ZISCO Steel sold all its hospitals to the respondent as a going concern and as such the respondent was obliged to employ all employees in terms of Section 16 supra. There has been a transfer of business. The test generally used being 'whether the effect of the transaction was to put the transferee in possession of a going concern the activities of which he could carry on without interruption'. There has been, in casu, transfer of the whole business of running the affected hospitals.[95]

It is common cause that the terms "alienated" or "transferred" as used in section 16 of the Labour Act are not defined. Recourse may be found in other jurisdictions. For example, section 197(1)(b) of the South African Labour Relations Act,[96] defines a "transfer" to mean the transfer of a business by one employer (the old employer) to another employer (the new employer) as a going concern. In interpreting section 197(1)(b), South African courts have held that for the section to apply, the business must have changed hands, through a transaction that places the business in question in different hands.[97] In a merger or takeover, businesses transfer hands, in the legal sense. Courts in Zimbabwe are likely to adopt this similar approach.

91 See the proviso to section 16(2)(b) of the Labour Act. The minister responsible is the Minister of Public Service, Labour and Social Welfare.

92 Section 16(3) of the Labour Act.

93 2000 1 ZLR 534 SC.

94 HB 50-04.

95 The court also cited with approval the cases of *Kenmirch Ltd v Frizzel* (1968) 1 WLR 329 at 335; *Lloyd v Brassey* (1969) 2 QB and *Woodhouse v Peter Brotherhood Ltd* (1972) 1 CR 186.

96 Act 66 of 1995.

97 See *Nehawu v University of Cape Town* 2003 3 SA 1.

Furthermore, "alienation" or "transfer" of an undertaking, as revealed in section 16(1) of the Labour Act is also qualified by the use of the words, "in any way whatsoever." This means that the alienation or transfer may take many forms, as long as there is a change of hands in the business. Mergers and takeovers are just one of the ways in which businesses change hands. Another way in which a business may change hands occurs when the business is sold but it keeps its own identity. It is thus submitted that section 16 of the Labour Act acts as a shield for employees.

When a merger or takeover has taken place, employees can find refuge in this section to enforce their rights in the newly formed entity. Employees can also find refuge in this provision where there is a transaction which, in the strict sense, may not be classified as a merger or a takeover, but as a business that has changed hands in whatever form. Thus, in deciding whether a business has entered into a merger or takeover transaction as a going concern, regard will be had to the substance and not the form of the transaction. The purpose of section 16 of the Labour Act is to protect employees against loss of employment or employment benefits in the event of a transfer of business.[98] Section 16 of the Labour Act must be interpreted purposefully because it is aimed at advancing social justice and democracy in the workplace, and any provisions in the Labour Act must thus be construed in a manner that best ensures the attainment of its purposes listed in section 2A(1)(a)-(f).[99] Additionally, given the entrenchment of labour rights in section 65 of the Constitution, any provisions of the law must be interpreted in compliance with the Constitution. Employees are entitled, under the Constitution, to fair labour practices and this, together with the objectives of the Labour Act are to be utilised in interpreting provisions such as Section 16 of the Labour Act.[100] in some cases, the employer may opt to terminate contracts of employment before the merger or takeover. Where such happens, the retrenchment procedures in sections 12C and 12D of the Labour Act read with the retrenchment regulations are invoked.

6 2 Section 25A Protection Mechanism

Section 25A of the Labour Act is also crucial. It provides as follows:

> (5) Without prejudice to the provisions of any collective bargaining agreement that may be applicable to the establishment concerned, a works council shall be entitled to be consulted by the employer about proposals relating to any of the following matters—
>
> …
>
> (c) partial or total plant closures and mergers and transfers of ownership;

Notwithstanding the fact that this statutory provision addresses the composition, procedure and functions of the works council, it contains elements of employee protection. It provides for the employees' right to be consulted when a merger is entered into. In fact, section 25A (5) is the only provision in the Labour Act where the word "merger" is mentioned. On the face of it, this section appears to lean towards protecting employees where there is a merger or takeover and business is transferred from the target to the acquirer. It provides that the works council shall be consulted. In other words, the employer has no discretion but must, as a matter of law, consult the works council.

98 A similar approach was adopted in South Africa in S*chutte v Powerplus Performance (Pty) Ltd* (1999) 20 *ILJ* 655 (LC).

99 See s 2 A(2) of the Labour Act.

100 For a detailed discussion of s 16 see generally, Kasuso 2014 *Midlands State Univ LR* 20–38.

A works council is a council or assembly composed of an equal number of representatives of the employer and representatives drawn from members of the workers' committee and a chairperson.[101]

The employer is also mandated to afford members of the works council representing the workers' committee, a reasonable opportunity to make representations and to advance alternative proposals.[102] A distinction must be made between the members of the works council and the members of the works council representing the workers' committee. A works council is composed of equal members drawn from the workers' committee and equal members of the representatives of the employer, and a chairperson. Members of the works council representing the workers' committee are only drawn from the employees' side. Although section 25(5)(c) provides that the works council shall be consulted, it is only the members of the works council representing the workers' committee who are entitled to make representations and or alternative proposals in terms of section 25A(6)(a). Though they form the works council, the employer's representatives are not entitled to be consulted. The rationale behind leaving the members from the employer's representative side is very simple. It is illogical for the employer to self-consult when making decisions.

More so, once the proposals are submitted by the works council members representing the workers' committee, the employer must respond to any such proposals and representations. Where the employer does not agree with the proposals, it must state the reasons for disagreeing with such proposals.[103] The employer, however, must, as a general principle, attempt to reach an agreement with the works council members representing the workers' committee before a merger is arrived at.[104]

The mandatory consultation process provided in section 25A of the Labour Act is paramount. This section impliedly acknowledges that in merger and takeover transactions, employees' rights may be negatively impacted. It ensures that the employer does not act unilaterally, thereby violating the employee's right to be heard before any decision affecting their rights is made. It enables fair play. It ensures that the employer acts fairly and applies the principles of natural justice before reaching any decision that may negatively affect the employees. The section also fortifies the common law *audi alteram partem* rule. This rule presages a tenet of natural justice which has resounded through the ages. It prescribes that when a decision maker wants to make a decision which limits or restricts the rights of a particular individual, the individual upon whom the intended decision will impact must be heard first.[105] The section limits the powers of the employer to act unilaterally.

Notwithstanding, section 25A(5)-(6) has some flaws, as it assumes that all workplaces have works councils, which may not necessarily be the practical reality. The section does not provide for alternative representation for employees where there is no works council. Secondly, the section provides for consultation. Although there is a mandatory obligation by the employer to receive representations, the section is silent on what form the representation should take, leaving room to disputes and misunderstandings.

101 Section 2 of the Labour Act defines a works council as a council composed of an equal number of representatives of an employer and representatives drawn from members of the workers committee and a chairperson.

102 Section 25A(6)(a) of the Labour Act.

103 *Ibid* s 25A(6)(c).

104 *Ibid* s 25(6)(c).

105 See *Taylor v Minister of Higher Education* 1996 (2) ZLR 772 (S). See also *Metsola v Chairman, Public Service Commission and Anor* 1989 (3) ZLR 147 (S) at 333B-F.

While it is acknowledged that not everything can be legislated and that it is desirable that some aspects are better left to judicial authorities to interpret, the absence of the nature and what form the representations should take, remains an area of concern. Further, the section only mandates consultations. Failure of the employer to consult is not considered an unfair labour practice by not entitling employees legal remedy by law.[106] It does not nullify a transfer which has already taken place in the absence of consultation and it imposes no sanction for non-compliance.[107] Where the employer disagrees with the representations, it can still proceed to implement the proposed merger or takeover. The employer is not bound by the representations.

7 EMPLOYERS' COMMON LAW RIGHT TO VARY THE CONTRACT OF EMPLOYMENT IN MERGERS AND TAKEOVERS

The process of mergers or takeovers inevitably comes with changes within the working environment. Due to the change in the structure of a company, the employer may decide to make some changes within the employment setup. At common law, the employer generally enjoys the right to vary the terms of the contract with regard to aspects like location and job description, as long as there is no variation of a material element of the contract or the status of the employee.[108] The nature of the changes intended determines whether it is necessary to consult the employee before effecting such changes. Apropos variation of conditions of service such as daily duties, place of work, and time to commence and finish work, the common law allows the employer to act unilaterally. Thus, in the case of *Mutare Board and Paper Mills v Mutsaka*,[109] the Supreme Court held that an employer has a firm right to determine and vary the duties of its employee and where those duties are to be performed as long as it is within the general scope of the employee's contract of employment. However, the Supreme Court did not shed any light on what it termed "the general scope." It missed an opportunity to clarify this critical phrase.

The rationale behind the common law position allowing the employers to unilaterally vary some of the terms and conditions of employment within the general scope of the contracts of employment, was further underscored in the case of *Chirasasa and Ors vs Nhamo NO and Anor*.[110] In this case, the Supreme Court remarked that a contract of employment cannot remain static throughout the whole of its existence, regardless of the changes in the fortunes of the business. It further remarked that refusal to accept a change in the terms and conditions of employment necessitated by the commercial interests of a business, may be a good enough reason for terminating a contract of employment on notice. The *Chirasasa* case sends a message that, under common law, the employer has the right to unilaterally vary the terms of contracts of employment in line with the fortunes of the business. The Supreme Court, however, did not provide meaningful detail on what it meant by "fortunes of business."

It is, however, submitted that although "fortunes of a business" can be interpreted differently, the general understanding is that the fortunes of a business relate to the business objectives, targets, or strategies that are intended to ensure that the business continues to be operational. Mergers and takeovers qualify under strategies that can be pursued as part of the fortunes of a business.

---

106 *Chemco Holdings (Pvt) Ltd v Tenderere and Ors* SC 14/17.

107 *Ibid*.

108 See Gwisai *Labour Law in Zimbabwe* (2002) 58. See also the case of *Chimenya v Associated Textiles (Private) Limited* SC 201-94 and *Muchakata v Netherburn Mine* 1996 1 ZLR 53 (S).

109 SC 02-05.

110 2003 2 ZLR 206 (S).

Steered by the *Chirasasa* case, where the fortunes of the business are conflicting with the fortunes of the employees, the employer can still act to vary the terms and conditions as long as the variation is within the general scope of the employee's contract. Given this common law position, employers have the latitude to vary the contracts of employment during mergers and takeovers, even where employees do not consent to such variation.

However, it needs to be noted that even though the common law allows the employer to vary the terms of the contract in line with the fortunes of the business, where there is a transfer of an undertaking such as in a merger or takeover, the employer cannot vary the terms of the contract by imposing less favourable conditions than those that were in place immediately before the transfer of the undertaking.[111] The employees may however agree to less favourable conditions.[112]

Further, Grogan contends that employers may not unilaterally amend the terms of an employee's service contract.[113] If an employer changes an employee's terms and conditions unilaterally, the employee may either resile from the contract or sue for damages in terms of the contract. The prohibition on variation includes lowering the status of employees and changing the nature of their work.[114] Unilateral change by an employer is unlawful only if it constitutes a change of terms and conditions of employment. Another view expressed in common law, which is different from the views expressed in the *Chirasasa* case, is that an employer cannot under any circumstances, unilaterally vary a contract of employment. The position would remain the same even in a case where the contract of employment provides that the employer could vary its policies and procedures.[115]

In *Commercial Bank of Zimbabwe Nominees (Pvt) Ltd v Shumba and Ors*,[116] the court held that in a situation where parties are bound by a contract, in this case a contract of employment, one cannot transfer rights and obligations without the consent of the other party. It also stated that any variation of an employment contract, including variation of the presence of the other party contracting, cannot be done unilaterally. The decision in *Commercial Bank of Zimbabwe Nominees (Private) Limited* is yet to be tested in the context of mergers and takeovers. Its implications are that even in mergers and takeovers, the employee must consent to the transfer of the obligations from the target to the acquirer. This is, with due respect, an incorrect interpretation of the law. Allowing the employees to sanction a merger or takeover transaction by giving their consent first before the obligations of the target are transferred to the acquirer will be a destructive exercise. Employers must, even in the absence of consent from employees, be allowed to proceed with the merger or takeover.

In the context of mergers and takeovers, however, the courts are likely to adopt the approach taken in the *Chirasasa v Nhamo* case, where it was held that, at common law, the employer has the right to vary the contract of employment as long as that variation is in line with the fortunes of the business. The decision in *Agricultural Bank of Zimbabwe Limited v Machingaifa,* where the Supreme Court ruled that the employer cannot unilaterally vary the terms and conditions of the contract of employment, is distinguishable on the basis that the employer's decision to vary the terms and conditions of employment was not made as a result of a change in the fortunes of the business.

111 Section 16(1) of the Labour Act.

112 *Ibid* s 16(2)(b).

113 Grogan *Workplace Law* 10 ed 87.

114 *Ibid* 88.

115 See *Agricultural Bank of Zimbabwe Limited v Machingaifa* SC 61-07.

116 SC 105-01.

Rather, the employer had varied the terms and benefits of the employee, where there was no evidence of the fact that such a decision was made pursuant to the fortunes of the business.[117]

Given the position in the *Chirasasa* case, employers can vary the terms and conditions of employment when mergers and acquisitions occur. However, the employer still has an obligation to consult the employees. In the event that the employees should not agree, the employer can still proceed to implement the proposed variation. Ram posits that mergers and takeovers can thus appear as a deliberate strategy to violate internal norms and as a brute exercise of power.[118] Lehto and Bockerman argue that when the control of the company is changed into new leadership, the new management will see their appointment as an opportunity to renege on implicit and explicit employment contracts that constitute obstacles to dismissal.[119] However, Lehto and Bockerman's submission on the reneging of employment contracts is flawed on two bases. Firstly, it ignores the fact that, in terms of the law of contract, the newly combined company will have the obligation to comply with the contracts on the basis of the principle of novation. Secondly, many jurisdictions have labour laws and regulations that seek to protect employees when it comes to mergers and takeovers. Although these labour regulations may be insufficient, legislation is at least in place. In Zimbabwe, section 16 of the Labour Act acts as a shield to employees against any potential layoffs and reneging of obligations by the new employer.

8 SUGGESTIONS FOR LAW REFORM

Mergers and takeovers substantially affect employees in a variety of ways. The available regulatory mechanism attempts to address some of these effects. However, much needs to be done to ensure that the employees are adequately protected. While section 3 of the Competition Act can be understood to be a recognition of the importance of the rights of employees, it is silent on the protection of employees but rather focuses on the market. It leaves employment-related issues to the Labour Act, which is desirable. While section 228 of the COBE Act provides for the procedures that must be followed, those procedures are shareholder-centric and ignore the rights and interests of employees. The same is true for section 229, which provides for the contents of the merger contract. Sections 234 to 239, which provide for takeover processes, do not provide for employees in any manner. Employment-related issues are left to the purview of the Labour Act. It is important to state that the authors do not suggest that labour employment-related issues ought to be dealt with in the Competition Act and the COBE Act.[120] It is prudent that employment-related issues should be dealt with in a single statute, namely the Labour Act, which is the current position. However, it is argued that the Labour Act does not sufficiently and effectively protect employees in mergers and takeover transactions. It has its own shortfalls.

Firstly, it is suggested that the Labour Act needs to be broadened, especially when it comes to the protection of employees in mergers and takeovers. The legislature missed a golden opportunity to incorporate mechanisms that seek to protect the rights and interests of employees, when it amended the Labour Act in 2023.[121] Section 8 of the Labour Act, which provides for unfair

117 For further discussion on the variation of employment terms and conditions, see also *Air Zimbabwe v Zendera and Ors* 2002 (1) ZLR 132 (S); *Stewart and Ors v Vice-Chancellor of UZ and Anor* SC 97/01; *Mawire v Rio Zim Ltd* SC 13/21; *Montclair Hotel and Casino v Dube* 2018 2 ZLR 712 (S).

118 See Ram 2012 *CLEAR IJRMST* 121. See also Lehto and Bockerman "Analysing the Employment Effects of Mergers and Acquisitions" 2008 *Journal of Economic Behaviour and Organization* 112 114.

119 Lehto and Bockerman (2008) 114.

120 Given that the Labour Act is specifically designed to give effect to constitutional labour rights and Zimbabwe's obligations as a member of the International Labour Organisation, it is most appropriate that the Act regulates these issues.

121 Labour Act Amendment Number 11 of 2023.

labour practices must be interpreted in a way that ensures that employees are protected from any conduct by the employer that can affect the rights of employees in any manner during mergers and takeovers. The fair labour practices should be broadened to cover circumstances where the employer abuses their power and authority when negotiating a contract change with the employee, as provided for in section 16(2)(b) of the Labour Act.[122] Although any violation of section 16 of the Labour Act is considered an unfair labour practice, the Act does not expressly state that abuse of negotiating power is in itself an unfair labour practice. It is a hard reality that the employees do not wield as much power as employers during negotiating processes.

Furthermore, the merger process in section 228 of the COBE Act has been described as a directorial process. In other words, it is a process that exclusively involves directors. The idea behind this section is the protection of shareholders. It is suggested that there should be consultation of the employees' representatives during these section 228 processes. Although section 25A(6)(a) of the Labour Act provides for consultation of the employees, it is not specific on whether the employees play a role during the merger process in section 228 of the COBE Act. Section 25A(6)(a) of the Labour Act only provides that the works council members representing the employees should be asked to make representations. It does not specify that such members should participate in the section 228 process. It is desirable for the members of the works council representing employees, to be involved in the section 228 process. This will ensure that employees and their representatives are well informed, before they are asked to make representations in terms of section 25A(6)(a) of the Labour Act.

Thirdly, section 16 of the Labour Act provides for the transfer of an undertaking where the business changes hands. This section equally applies where there are mergers and takeover transactions. This section is interpreted broadly to cover situations that may not be clearly identified as qualifying under mergers and takeovers. Where section 16 is invoked, the employees automatically become the employees of the acquirer from the target. The employees' rights and interests must not be changed by the new employer. However, in line with the *Chirasasa* decision, employers may change the rights of employees, especially when it comes to the nature of work to be handled by the employee. This is true if the "variation is in line with business fortunes." This may be abused by the employer to make unilateral decisions.

Additionally, employers are allowed to enter into negotiations with employees to provide less favourable terms than those that existed before the merger or takeover. The only restriction is that the parties are not allowed to enter into an agreement that reduces the rights relating to social security, pensions, gratuities or any other retirement benefits, without the written authority of the minister. This is a necessary restriction. It is, however, suggested that an additional restriction regarding payable salaries reduction must be imposed. Parties must also seek the approval of the relevant national employment council before they agree to any salary reduction. As observed earlier, employers wield more bargaining power than the employees. The employees are unlikely to turn away any salary or proposal placed on the negotiating table by the employer, even if the salary or wage proposal is adverse to their target, lest they lose their employment.

Moreover, it has been observed that employers involved in mergers and takeovers are mandated to afford members of the works council representing the workers committee, a reasonable opportunity to make representations and to advance alternative proposals. This is to ensure that employees are heard. However, some gaps arise. Firstly, there is no minimum threshold of information that must be furnished to the members of the works council representing the workers committee for them to respond. Thus, the employer may withhold information from the employees' representatives, thereby denying them an opportunity to meaningfully make

122 Section 16(2)(b).

representations because of information asymmetry. It is suggested that legislation should contain a minimum threshold of information that must be made available by employers to the members of the works council representing the workers' committee. This will assist the employees to meaningfully make representations.

More so, once the members of the works council representing the workers' committee submit their representations, the employer must respond to any such proposals and representations. If the employer disagrees with the proposals, it is obliged to provide written reasons for disagreeing with such proposals.[123] This means that the employer is not bound by such representation. Section 25 does not provide for the remedies available to the employees where their proposals are turned down. Although the employer must attempt to reach an agreement with the works council members representing the workers' committee, before a merger is finalised,[124] it is not bound by the representations from the employees. It is suggested that section 25 must be amended to provide a remedy to the employees where they are not satisfied with the decision made by the employer. One possible remedy would be for employees to be able to file additional representations addressing the reasons provided by the employer for rejecting the employee's representation. This will enable fair play.

Lastly, section 25A (5)-(6) of the Act assumes that all work-places have works councils. This may not necessarily be the reality. This section does not provide for alternate representation for employees where there is no works council. It is suggested that the employees' right to make representation should be widened to allow them to individually engage their legal practitioners or any other experts.

9 CONCLUSION

Mergers and takeovers present opportunities for the growth of companies as well as the national economy. The main motivations for these transactions are the enhancement of shareholder value, but this is not always in line with the rights and interests of employees. Zimbabwe's past has shown that some mergers and takeovers have been successful, while others have failed. It has been found that the Competition Act and the COBE Act are not very valuable in the promotion of the rights and interests of employees when mergers and takeovers take place. The COBE Act mostly deals with the merger procedure and the merger contract. These contract provisions provide no meaningful insight into the protection of the rights and interests of employees. The Labour Act, which is the parent Act in regulating employment-related issues, provides for the rights of employees, especially in sections 16 and 25. It also addresses unfair labour practices in section 8. However, although these provisions already exist, much more needs to be done to reform the existing legislation so that the rights and interests of employees are safeguarded. It is hoped that this article will serve a useful purpose for policymakers in shaping and developing the law for the protection of employees during mergers and takeovers.

123 Section 25A(6)(c) of the Labour Act.

124 *Ibid* s 25(6)(c).