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Commentary on Contemporary Legal Issues

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The primary objective of this journal is to post regularly online articles discussing topical and other important legal issues in Zimbabwe soon after these issues have arisen. However, other articles on other important issues will also be published.

The intention is to post at least two editions of this journal each year depending on the availability of articles.

We would like to take this opportunity to invite persons to submit for consideration for publication in this journal articles, case notes and book reviews.

Articles must be original articles that have not been published previously, although the Editors may consider republication of an article that has been published elsewhere if the written authorization of the other publisher is provided. If the article has been or will be submitted for publication elsewhere, this must be clearly stated. Although we would like to receive articles on issues relating to Zimbabwe, we would also encourage authors to send to us other articles for possible publication.

A legal analysis of retrenchment and termination of employment under the Labour Laws of Zimbabwe ushered in by the Labour Amendment Act, 2015: simplified, seamless and synchronized termination and retrenchment of employees by employers

By Caleb Mucheche¹

Introduction

On 17 July 2015, a five member bench of the Supreme Court led by Chief Justice Godfrey Chidyausiku delivered a far reaching judgment in the case of *Don Nyamande and Anor v Zuva Petroleum (Private) Limited*, which upheld the employer's common law right to terminate a contract of an employee on notice for no fault on the part of the affected employee. The aftermath of that judgment saw mass arbitrary sacking of employees on the basis of the common law right of the employer to terminate a contract of employment. It was such indiscriminate and frenzied terminations which led to the legislature enacting the Labour Amendment Act No. 5 of 2015 in an attempt to stop the hemorrhage that arose from the Supreme Court judgment.

Meaning of *Don Nyamande & Anor v Zuva Petroleum* judgment

In its simplest form the import of the Supreme Court judgment in *Don Nyamande and Anor v Zuva Petroleum* was that, at common law, an employer had the legal right to terminate a contract of employment for any employee at any given time even if that employee had not committed any wrong against the employer. The court reasoned that just like an employee had the right to terminate a contract of employment at any time by giving a notice of resignation from such employment, by the same token, an employer also enjoyed the same right to terminate such contract of employment by giving an employee notice of termination. The Supreme Court's decision was based on a startling reasoning that employers and employees are equal in the employment contract.

With due respect, the Supreme Court erred by holding that employers and employees are on an equal footing. In reality, there is inequality between an employer and an employee due to the economic disparity between the two parties and the employee is economically dependent on the employer. It was such a fallacious employer-employee equality based reasoning of the Supreme Court that soon after the *Zuva* Judgment was delivered on 17 July 2015, both Parliament and the President of Zimbabwe moved extremely quickly to pass the Labour Amendment Act No. 5 of 2015. Technically, the Labour Amendment Act No. 5 of 2015 (hereinafter referred to as the 'new Labour Act') reversed the *Zuva* judgment with effect from 17 July 2015.

Labour Amendment Act No. 5 of 2015 and its implications

The advent of the Labour Amendment Act No. 5 of 2015 marked the demise of the employers' unbridled common law right to terminate a contract of employment on notice at any time. In the *Zuva* case, the Supreme Court judgment gave employers the opportunity to terminate contracts of employment on notice but that short lived prospect was shut down by the Labour

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Amendment Act No. 5 of 2015. With this enactment, employers no longer no longer have the right to terminate a contract of employment on notice.

In fact, the new section 12(4a) (a)-(d) of the Labour Amendment Act No. 5 of 2015 expressly abolished the employer's common law right to terminate a contract of employment on notice as enunciated by the Supreme Court in the *Zuva* judgment. In terms of section 12(4a) of the Labour Amendment Act No. 5 of 2015, an employer's right to terminate an employee's contract of employment on notice is now strictly limited to **four** scenarios namely; (a) termination in terms of an employment code or, in the absence of an employment code, in terms of the model code made under section 101(9); or (b) the employer and employee mutually agree in writing to the termination of the contract; or (c) the employee was engaged for a period of fixed duration or for the performance of some specific service; or (d) pursuant to retrenchment, in accordance with section 12C. Outside the aforementioned four instances, an employer does not have any legal right to terminate a contract of employment on notice. The common law right that existed formerly in favour of employers to terminate a contract of employment on notice is now a thing of the past as it was abolished by section 12(4a) of the Labour Amendment Act No. 5 of 2015 with effect from 17 July 2015.

The termination on notice in terms of an employment code or the model code means that a registered employment code of conduct, or the national employment code of conduct (model) code, gave an employer with a right to terminate a contract of employment on notice within that relevant employment code or model code. In the absence of an express right of an employer to terminate a contract of employment on notice being provided for in the applicable employment code of conduct, an employer does not have any legal right to terminate a contract of employment on notice in terms of an employment code. It is noteworthy to point out that the model code, that is, the National Employment Code of Conduct, Statutory Instrument 15 of 2006 does not give employers any right to terminate a contract of employment on notice. Suffice to mention that section 5 of Statutory Instrument 15 of 2016 provides for legally permissible grounds upon which an employer can terminate an employee's contract of employment and none of these grounds closely or remotely relates to termination on notice. Thus, in terms of the model code as it currently stands, termination on notice is illegal.

Concerning the second scenario in terms of which termination on notice at the instance of the employer is allowed where the employer and employee mutually agree in writing, it is important to emphasize that there must be a mutually signed agreement between the concerned employer and employee confirming termination on notice. Once the parties append their signatures to the mutual termination agreement, in sync with the legal principle known as the *caveat subscriptor* rule (the person signing beware), both parties are legally bound by the mutual termination agreement. Thus it is vital for the employer and employee to know that the moment they sign a mutual termination agreement, they are legally bound by such a contract. Also it is necessary that the mutual termination agreement be signed by the employer and employee and not some other third parties, agents or proxies, otherwise such a mutual termination agreement can be legally contested.

The third scenario which allows for termination of a contract of employment on notice at the behest of the employer is where the employee was engaged for a period of fixed duration or for the performance of a specific service. This circumstance applies to fixed term contracts of employment and those contracts for some specific service. If an employee is employed for a

fixed term contract of employment or on a contract for the performance of some specific service, then the employer has a right to terminate that contract of employment on notice.

The fourth scenario which gives an employer the right to terminate a contract of employment on notice is where the employer terminates such contract of employment pursuant to a retrenchment in terms of section 12C of the Labour Act. The retrenchment procedure has been simplified by the new section 12C of the Labour Act which has created a one stop shop by giving employers the right to retrench employees and also specifying the minimum retrenchment package which employers can pay the affected employees. The new section 12C of the Labour Act applies to the retrenchment of one or more employees unlike the repealed old section 12C of the Labour Act which applied only to the retrenchment of five or more employees. In terms of section 12C (2) of the Labour Act, unless the employer and employees concerned, or their representatives, agree to better terms, the employer has the right to pay the affected employees a minimum retrenchment package of not less than one month's salary or wages for every two years of service as an employee or the equivalent lesser proportion of one month's salary or wages for a lesser period of service.

One size fits all minimum retrenchment package

This minimum retrenchment package is in full and final settlement of such retrenchment. It is worth pointing out that, in terms of section 12C (3) of the Labour Act, should an employer allege financial incapacity and consequent inability to pay the minimum retrenchment package timeously or at all, the employer has the right to apply in writing to be exempted from paying then full minimum retrenchment package or any part of it either to an employment council or, if there is no employment council, the retrenchment board. If the employment council or retrenchment board fails to respond to the request for exemption within fourteen days of receiving the notice, the application is deemed granted.

If the employer succeeds in an application to be exempted from paying the full minimum retrenchment package, the employer can retrench the concerned employees and such employees can leave empty handed. Also due to bureaucracy that normally characterize the operations of employment councils and the retrenchment board, once fourteen days elapse from that date the employment council or retrenchment board receives the employer's written application for exemption, that application for exemption will stand granted by operation of the law as provided for in terms of section 12C(3) of the Labour Act.

Demise/redundancy of the retrenchment board

Works councils, employment councils and the retrenchment board have been rendered white elephants or lame ducks when it comes to retrenchment of employees in Zimbabwe as they no longer enjoy the legal power to approve or not to approve the retrenchment of employees. Under the former retrenchment law, the retrenchment board was the final arbiter on whether or not to approve the retrenchment and the applicable package. In the past, a retrenchment process could be long and cumbersome but under the new law, it has been made simple and fast.

In the same vein, the retrenchment board now has a limited say on the retrenchment package as its role is now confined to dealing with applications for exemptions in default of employment councils as provided for in terms section 12C(3) of the Labour Act. There is no longer a need for employers to seek any approval of retrenchment as that approval is already given in terms of section 12C of the Labour Act. Those employers who approach the retrenchment board

other than in circumstances of applying for exemption from paying the minimum retrenchment package under section 12C(3) of the Labour Act, are not legally obliged to do so but simply do so out of courtesy or a mere formality. One can jokingly say that the new section 12C of the Labour Act "... retrenched" and sidestepped the retrenchment board". Operationally, the retrenchment board was dethroned except for the very limited role on exemptions.

Commonality of compensation for loss of employment via termination on notice in terms section 12(4a) or retrenchment as provided in terms of section 12C of the Labour Act.

In terms of section 12(4b) of the Labour Act:

"... where an employee is given notice of termination of contract in terms of subsection (4a) and such employee is employed under the terms of a contract without limitation of time, the provisions of section 12C shall apply with regard to compensation for loss of employment."

The meaning of section 12(4b) of the Labour Act is that a permanent contract of employment/contract of indefinite duration/contact without limit of time can easily be terminated on notice by the employer in terms of section 12(4a) of the Labour Act but the employer must compensate the affected employee by paying him/her the minimum retrenchment package provided for in terms of section 12C (2) of the Labour Act. Thus, practically speaking, job security no longer exists in Zimbabwe. as it is now so easy for employers to terminate permanent contracts of employment by simply paying the affected employees the minimum retrenchment package stipulated in terms of section 12C(2) of the Labour Act.

If the employer terminates a contract of employment on notice as stated in section 12(4a) of the Labour Act and the employee was not employed on a permanent contract of employment, that employee is not legally entitled to any compensation for loss of employment which is entrenched in terms of section 12(4b) of the Labour Act. There is a nexus between the compensation for loss of a permanent contract of employment and retrenchment under sections 12(4a) and 12C of the Labour Act in that both attract payment of the minimum retrenchment package. Retrenchment is now the easiest method for employers to terminate contracts of employment such that employers are likely to forgo going through costly and arduous disciplinary hearings for misconduct by simply resorting to termination on notice in terms of section 12(4a) of the Labour Act.

Conclusion

In conclusion, the previously watertight legal provisions restricting termination of contracts of employment in Zimbabwe have been watered down by the enactment of the new Labour Act. Employees are now at the mercy of employers in so far as termination of contracts of employment is concerned. There is need to effect further amendments to our labour laws to protect both employers and employees from abuse.