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Zimbabwe's Labour Relations Implications amidst Covid-19 Pandemic

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No one anticipated the scale and attention to be commanded by the corona virus (Covid-19). If we are agreed on this, then you can proceed to read the rest of this article.

A contract of employment is a legal relationship that is sui generis. This means that it is very unique and markedly different from the standard contractual relationship. It is probably the most common type of contract yet it comes with onerous legislative intervention and influence. Our labour relations are heavily legislated and influenced by legal principles developed by our courts over a number of years. But as life produces times and seasons, there are moments where no one contemplated, foresaw and certainly planned for. The Covid-19 pandemic presents a totally new dimension to labour relations and has created a dark cloud of uncertainty on the part of the employee and deep seated desperation on the part of the employer. As labour has been divided into essential and non-essential during this lockdown, the division also reflects itself in the ability to earn as well. The essential will earn whilst the non-essential yearn (pun intended). This article will expose the challenges that the human resource relationship across the board has been affected and how the law participates to reconcile the necessary but drastic measures. For a more direct and measured approach to understanding how labour relations have been affected, appropriate sequential headings will be calibrated throughout the article to answer the critical concerns aroused by this pandemic.

Has the performance of obligations under a contract of employment been suspended?

The president of Zimbabwe through statutory instrument 83 of 2020 declared a 21 day lockdown that restricted the movement of most people who have been categorized as non-essential service providers. The non-essential naturally form the greater portion of the population restricted to their compounds as the nation battles to control the spread of the pernicious and devastating viral pandemic. Since the

declaration of the lockdown, no meaningful governmental incentives where proposed toward alleviating the obvious consequences of an unsolicited industrial siesta. Revenue creation is at an all-time low and only the biblical proverb satirically captures the consequence: A little sleep and the folding of hands…so shall poverty come into your house like a thief in the night. Be assured, with the lockdown comes much sleep and the folding of hands!

The question that must weigh heavily on the minds of any individual consummating the employment relationship is: what becomes of the contract of employment I have? The question will also be critical to the Zimbabwe Revenue Authority and the National Social Security Authority which are the two state institutions that have a direct relationship with most employment relationships for the collection of taxes and stipulated social security premiums. The two most important obligations that arise from a contract of employment are:

1. The provision of specialized labour broken down into tasks and duties of responsibility on the part of the employee and,

2. The provision of a specified remuneration/salary at the end of a stipulated and agreed period, usually at an interval of a calendar month.

Contracts also vary in as far as other benefits, in addition to the basic salary is concerned based on a wide range of factors which broadly reflect the nature of the business/employer and its source of income, the position occupied by the employee in the organization and critically, whether the employer organization is presently during this lockdown, an essential service providing entity.

In all truth, it is quite difficult and debatable to suggest that a contract of employment can be suspended based on the existence of an' act of God' (this doctrine of law will be discussed later). Any suspension of the performance of obligations under a contract of employment will have to be by the consent of the contracting parties, subject to the various statutory and common law remedies afforded by law.

The doctrine of 'An act of God'/ Vis Major/ force majeure/ Casus fortuitous

Cutting to the chase is critical in articles of this nature. The overwhelming principle of law that will take precedent in governing the progression of any employment relationship under the current Covid-19 pandemic is the vis major concept also known as An Act of God. The latter description illuminates the seriousness of the doctrine in that, when 'God' intervenes in mankind's dealings then we ought to recline in our cradles and introspect. Suffice to say, a vis major is an uncontemplated situation or set of

circumstances that are beyond the norm of day to day lives and which do not occur with regular frequency to be averted as an industrial vice. The unforeseen events render the performance of obligations under a contract impossible or highly unlikely.

The Zimbabwean Supreme Court in the case of **Firstel Cellular (Pvt) Ltd v Net One Cellular (Pvt) Ltd S-1-15** reasoned as follows:

The courts will be astute not to exonerate a party from performing its obligations under a contract that it has voluntarily entered into at arm's length. Thus, the suspension of a contractual obligation by dint of vis major or casus fortuitus can only be allowed in very compelling circumstances. The courts are enjoined to consider the nature of the contract, the relationship between the parties, the circumstances of the case and the nature of the alleged impossibility. In particular, it must be shown that the impossibility is objective and absolute in contradistinction to one that is merely subjective or relative. Again, the contract must have become finally and completely impossible of performance, as opposed to the situation where one party is only temporarily disabled from fulfilling its obligations.

Critical, in understanding the doctrine are the sentiments of the South African Supreme Court in **MV Snow Crystal Transnet Ltd t/a National Ports Authority v Owner of MV Snow Crystal 2008 (4) SA 111 (SCA) at 128:**

"As a general rule impossibility brought about by vis major or casus fortuitous will excuse performance of a contract .But it will not always do so. The rule will not avail the defendant if the impossibility is self-created; nor will it avail the defendant if the impossibility is due to his or her fault".

Without any prophetic gift or inclinations as a seer, the doctrine of vis major will be widely used and/or abused by litigants justifying their drastic responses to the human resource situation as a result of the pandemic. In my view, any court should accept without hustle that the present pandemic circumstances should pass the test of being a vis major. The individual application and justification of the various course of action will strictly ad sincerely depend on the facts of each particular case.

The vis major contractual clause

For those employment relationships that leave no stone unturned in regulating their relationship, a vis major clause may be part of your written contract. For the employee who doesn't pay attention to every detail upon signing, you may have to scurry to those hidden files and fetch your dusty contract of employment to read through it and identify if the contract has this clause. If your employment contract has a vis major clause, you will definitely require a

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more personal appraisal of the consequences you will meet from the stipulations of such clause which constitute what you agreed would happen in the event of a commonly agreed act of God. For those whose contracts do not have the clause, we remain guided by the common law principles.

What is the effect of a unilateral variation of an employment contract?

Unilateral variation of a contract is the act of independently changing the terms of performance in a contract without consulting and getting approval from the other contracting party. Invariably employers are the ones that fall guilty of attempts to unilaterally vary their employees' contracts without consultation. It will not be unusual in the face of this pandemic that, without consultation or prior warning an employee or employer can unilaterally vary the terms of the employment engagement. In the Zambian appellate court, the question of unilateral variation was raised in the case of **Sililo v Mend-A-Bath and Another ZMSC 54 [2017]** the Zambian Supreme court held as follows:

"Contractual obligations cannot be overlooked merely because it is convenient for one party to do so…. An employer is not at liberty to alter an employee's terms and conditions of employment to the employee's detriment without the agreement or concurrence of the employee. A unilateral alteration of the conditions of service, which negatively impacts on the employee, amounts to breach and wrongful termination of the contract of employment. In appropriate circumstances, this may result in liability by the employer to pay damages to the employee."

The author has caught wind of some proposed course of action by different employers which include forced unpaid leave, unilateral salary cuts and contractual benefits or total salary withdrawal. It is quite unfortunate (for the employee) that under the doctrine of vis major, these courses of action are likely to be defendable. An employer may not need to consult at all, it will simply be a gesture to communicate incapacity. The contracting parties should however be guided by good faith in their dealings with the knowledge that neither the employee nor the employer has caused the pandemic to be at our doorsteps.

Forced unpaid leave days during the lockdown

Ingenious methods by employers to curb foreseeable economic loss will be rife. One of such methods involves justifying the absence of the employer from the work place through a deemed unpaid vacation or compassionate leave period. This proposal is severely problematic for the employer. Non-essential service providers must be reminded that it is the

President of Zimbabwe by authority of the law who restricted the ability of employees to perform their obligations in terms of their contracts of employment. On the other hand 'leave days' are a right of every employee to be exercised in accordance with law, mostly at the instigation of the employee concerned, in consultation with the employer. It is undesirable for an employer to initiate conversations suggesting the utilization of 'leave days' as the right to choose when to take such leave days belongs to the employee. Whilst the granting of the leave days falls within the employers purview, it must be exercised with due regard to the provisions of the law. It is certainly unlawful to unilaterally impose an unpaid leave on an employee without their consent. Even if suggested to the employee to take leave days as an option, duress and undue influence may become topical in litigation.

Forcing employees to be on unpaid leave during the lockdown will certainly constitute an unfair labour practice as contemplated by section 6 of the Labour Act. A consultative approach, cognizant of the competing interests of each party should be adopted. Honest and non-coercive dialogue must be held between the contracting parties, affording each party an opportunity to make a decision on the available legal option in the present circumstances. The Ministry of Public Service, Labour and social welfare issued a press statement on the 10th of April 2020 and correctly urged the employers to refrain from adopting forced unpaid leave days as a measure against the lockdown. Dialogue was the overwhelming solution to obtain the consent of both parties in agreed measures to be pursued.

Salary cuts and suspension of benefits

By now we should be singing the same song. Unilateral variations to a contract of employment are unlawful. Any salary cut must be after consultation with the employee in the face of the undeniable effects of the pandemic. Both parties must consent to the course of action and it is wise to put such consent in writing where possible (email/WhatsApp confirmations), if not you may as well record the acceptance to adhere to social distancing guidelines. Vis major does not elevate the employee into a position of taking the law into their own hands. It only accepts that performance of a contract may be impossible. The procedure of communicating that impossibility and coming up with mitigatory measures will still require adherence. Unfair labour practices remain a cardinal principle of the employment relationship which must be adhered to. The author also urges employees to be reasonable in the face of the current circumstances, they are certainly not the

employer's problem. A salary cut is an indication that the employer may still want to retain you after all of this is over, that will require your sincere consideration.

Retrenchment/laying off

Retrenchment is an option provided by the Labour Act to terminate an employment contract at the behest of the employer usually for 'operational' reasons i.e. revenue incapacity, redundant employee positions, technological advancements strategically altering roles etc. In all fairness has become a walk in the park as far as Employers are concerned. The current legal framework spear headed by section 12 C of the Labour Act all but makes it a dog's breakfast. Before the Labour Amendment Act changed the modes of termination of employment contracts, retrenchment was basically a nightmare for employers. The old position expected a crusade of employees (at least 5) losing their jobs for a retrenchment to be approved. Presently even a single employee can be the subject of a retrenchment. The retrenchment board had, in the past, real power to police the retrenchment process whilst it presently can only accommodate grievances after the retrenchment has already be done and the grievances relate mainly to the retrenchment package payable.

The retrenchment package itself is clearly a get out of jail card for the employer. The current formula upon retrenchment is that an employee is entitled at the very minimum a package of one month's salary for every two years served with the employer's organization. The disparity and unfairness to the employee is quite simple: having served a greater portion of the employment relationship at a time when the multi-currency economy was active, the employee earned value. With the reintroduction of the much weaker Zimbabwean dollar, with most employers maintaining salaries and benefits in the USD$ figures but payable in Zimbabwean dollars the retrenchment formula will be a heist. It will be significant to mention that statutory instrument 81 of 2020, the Labour relations specifications on minimum wages amendment notice pegged the minimum wage for all employees excluding domestic workers and agricultural workers to be ZWL$ 2 549.74. This will mean that the computation of a retrenchment package should in the least be governed by the new figure. Employers can however apply to be exempted from paying that amount.

Essential Service Employees

Those individuals bravely dedicating their labour in the face of the untamed corona virus because the nation needs them offer a different perspective to the rest of the employee community. They will certainly be serving institutions that has

retained the ability to generate revenue. It is the conditions of service during a global pandemic that may concern the recompense they may deserve during times such as these. The risk associated with performing your employee duties staring death in the face cannot be understated. The employers have a legal obligation to protect their employees as much as possible from being exposed to scenarios that they can contract the virus. Depending with the nature of employment, face masks, hand sanitizers, personal protective equipment must be availed to the serving employees without hesitation. In addition, a competitive risk allowance and/or other additional benefits ought to be provided to the employees who are certainly going beyond the natural expectations of conditions of service as contemplated by their employment contracts, depending on the industry. An employee who unilaterally refuses to show up for duty citing a potential exposure to the corona virus under 'sorry' working conditions during this pandemic, will not only be forgivable but will be an easy client to defend. **Section 65 (1) and (4) of the Constitution of Zimbabwe 2013** provides for the fundamental right to employment conditions that are fair, equitable and safe.

State Institutions and Conclusion

In the event that the contracting parties to an employment agreement agreeing to novate/ vary their agreement and reduce the salary and benefits payable, the national revenue authority will take a hit in terms of the amount of Pay as you earn (PAYE) it can collect from the employer. The same will also apply but with a different context for social security collections. This will form a different discussion for another publication.

Without any doubt, without the ability to generate revenue, employers will be at the end of the day incapacitated to bear the burden of shouldering the cost of expenses without a silver lining in sight. What is undeniable is the fact that the pandemic has come with a wind of change that will leave a trail of economic devastation and will empty several offices of their former custodians in most workplaces. The employers certainly have to brain storm on which course of action to take, cherry picking from the alternatives provided above. The employee in turn will need to be informed, at any rate forewarned remains forearmed. They may still catch hasty employers and stop them in their tracks. May we live to narrate the episode of Covid -19 in a better day in the future.