

TERMINATION OF EMPLOYMENT AND RETRENCHMENT PROCESSES

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PRESENTATION OVERVIEW

- Overview of lawful termination grounds in Zimbabwe
 - *dismissal, termination on notice, resignation, incapacity, expiration of contract, death, retrenchment*
- Retrenchment procedures & guidelines for handling large layoffs
 - *Effect of the new LAA on retrenchment – differences based on numbers?*
- Best practices for settlement negotiations
 - *Are negotiations needed in labour dispute resolution*

LAWFUL TERMINATION

- ‘Termination’ simply means bringing employment to an end .
- The Labour Act loosely regulates how employment starts but is strict on how you can terminate a contract
- Constitutionalisation of the right to safe and fair labour practices and standards – section 65 of the ZC - key issue in the regulation of how employment relationships come to an end.
- There is no dedicated section for all conceivable terminations – its scattered all over the act.

CNTD...

- Starting point is Section 13 of the LA says;
 - ‘(1) Subject to this Act or any regulations made in terms of this Act, whether any person—*
 - (a) is dismissed from his employment or his employment is otherwise terminated; or*
 - (b) resigns from his employment; or*
 - (c) is incapacitated from performing his work; or*
 - (d) dies;*
- Termination is not dismissal.
- This provision list 5 ways of termination – dismissal, resignation, incapacity, death, otherwise –
- so its not exhaustive – think of retrenchment, retirement, effluxion of fixed term contract etc

CNTD...

- Termination is not the same as dismissal – dismissal is just one form of termination – **Nyamande & Ors v Zuva Petroleum SC 43-15**, court said, at **page 9**;

‘Quite clearly, the appellants’ case is predicated on the proposition that dismissal means all forms of termination of employment. Put differently, all terminations of employment are dismissals. This proposition is not tenable on the authority of the above cases. That proposition is clearly erroneous. The proposition that there are other methods or forms of terminating employment apart from dismissal was clearly articulated in the case of Samuriwo v Zimbabwe United Passenger Company 1999 (1) ZLR 385 (H) ’

- So a contract can be terminated without a person being dismissed – lawyers at least have to be clear of that.

DISMISSAL

- Section 12B(2) of the LA – conventional dismissal happens when an employer takes in aid a code of conduct to discipline an employee for misconduct
- Use workplace code or failing that use Model Code – SI 15 of 2006 – **Chikomba Rural District Council v Pasipanodya SC 26-12**
- There is also section 12(4a)(b); *“A contract of employment may be terminated on the part of an employer for the breach of an express or implied term of contract, upon such breach being verified after due inquiry under an applicable employment code or in any other manner agreed in advance by the employer and employee concerned”*
- The key to this termination is the inquiry held in terms Section 69(2) of ZC – right to a fair hearing – no shortcuts.

AUDI ALTERAM PARTEM RULE

- The cornerstone of fairness and realization of Section 69(2) right.- ***Taylor v Minister of Higher Education & Anor 1996(2) ZLR 772(S)***, it was held; at p780 that

‘The maxim audi alteram partem expresses a flexible tenet of natural justice that has resounded through the ages. One is reminded that even God sought and heard Adam’s defence before banishing him from the Garden of Eden.’

- In the case of ***Sable Chemicals, Industries Ltd v Easterbrook SC 18-10*** it was held that;

“It is true that proceedings before disciplinary hearing committees established under a code of conduct are intended to be flexible and less formal than proceedings in a court of law. Various decisions of the High Court and Supreme Court in this jurisdiction have stressed the need for flexibility in these circumstances. Those same decisions have also stressed the need for a fair hearing and in particular for the audi alteram partem rule to be observed. It is not part of our law that tribunals can, under the guise of flexibility, violate the principles of fairness and do so with impunity.”

CONSTRUCTIVE DISMISSAL

- Dismissal can also be constructive – Section 12B (3) (a); ‘An employee is deemed to have been unfairly dismissed if the employee terminated the contract of employment with or without notice because the employer deliberately made continued employment intolerable for the employee;
- In **Astra Holdings (Private) Limited v Peggy Kahwa SC97/04**, this court stated the principles governing constructive dismissal as follows:

“Constructive dismissal is claimable where an employer has committed conduct which as a breach goes to the root of the contract of employment so as to constitute repudiation and by reason of that conduct the employee leaves employment.”

- Court also added the following key requirement —

‘But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract ’

- So contemporaneity between conduct of employer and resignation is key, delay may be costly

PREMATURE TERMINATION OF FIXED TERM CONTRACT – LEGITIMATE EXPECTATION

- Section 12B (3)(b) of the LA; *‘An employee is deemed to have been unfairly dismissed if, on termination of an employment contract of fixed duration, the employee— (i) had a legitimate expectation of being re-engaged; and (ii) another person was engaged instead of the employee.’*
- The 2 requirements are conjunctive. Cant get relief on proof of only one - ***Magodora & ors v Care International SC 24-14***
- The objective behind s 12B(3) is to ensure that an employee is not discharged and replaced by another simply because his fixed term contract has expired - ***Kenyan Airways Limited v Musarurwa And Mwanakaoma SC 11-16.***
- The provision does not require that that the person engaged be someone who is engaged from outside the employer’s establishment - ***Kenyan Airways supra;***

MUTUAL TERMINATION - ON NOTICE

- Section 12 (4a); ‘A contract of employment may be terminated....by mutual agreement in writing’
- See also SI 15 of 2006 – Section 5 (c)
- Absence written agreement, there is no termination – **Pioneer Transport v Da Silva SC 42-19.**
- No prescribed procedure but is a product of negotiation.
- No limitation on what could be the subject of negotiation – agreement is key.

RESIGNATION – ON NOTICE

- Section 12 (4a) - ‘A contract of employment may be terminated only, on the part of an employee, by his or her resignation’
- Resignation is a voluntary and deliberate unilateral act by the employee in terms of which he or she brings the employment relationship to an end without the consent of the employer. - **Madondo v Conquip Zimbabwe (Pvt) Ltd SC 25/16.**
- Resignation is a unilateral act – no need for acceptance - **Muzengi v Standard Bank & Anor (2) ZLR 137 (S).** It can only be revoked with the consent of the employer.
- It can either be on notice or without notice and may be by words or conduct - **Fijen v Council for Scientific and Industrial Research (1994) 15 ILJ 759 (LAC) at 772 C-D.**

MEDICAL INCAPACITY

- Section 14 (4) of the Labour Act

‘(4) If, during any one-year period of service, the period or aggregate periods of sick leave exceed—

(a) ninety days’ sick leave on full pay; or

(b) subject to subsection (3), one hundred and eighty days’ sick leave on full and half pay;

the employer may terminate the employment of the employee concerned.’

- No need for notice once days are exhausted. Notice is courtesy - ***Magodora & ors v Care International SC 24-14;***

EXPIRATION OF CONTRACT

- A fixed term contract has a known start and end date
- Fixed term contracts expire by effluxion of time unless the contract is further extended - ***Chikonye & Anor v Peterhouse* 1999 (2) ZLR 329(S), at 332C-H.**
- See also – **Magodora v Care International** *supra*.

RETIREMENT

- Section 12(4a) of LA; *'A contract of employment may be terminated, on the part of an employee, by his ... retirement'*
- No provision in Labour Act provides for how and when an employee retires. Section 17 (3) (a) of the LA– *'Without prejudice to the generality of subsection (1), the Minister may make regulations in terms of that subsection providing for the rights of employees, including minimum wages, benefits, social security, retirement and superannuation benefits, and other conditions of employment'*
- Not sure if these regulations were ever made. However, retirement is mostly governed by contracts, policies, CBAs,
- See however the **NSSA (Pensions and Other benefits Scheme) Notice, 1993 [SI 393/93]** – retirement pension payable to an employee who has reached retirement age of 60 years
- For private pension schemes– **Pension and Provident Funds Act (Cap 24:09) as read with the Pension and Provident Fund Regulations, 1991 [SI 323/91]** – minimum retirement age set at 55 years and maximum of 70 years, retirement below 55 years to be approved by the Registrar of Pensions – section 15 of SI 323/91.

DEATH

- If you die, *cadit quaestio*.
- There is only one way to terminate a contract by death – stop breathing.
- Section 13 (1) (d) of the LA.
- Estate can claim all terminal benefits.

RETRENCHMENT

- SECTION 12C of the LA
- Termination for operational reasons
- Definition of “retrench” in Section 2 of the LA.
- Termination for no fault of employee.
- To be discussed in detail in next segment.

RETRENCHMENT PROCEDURES & GUIDELINES FOR HANDLING LARGE LAYOFFS

PRELUDE

- One of the most regulated area of termination of employment – amended at every turn.
- Definition of “retrench” in Section 2 of the LA – *“in relation to an employee, means terminate the employee’s employment for the purpose of reducing expenditure or costs, adapting to technological change, reorganising the undertaking in which the employee is employed, or for similar reasons, and includes the termination of employment on account of the closure of the enterprise in which the employee is employed”*
- No more difference in retrenchment based on number of affected employees – used to be there prior to LAA No 5 of 2015.
- All retrenchment now in terms of Section 12C regardless of number of employees affected –
- Section 12C came by LAA 11 of 2023 of 14 July 2023.

RETRENCHMENT PROCEDURE (NEW) – SI2C

WHATS NEW?

- Difference between a minimum retrenchment package and an agreed retrenchment package (no definition of minimum retrenchment package defined in SI 191/24)
- Suggests the need for compulsory engagement of employees before issuing notice (notice of intention to retrench given in the absence of an agreed package) – ss(3)
- 14 days notice to be given as before to WC or NEC and RB
- Negotiations for a better package can however be held after notice – ss(4)
- RB to issue *notification certificate (NC)* within 15/14 days of notification of details of the agreed or minimum package – ss(5)
- NC has to be physically or virtually posted on notice board for 7 consecutive days. – ss(5)(b)(iii)
- Affidavit by employer that it complied with the notification requirements suffices in absence of a RB NC

RETRENCHMENT CONTINUED...

WHAT HAPPENS IF EMPLOYER DEFAULTS? SS5-8

CIVIL OR CRIMINAL SANCTIONS

- **CIVIL** –
- The civil process has 2 stages that is before the RB and LC
- Firstly, 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)
- Secondly, if employer does not notify the RB, full amount of minimum or retrenchment package vests in affected employees, and;
 - (a) package has to be paid within 21 days of retrenchment date
 - (b) employees can seek enforcement at RB or ultimately LC - ito ss(6) and (7)

RETRENCHMENT CNTD...

What happens if employer defaults? ss5-8

- Thirdly, employees can petition RB (on affidavit) if the employer delays or fails to pay agreed or minimum package. Employer afforded chance to make representations – RB issues ‘non-compliance certificate’ (NCC)– ss(6)
- Once NCC is issued, its binding on both parties and should be complied with.
- If no compliance, employee can approach LC for an enforcement order based on the certificate (NCC treated as a liquid document)
- LC order to be submitted for registration to HC or MC as the case may be for enforcement purposes – *but why?*.

RETRENCHMENT CONTINUED...

WHAT IF EMPLOYER ALLEGES LACK OF CAPACITY TO PAY? SS9-12

- Within 14 days of retrenchment pay not less than 25% of the minimum package
- Apply in writing to the NEC or RB for exemption
- Provide necessary albeit plausible evidence of financial incapacity
- Serve employees with the application
- EC or RB consider exemption application within 30 days after hearing both parties
- Determination appealable to LC within 21 days of its pronouncement
- Failure by RB or EC to decide application within 30 days, aggrieved party appeals to LC within 21 days from expiry of 30 day period

RETRENCHMENT CNTD...

CAN EMPLOYEES CHALLENGE DECISION TO PAY MINIMUM PACKAGE? SS13-16

- Within 60 days of issuance of notification certificate (*ito* ss5), employees can petition RB (or, by extension NEC – ss14) alleging employer's capacity to pay enhanced retrenchment package.
- Employees to give '*particulars of any proof*' of capacity to pay. Note – particulars. Not actual proof???
- NEC or RB to receive representations from employer in the form of an affidavit and attaching audited financial statements.
- Determination to be made within 30 days of receipt of application. Determination appealable to LC within 21 days and so is the failure to decide application within 30 days
- Failure to comply with NEC or RB decision which is extant is criminal contempt of court (punishable by a level 6 fine or imprisonment for 1 year or both)

FRAUD, RECKLESSNESS OR NEGLIGENCE IN NOT PAYING RETRENCHMENT PACKAGE – S12CC (NEW)

- Rationale in Bill – to ensure employees do not evade having to pay retrenchment packages by fraudulent or reckless conduct of their business in a manner that render the employer unable to pay the package.
- Employer who alleges financial incapacity in s12C(9) proceedings will be asked by RB or NEC to respond to allegations in affidavit form if it emerges that it;
 - (a) deliberately stripped or downgraded assets in contemplation of retrenchment
 - (b) carried on business recklessly, fraudulently or negligently (gross)

SI2CC CONTINUED

- RB or NEC to issue provisional order after hearing parties
- Order subject to discharge or confirmation by the LC.
- Order to be registered at MC or HC just like all LC orders.
- LC can issue a general declaration confirming provisional order and/or a specific declaration imputing liability on the specific owner or director of the employer who is liable including anyone who was a knowing party to the carrying on of the business. – *food for thought* -

FAILURE TO NOTIFY RB OF RETRENCHMENT (CRIMINAL DISPUTE)

- New dispute brought about by amendment. Notification of RB about retrenchment now mandatory
- 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)
- *What should be done* – just notify RB of every retrenchment
- Or employer did so done but no ‘Notification Certificate’ was issued, Sec 5(b)(iii)... employer can do an affidavit to prove that it complied with the notification requirements

FAILURE TO NOTIFY RB OF RETRENCHMENT (CIVIL DISPUTE)

Employee(s) can apply to RB/NEC (on affidavit) if the employer delays or fails to pay the agreed or minimum package. Employer afforded the chance to make representations –

- RB/NEC determines the issues and may issue a '*non-compliance certificate*' (NCC)– ss(6)
- Once NCC is issued, its binding on both parties and should be complied with.
- If no compliance, employee can approach LC for an enforcement order based on the certificate (NCC treated as a liquid document)
- LC order to be submitted for registration to HC or MC as the case may be for enforcement purposes – *elephant stays in the room.

ELECTION TO PAY MINIMUM RETRENCHMENT PACKAGE

- Where employer elects to pay only minimum retrenchment package, employees can apply to RB (or, by extension NEC – ss14) alleging employer's capacity to pay enhanced retrenchment package.
- Employees to give '*particulars of any proof*' of capacity to pay. Note – particulars.
- NEC or RB to receive representations from employer in the form of an affidavit and attaching audited financial statements.
- Determination to be made within 30 days of receipt of application. Determination appealable to LC within 21 days and so is the failure to decide application within 30 days
- Failure to comply with NEC or RB decision which is extant is criminal contempt of court (punishable by a level 6 fine or imprisonment for 1 year or both)

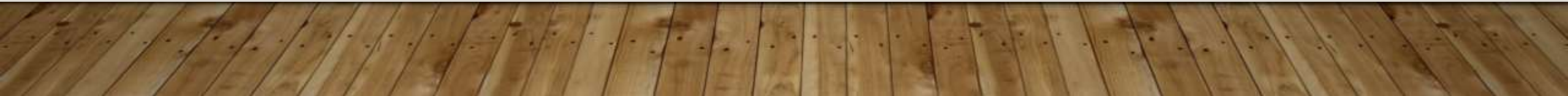
APPLICATION FOR EXEMPTION DISPUTE

- Within 14 days of retrenchment, Employer first pays not less than 25% of the minimum package
- Employer then applies in writing to the NEC or RB for exemption
- Provide necessary albeit plausible evidence of financial incapacity
- Serve employees with the application
- EC or RB consider exemption application within 30 days after hearing both parties
- Determination appealable to LC within 21 days of its pronouncement
- Failure by RB or EC to decide application within 30 days, aggrieved party appeals to LC within 21 days from expiry of 30 day period

FRAUD, RECKLESSNESS OR NEGLIGENCE IN NOT PAYING RETRENCHMENT PACKAGE

- Where in the course of financial incapacity-related proceedings *ito* s12C(9) it emerges that Employer;
 - (a) deliberately stripped or downgraded assets in contemplation of retrenchment
 - (b) carried on business recklessly, fraudulently or negligently (gross)
- RB or NEC requests employer to respond to these allegations in affidavit form.
- RB or NEC issues provisional order after hearing parties
- Order to be discharged or confirmed at LC. Order to be registered at MC/HC
- LC can issue a general declaration confirming provisional order and/or a specific declaration imputing liability on the specific owner or director of the employer who is liable including anyone who was a knowing party to the carrying on of the business. – *food for thought* -

BEST PRACTICES FOR SETTLEMENT NEGOTIATIONS



ARE NEGOTIATIONS NEEDED LABOUR LITIGATION?

- The labour system pits equity higher than formalism – ***Dalny Mine v Banda 1999 (1) ZLR 220 at 221; Mapondera v Fredda Rebecca Mine SC 81-22***
- This should inform how parties approach negotiations – equitable jurisdiction given to LC and tribunals below especially arbitrators – Section 98(9) of LA *‘in hearing and determining any dispute an arbitrator shall have the same powers as the Labour Court’*.
- Negotiations also help to achieve purpose of the LA in Section 2A(1) (f) - *to advance social justice and democracy in the workplace by securing the just, effective and expeditious resolution of disputes and unfair labour practices.*
- Elements in the Labour Act – borrowed from Section 75 of the LA - good faith
- Understanding the effect of costs of litigation – security for costs – ***Matenhere v Cornway College SC16-24***
- Understanding that labour rights are human rights – ***Section 65(1) of the Constitution***

THANK YOU ALL

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