

# Practical Insights on labour disputes handling post Labour Amendment Act No. 11/23

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# *prelude*

- ▶ The Labour Amendment Act, No 11 of 2023 became law on 14 July 2023.
- ▶ A lot of issues arose in the new law and there were a lot of uncertainties.
- ▶ DISPUTES have now started to arise and to be determined in our courts
- ▶ Presentation will track the DISPUTE settlement terrain post amendment.

# Structure of presentation

- ▶ Definition of a dispute
- ▶ Misconduct related disputes
- ▶ Key pointers in disciplinary hearings
- ▶ Retrenchment disputes
- ▶ Violence and sexual harassment
- ▶ Voluntary associations disputes
- ▶ From the Labour Officer/Designated Agent to the Supreme Court
- ▶ Conclusion

# WHAT IS A DISPUTE

- ▶ Section 2 of the Labour Act defines 'dispute' as a "*dispute relating to any matter concerning employment which is governed by this Act.*".???
- ▶ The Merriam-Webster Law Dictionary defines the word 'dispute' using its synonyms such as – 'controversy', 'argument', 'conflict', 'quarrel', 'wrangle' etc
- ▶ So we are focusing on *labour controversies, conflict, wrangles* as they have been impacted by the LAA of 2023.

# Misconduct related disputes

- ▶ Acts of misconduct - Codes of Conduct.
- ▶ Sec 12B(2) - unfair labour practice failure to us a registered/model code.
- ▶ Sec 12(4a) (b) termination on notice 'for breach' only after 'due inquiry' – hearing
- ▶ Proviso to section 101(5) – appeal to LO/DA.
- ▶ Relationship between s101(5) and s92D – appeals not provided elsewhere
- ▶ Matter dealt with *ito* s93 only 'powers of LO/DA are to;
  - a. Attempt to conciliate dispute *ito* sec 93
  - b. Exercise any other power provided for in that section –

See Section 93(1) 'or if agreed by the parties, by reference to arbitration.' -

***Munchville Investments v Mugavha SC 62-19***

- ▶ Employer or employee has right of appeal – ***ZESA Holdings v Matunja SC 73-22***

# Key issues in Disciplinary Hearings

- ▶ Natural justice – regardless of guilt.
- ▶ Hearing authority or disciplinary committee – make sure
- ▶ Legal representation - constitutionally guaranteed – **ZUPCO v Mashinga SC 42/2017**
- ▶ Walk out is waiver - **Moyo v Rural Electrification Agency SC 4/14**;
- ▶ Loss of jurisdiction *ito* Sec 101(6) - **Marimo v National Breweries SC 125-2000; Watyoka v ZUPCO 2006 (2) ZLR 170 (S)**.
- ▶ Record minutes,
- ▶ Factor mitigation,
- ▶ Give reasons for decision.

# Retrenchment disputes – section 12C

- ▶ FAILURE TO NOTIFY RB OF RETRENCHMENT - A failure to notify RB ito ss5 is a crime punishable by a level 12 fine or imprisonment (period not specified). Imprisonment for employer is to the board of directors. Ss(12). Also retrenchment Board may issue a non compliance certificate
- ▶ DISSATISFACTION WITH MINIMUM PACKAGE – employees can apply to RB or NEC and employer has onus to disprove employee's allegations of CAPACITY
- ▶ FAILURE TO PAY MINIMUM PACKAGE – Employer can apply for exemption to RB or NEC to prove INCAPACITY
- ▶ ALLEGATIONS OF FRAUD/ RECKLESSNESS/NEGLIGENCE – *Piercing the corporate veil, provisional order by RB subject to confirmation by the LC*

# VIOLENCE AND HARASSMENT DISPUTES

## (including sexual harassment)

- ▶ ***'Violence and harassment' as a crime*** - Up to level 12 fine or 10 years imprisonment if convicted. can be committed at work, on the way to work, online, on work-related trips
- ▶ ***Violence and harassment as an act of dismissable misconduct*** - One can be charged and dismissed whether or not criminal charges have been raised or sustained.
- ▶ ***Violence and harassment as an unfair labour practice*** - dealt with under s93. Commission of such offenses by individual managers- employer still answerable.

# Voluntary Associations Disputes

- ▶ *Trade unions, employers association or Employment Council disputes*
- ▶ All disputes referred to Registrar/Minister as the case may be.
- ▶ Seat allocation disputes for employment councils or disputes as between employment councils eg on scope of coverage
- ▶ Decision of registrar appealable to Labour Court

# From the LO/DA to the SUPREME COURT

- ▶ No more draft rulings, confirmation proceedings etc
- ▶ Both ADR and ADJUDICATION available *to* section 93
- ▶ Conciliation, certificate of no settlement, arbitration
- ▶ Voluntary arbitration for disputes of interest
- ▶ Compulsory arbitration for disputes of right
- ▶ Appeal against award made in terms of s98(10) (only on points of law)
- ▶ Certificate of Settlement now enforceable upon registration at HC or MC depending on monetary jurisdiction

# At conciliation

- Starting point is jurisdiction –**Manning v Manning – sec 2, 93, 63(3b), 101(5), etc**
- **Isoquant t/a Zimoco v Darikwa CCZ 6/20** case guides on how conciliation is done up to Certificate of settlement or no certificate of no settlement – please understand the role of LO/DA and that of each party – not adjudication yet.
- Understand what to do - Where and when is a matter outside your jurisdiction
- Understand the effect of signing a certificate of settlement – registrability – DAs and LOs should not scare parties from non-agreement – consider costs of litigation.
- Understand the roles and duties of a DA (jurisdictional limitation), how to deal with disputes between parties etc
- Understand the importance of workplace inspections to dispute settlement – Section 63(3a) a.r.w sec 93(1)
- NECs should allow DAs to function properly and independently
- Parties respect the office of conciliator and cooperate with directions

# Arbitration

- DA and parties; make sure arbitration issues are clear, coherent and concise.
- Arbitrator cannot deviate from these terms of reference - Art 34(2)(a)(iii) of Arbitration Act.
- Take note that the arbitrator is the final arbiter of facts.
- Be thorough in preparing and presenting facts as this is the last bite – s98(10). If you can, get legal help.
- Adhere to agreed timelines – sec 2A(1)(f) ‘expeditious resolution of disputes’
- Pay the arbitrator(s) please!

# A note to arbitrators

- Take note that yours is adjudication with all powers of the LC – sec 98(9). Read section 2A (purpose of LA), Section 90A (power to call evidence),
- Procedural and substantive fairness to both parties is non-negotiable.
- Know provisions of the Arbitration Act as same is applicable to you.
- Make awards on time and render well-researched & reasoned decision.
- Venues of your arbitration matter (informality doesn't mean shabby/clumsy)
- Set time for award and release awards to parties timeously. If not, explain.
- Be punctual and set cue for parties
- Adhere to statutory charges

# At Courts

## In general

- Note these have gone virtual, acquaint yourself with processes
- Linking to cases, personal details, emails, etc
- Invest in technological gadgets and knowledge.
- Proper high bandwidth broad band not phone data
- Even gadgets proper computers not phones - distraction
- File papers on time, check with Registry or lawyers if not sure
- All fresh process has forms – acquaint yourself
- Rules require agreement to have virtual hearing – *but in practice?*
- Get a lawyer if you can as courts are a hard hat area

# Labour and Supreme Court

- These two courts shape the substance and procedure of our labour law. Acquaint yourself with their decision especially if cited for you. Don't ignore.
- **Labour Court** developing into a technical court, remind it of its equitable jurisdiction – also remind it of its section 90A powers to call in evidence – but also try and be on the correct side of the procedure – don't be sloppy in filing, forms and timelines etc
- **Supreme Court** litigation also highly technical – positivist approach in notices of appeal - points of law frequently raised for first time **Zimasco v Marikano SC 6-14** – matters decided on new premise in SC – technical objections; how to raise them – DAs, please deal with legal issues arising below – don't brush them aside for lateness etc, see **Medicines Control Authority of Zimbabwe v Toronga & Ors SC 10-17** – jurisdiction issued brushed aside because it was not brought as a review – SC had no kind words

# Thank you all

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