

**MANAGING CORPORATE RESCUE STRATEGIES, RESIGNATION, RETIREMENT,  
CONSTRUCTIVE DISMISSAL AND MUTUAL TERMINATION BY CALEB MUCHECHE LLM  
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# Two (2) ways to commence corporate rescue

- ▶ **Option 1:** Corporate rescue may be done in a fast way by a company voluntarily by means of a board resolution by the company in terms of section 122 of the Insolvency Act where the company is financially distressed and there appears to be reasonable prospect of rescuing the company. Such company resolution to voluntarily place a company under corporate rescue is not legally binding unless it has been filed with the Master of the High Court and the Registrar of Co-operative Societies in the case of a Co-operative society.
- ▶ **Option 2:** Section 124 of the Insolvency Act gives the second way of placing a company under corporate rescue by way of a court order initiated by means of a court application commenced by any person (natural “human beings”, shareholders or creditors or legal/juristic/fictitious person e.g trade unions or other legal persona) who can prove that the company is financially distressed, that the company has failed to pay any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters or it is otherwise just and equitable to do so for financial reasons; and there is reasonable prospect of rescuing the company.

# Corporate rescue strategies and effect on contracts of employment

- ▶ Section 129 of the Insolvency Act [Chapter 6:07] deals with the effect of corporate rescue on employees and contracts.
- ▶ During corporate rescue proceedings, the employees' contracts of employment remain legally valid under terms and conditions that applied before corporate rescue, meaning that the status *quo ante* for contracts of employment for employees remain in legal force.
- ▶ During corporate rescue, the employee's contracts of employment remain legally binding on the same terms and conditions that applied before corporate rescue.
- ▶ Corporate rescue does not stop changes to employees' contracts in the ordinary course of attrition e.g expiry of fixed term contracts, mutual termination, termination by way of a disciplinary hearing leading to a dismissal for misconduct, resignation by employee and retirement.
- ▶ If the employees and the company agree to different terms and conditions in terms of applicable labour laws, corporate rescue does not stop such an agreement

# Corporate rescue and employment contracts

- ▶ If an employer or the company under corporate rescue wishes to conduct a retrenchment of employees as part and parcel of corporate rescue, that retrenchment must be done in terms of the Labour Act and regulations governing retrenchment.
- ▶ Section 129 (3)(a) of the Insolvency Act provide that a corporate rescue practitioner must not suspend any provision of an employment contract.
- ▶ Section 2A (3) of the Labour Act clearly provide that the Labour Act prevails over any other enactment inconsistent with it.
- ▶ In terms of section 129 (3) (b) of the Insolvency Act, a court may not cancel any provision of an employment contract, meaning that contracts of employment are protected during corporate rescue proceedings.

## **Section 8 of Labour Amendment Act No. 11 of 2023: legal provisions about termination of employment under section 12(4a) of the Labour Act.**

- ▶ This is a mixed legal provision which repealed the old section 12 (4a) of the Labour Act and re-enacted a new section 12 (4a) of the same Labour Act giving legal parameters or circumstances in terms of which an employee or employer can lawfully terminate a contract of employment.
- ▶ An employee is given a legal right to terminate a contract of employment via two scenarios, namely by either resignation or retirement.

# Resignation by an employee

- ▶ A resignation is a voluntary act of termination of employment by an employee which automatically has the legal effect upon an employee submitting or tendering such resignation to an employer. See *Fonda v Mutare Club* HH 40/1991, *Jakazi & Another v Church of the Province of Central Africa* 2010 (1) ZLR 335 (H), *Bulawayo Municipality v Bulawayo Indian Sports Ground Committee* 1955 SR 114.
- ▶ A resignation does not require the consent or approval of the employer to become legally valid. See *Riva v NSSA* 2002 (1) ZLR 412 (H), *Kudada v City of Harare* HH 26/94, *Muzengi v Standard Chartered Bank* 2000 (2) ZLR 334 (S).
- ▶ Section 12 (4) of the Labour Act governs the various notice periods for termination of employment via resignation unless a contract of employment stipulates some other notice period.
- ▶ A voluntary resignation from employment by an employee brings the employer-employee relationship to an end. A resignation cannot be withdrawn by an employee without the consent of the employer.

# Retirement by an employee

- ▶ Retirement is defined in the Oxford dictionary as the action or fact of leaving one's job or work.
- ▶ Retirement on the basis of age is usually regulated by the contract of employment or other conditions of service between an employer and employee.
- ▶ Generally, the early retirement age is 55 years. Some employers provide for retirement age of 60 years whilst other employers peg the retirement age at 65 years. Pension rules for different employers may provide for retirement age.
- ▶ Without the consent of the affected employee, an employer cannot terminate an employee's contract of employment on the basis of retirement before that employee reaches the applicable retirement age specified in the contract of employment or conditions of service. See [Mubvumbi v City of Harare SC 64/2018](#).

# Mutual termination/separation

- ▶ Mutual termination of employment happens where both the employer and employee agree in writing to the termination of the contract of employment.
- ▶ The mutual termination agreement must be signed by both the employer and employee for it to be legally binding. A verbal mutual separation is not legally binding.
- ▶ Usually a mutual termination is a product of negotiations between the employer and employee. Good negotiating skills between the employer and employee are essential for a fruitful mutual termination of employment.
- ▶ Employer and employee parties agree on the mutual termination package and the manner in which it will be paid to the employee.
- ▶ Once the employer and employee sign a mutual termination agreement, it becomes a legally binding contract without the need of going to any court or tribunal of law.



## **Section 8 of Labour Amendment Act, 2023: new legal provisions about termination of employment under section 12(4a) of the Labour Act.**

An employer is given the legal right to terminate a contract of employment via three scenarios namely, a written mutual agreement with an employee, disciplinary inquiry in terms of an applicable registered employment code of conduct or some other manner agreed in advance by the employer and employee concerned (this may apply to a fixed term contract of employment which has a specific date of commencement and expiry/termination).

A mutual termination of employment requires the written consent of both the employer by appending or putting their signatures to the mutual termination agreement. Once lawfully signed by both the employer and employee, a mutual termination of employment is one of the safest ways to terminate a contract of employment without any comebacks due to parties' agreement.

# Constructive dismissal of an employee

- ▶ Section 12B (3)(a) of the Labour Act provides for a form of dismissal of an employee in terms of which an employee terminates employment with or without notice because an employer deliberately makes continued employment intolerable for an employee. It is a necessary legal requirement that an employee must terminate a contract of employment because of intolerable conditions created by the employer for there to be a case of constructive dismissal. See **Rainbow Tourism Group v Richard Nkomo SC 118/2014**, **Astra Holdings (Pvt) Ltd v Peggy Kahwa SC 97/2004**.
- ▶ An employee is allowed by law to terminate a contract of employment with or without notice if an employer creates a hostile, untenable, incompatible or unbearable or toxic work environment. The affected employee ought to use internal workplace remedies like grievance procedure if that is available, before rushing to allege constructive dismissal.

# Constructive dismissal of an employee

- ▶ An employee is allowed by law to terminate a contract of employment with or without notice if an employer creates a hostile, untenable, incompatible or unbearable or toxic work environment. The affected employee ought to use internal workplace remedies like grievance procedure if that is available, before rushing to allege constructive dismissal. Constructive dismissal is easy to allege but may be difficult to prove if the facts alleging intolerable conditions by the employer are not solid.
- ▶ The employee has the onus to prove that the employer created intolerable conditions of employment. A voluntary resignation by an employee to avoid a misconduct disciplinary hearing is not constructive dismissal by an employer. See **Fonda v Mutare Club HH 40/91, Muzengi v Standard Chartered Bank of Zimbabwe 2000 (2) ZLR 334 (S),.**
- ▶ If the employee is responsible for the alleged intolerable conditions of employment, then such employee cannot sustain a case of constructive dismissal.

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### **PROPER AND LAWFUL WAY TO CONDUCT A DISCIPLINARY HEARING AT THE WORKPLACE. DOS &DON'TS**

- ❖ *Overview of disciplinary Hearing*
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- ❖ *Investigating labour matters*

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# The End!!!