

LABOUR LAW TERMINATION OF EMPLOYMENT FOR EMPLOYEE ON PROBATION IN ZIMBABWE

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INTRODUCTION

Termination of an employee on probation is ubiquitously governed in terms of section **12(5)** of the **Labour Act [Chapter 28:01]** which expressly provide that a ***“contract of employment may provide in writing for a single non-renewable probationary period of not more than-***

(a) one day in the case of casual or seasonal work; or

(b) three months in any other case;

During which notice of termination of the contract may be one week in the case of casual work or seasonal work or two weeks in any other case.”

Suffice to mention that Zimbabwean labour law entrenches termination of employment during probation by giving both the employer or employee a statutory right to terminate a contract during probation by giving either party two weeks for contracts which are not for casual work or seasonal work and one week's notice for casual work or seasonal work.

TERMINATION OF EMPLOYMENT DURING PROBATION

The Supreme Court of Zimbabwe clarified the law applicable to termination of a contract for an employee during or after probation in the case of **St Giles Rehabilitation Centre v Lambert Patsanza SC 59/18 at pages 4-6 per GUVAVA JA** as follows:

“The main reason for having a period of probation is now generally accepted. A probation period is designed to function as a time when an employer can evaluate a potential employee before opting to accept him or her as a full time employee. During this period the employee is assessed and evaluated to determine his suitability for permanent employment. It is apparent from the above that firstly, the employee

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*must successfully complete the probation period before he can be permanently employed. Secondly the probation period is a separate and distinct contract. Thirdly the contract of employment comes into operation once an employee has successfully completed the period of probation and finally, it is reciprocal in nature. In other words, if an employee is dissatisfied with the employer he may also terminate the employment by giving the requisite notice. There are two ways in which an unsuccessful probationary employee can be dismissed. The first is to allow the probation period to expire naturally wherein the employee is released at the end of the contract. The second is to release the probationary employee before the end of the probation period. Where the probationary period is cut short then the issue of notice arises and he must be given notice in terms of the contract. (see *Time Bank of Zimbabwe v Nkosana Moyo* HH 126/02) Professor Lovemore Madhuku in his book *Labour Law in Zimbabwe* at page 44 states as follows with regard to the purpose of probation " A probationary employee is one who is in the initial period of his employment where his skills and abilities are assessed. The probationary contract is separate from the second employment contract, which is conditional upon successfully completing probation In this regard Professor Madhuku states: "This means that at the end of the probation period employer has two choices: either to allow the probationary contract to lapse and let the employee go or enter into a second employment contract with the employee. There is no room for renewal of a probationary contract"*

RECIPROCAL RIGHT OF AN EMPLOYER OR EMPLOYEE TO TERMINATE A CONTRACT OF EMPLOYMENT DURING PROBATION PERIOD

A clear reading of **section 12(5)** of the **Labour Act** reveal that the legislature gave both an employer and an employee a juxtaposed reciprocal legal right to terminate a contract of employment on two weeks' notice during probation in relation to any other contract part from a contract for casual work or seasonal work which requires one week notice. The back to back or side by side reciprocal right of an employer or employee to terminate a contract of employment was

nicely articulated by NDOU J (as then he was) in **Commercial Bank of Zimbabwe v Kwangwari HH 77/2003** as follows:

“Probationary clauses provide for a trial period during which the reciprocal periods of notice required for termination are shorter, and which purportedly give both parties the right either to confirm or not to confirm the contract at the conclusion of the probation period.”

It is noteworthy that probation is a trial or test period, hence the requirements for an employer to terminate a contract of employment for an unsuccessful employee on probation must be less onerous than the procedure for terminating a successful employee post probation. An employee on probation may be described as someone with a putative contract of employment or a contract within a contract in that there is no automatic guarantee of being offered substantive employment when one is on probation as eligibility for confirmation to employment hinges on the employee successfully completing the probation period to the satisfaction of the prospective employer. Probation is akin to a courtship and not a marriage but if an employer or employee fails to sleep with one eye open by allowing the probation period to expire without invoking the legal provisions in terms of **section 12 (5)** of the **Labour Act** to terminate such contract on notice, the defaulting employer or employee may enter into a forced marriage or oversize shoes in the form of an unwanted contract of employment. A probation contract is a separate contract within the main contract. In the case of **Madawo v Interfresh Limited 2000 (1) ZLR 660** at **882** CHINHENGO J (as then he was) remarked as follows:

“ Probation is defined in the new English Dictionary as ‘ The action or process of testing or putting to proof.....the testing or trial of a person’s conduct, character or moral qualification, a proceeding designed to ascertain these.....for some position or office. I think these words commonly describe the process of probation as commonly undergone by accepted candidates.....”

The purpose of probation period was also explained and elucidated in the case of **Kazembe v The Adult Literacy Organisation SC 173/1994** where the Supreme Court of Zimbabwe underscored that once a probation period ends and the employer is dissatisfied with the probationer's performance, all that the employer needs to do is to inform him that his services are no longer required and that would be the end of the matter. An employer must not rush to terminate a contract of employment for an employee on probation before doing an objective performance assessment for such employee proving failure that cannot be corrected or remedied and also offering performance enhancement support services or resources to that employee.

WHETHER PROBATION PERIOD CAN BE EXTENDED OR RENEWED BY AN EMPLOYER?

In **St Giles Rehabilitation Centre v Lambert Patsanza** (supra) at **page 5**, the Supreme clearly, unequivocally and unambiguously stated that an employer is legally barred or precluded from extending a probation period for an employee in the following salutary words:

"Whether the Labour Act permits an extension of probation period Section 12 (5) of the Labour Act [Chapter 28:01] regulates the issue of probation in the workplace. The section reads as follows:

" A contract of employment may provide in writing for a single, non-renewable probationary period...."

This provision is clear and requires no interpretation. It seems to me that the provision provides that where the employer decides to include a probationary period in a contract of employment then that period is not renewable. The court a quo in my view correctly found that the use of the word "may" in the above section relates to the employer's discretion to engage an employee either on probation or immediately into a substantive position. Once a probation period is given by an employer then it can only be a "single non-renewable" period."

LABOUR LAW PROVISIONS FOR TERMINATION OF EMPLOYMENT AFTER PROBATION

The legal status of an employee after the expiry of probation period without the employer terminating his/her contract of employment during the probation period is that such an employee, **by operation of the law automatically** becomes a full time employee in terms of the applicable contract be it fixed term contract or a permanent employee if it is a contract for an indefinite period or permanent contract of employment. After the expiry of the probation period, **section 12B (1)** of the Labour Act which says, "**every employee has the right not to be unfairly dismissed**" kicks in or roars into life to protect an employee from unfair dismissal by the employer. Labour law in Zimbabwe does not allow an employer to extend or renew the probation period for an employee. Also the statutory right to terminate a contract of employment on notice during the probation period available to either the employer or employee does not apply after the expiry of the probation period. An employer who is faced with an employee who shows signs of failing the probation period must make hay whilst the sun shines by invoking the statutory right to terminate such contract on two weeks notice for a contract which is not for casual work or seasonal work and one week notice for a contract for casual work or seasonal work as provided for in terms of **section 12 (5)** of the **Labour Act**.

In the case of **St Giles Rehabilitation Centre v Lambert Patsanza (supra)** at **page 7** of the judgment, the Supreme Court had this to say:

' What was the respondent's employment status at the time of termination of contact?

It seems to me that the appellant, having failed to dismiss the respondent during the probation period, the question that arises is the status of the respondent after three months' probation period. Applying section 12(5) of the Labour Act, it was apparent that the respondent was no longer on probation as the contract stipulated a three month probation. Clearly, therefore, in these circumstances the court a quo was correct in finding that the respondent had become a permanent employee. However, I am not satisfied that the respondent was entitled to the total award made by

the Arbitrator. As the respondent was now a permanent employee, the consequence of his dismissal which the Arbitrator found to be unlawful should have been reinstatement. The remedy was not to dismiss him on three months' notice''.

CONCLUSION

Both an employer and employee must act timeously if unhappy with the contract during the probation period by terminating it using the legally stipulated period of notice in terms of **section 12 (5) the Labour Act**, to avoid crying foul by being legally bound and heavily saddled by the ironclad fetters of the contract of employment after the expiry of the probation period in default.