
COVID-19 and Labour Law: Zambia

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Abstract

Zambia's responsive measures in mitigating the effects of COVID-19 in the labour market have been fragmented and ineffective. These half-hearted measures taken by government can be attributed to its crippling huge debt burden compounded by alarming levels of mismanagement of public resources. These factors have left Zambia with no meaningful fiscal space to navigate the effects of COVID-19.

Keywords: Covid-19; Labour Law; Essential workers; Redundancy; Destitution; Debt burden; Economic mismanagement.

1. Introduction

Zambia reported its initial two cases of Covid-19 on 18th March 2020. It must, however, be noted that the country had already, as a preparatory measure, invoked the Public Health Act under which the Minister promulgated two Statutory Instruments. The Act provides for the prevention and suppression and for the general regulation of matters dealing with public health. Statutory Instrument No. 21 of 2020 declared the Coronavirus Disease 2019 as a notifiable infectious disease pursuant to section 9 of the Public Health Act. Statutory Instrument No. 22 of 2020, set out measures aimed at controlling the spread of COVID-19.

2. Measures taken by Government to combat the spread of COVID-19

Following the announcement of the first COVID-19 positive cases on 18th March 2020, the Minister of Health announced that all schools, colleges and universities would close indefinitely on 20th March 2020. The President of Zambia, on the 25th March, in his address to the nation, made further pronouncements that were meant to augment the already existing measures. These directives included the closure of bars, night clubs, casinos, gyms and cinemas. All restaurants were directed to operate only on take away

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basis¹. The Government went further and encouraged employers to send non-essential workers on paid leave or to work from home while retaining the services of essential workers.

Further to this, the Minister of Labour and Social Security announced that government intended to invoke Section 2 of the Employment Code Act, No. 3 of 2019 so as to come up with a Statutory Instrument that would enable the Minister to suspend some of the provisions of the Employment Code Act. Some of the provisions the Minister intends to suspend through such a proposed Statutory Instrument include: dispensing with the need for an employer to give notice in redundancy cases, suspending the need for the employer to pay lump sum redundancy benefits upon termination of the contract of employment so as to allow for the employer to work out a flexible payment plan².

3. The impact of the measures taken by Government on the Labour market in Zambia

The advent of COVID-19 has shaken the already ailing Zambia's economy to its core with innumerable damaging effects on the welfare of its people, especially in the labour market. It must be understood that Zambia has a weak and highly fragile economy saddled with huge and unsustainable external and domestic debt. The outbreak of COVID-19 has revealed and laid bare the underlying structural problems in the economy. Public and publicly guaranteed debt did nearly quadruple from 20.5 in 2011 to 78.1% of GDP in 2018 driven by accumulation of both external and domestic debts. The 2018 World Bank and International Monetary Fund debt sustainability analysis concluded that that Zambia's risk of overall and external debt distress remained very high and that public debt under the current policies was on an unsustainable path³. The problem of debt is seriously compounded by mismanagement of public resources at a grand scale. In 2018, the UK Government froze aid funding to Zambia after the Zambian Government admitted that 3.3 Million Pounds meant for poor people under the Social Cash Transfer Programme had 'mysteriously' gone missing⁴. The Kwacha had also been on an upward surge depreciation against major currencies. As a consequence, debt servicing has continued to be more costly than programmed. The choking effects of economic mismanagement further resulted in substantial delays by government in the payment public service workers' salaries thereby generating industrial disharmony in the labour market⁵. The reality was that Zambia, even prior to the advent of the pandemic, was teetering on the brink of economic distress.

¹ Mwenda J, 'Lungu's Full Address: Zambia Records 12 COVID-19 Cases' News Diggers (2020) <https://diggers.news/local/2020/03/25/lungus-full-address-zambia-records-12-covid-19-cases-as-lock-down-looms/> accessed on 28/04/20

² <https://www.lusakatimes.com/2020/04/23/labour-ministry-to-issue-si-on/> accessed on 01/05/202

³ The World Bank, 'the World Bank in Zambia: Overview.' <https://www.worldbank.org/en/country/zambia/overview>

⁴ BBC News Services, 'Zambia aid: UK suspends funding over corruption fears.' (2018) <https://www.bbc.com/news/world-africa-45560404>

⁵ Nicholas N, 'Zambia' President Struggles to Pay Civil Servants' The Africa Report

The measures that government has undertaken to arrest the spread of COVID-19 have had an immediate impact and further magnified the economic woes of Zambia. The closure of schools, colleges and Universities entails that in many cases, particularly for private institutions whose operations depend solely on the fees paid by pupils and students, can no longer afford to pay employees. As a result, many of them are laid off or are told to stay home without pay until the pandemic withers. Workers in public institutions are not spared either, especially part-time employees whose wages are computed and paid based on actual classes conducted. Given this state of affairs, it follows that in the absence of classes being conducted, part-time workers in institutions of learning are left in the cold.

Further, the closure of bars, night clubs, casinos, gyms and cinemas has further exposed the vulnerability of the already vulnerable class of employees in Zambia's labour market. Without employers generating resources, it would be highly unreasonable to expect employers to pay workers when the businesses are not running. The poverty levels, have therefore, increased in the households of those engaged in the hospitality industries and associated enterprises. Domestic workers are another class of employees that have borne the blunt of COVID-19. Many of these domestic workers come from high density areas which have so far recorded cases of COVID-19. As a preventive measure, many employers have decided to part ways with their domestic workers for fear that such persons would be the possible purveyors of the virus⁶. Unfortunately, where such cases of termination or temporal suspension of work have been effected, the end result has been the suspension of pay. The question that emerges is: How are persons who have lost their livelihoods as stipulated above being helped by government/social partners to prevent absolute destitution?

4. Government's response to salvage the labour market

It must be noted that from the above chronicled Zambia's economic problems arising from debt and economic mismanagement, Zambia has no fiscal space to navigate the pandemic more effectively. Some half-hearted measures taken include: release of funds to reduce domestic arrears owed to domestic suppliers of goods and services, reduce outstanding arrears to pensioners, payment of local contractors, suspension of import duties on importation of ethanol used in the manufacturing of alcohol based hand sanitisers⁷.

However, one would clearly note these interventions taken are not targeting at specifically addressing the informal sector employees who are the most hit, domestic workers, employers and employees in the hospitality industry which have indefinitely shut, employees and employers in institutions of learning, especially private ones. These measures fall short of the expected stimulus packages expected of government such as

<https://www.theafricareport.com/12831/zambias-president-lungu-struggles-to-pay-civil-servants/>

⁶ Mwitwa E, 'Domestic Workers in COVID-19 Storm: Gender Focus' Zambia Daily Mail Limited (2020) <http://www.daily-mail.co.zm/domestic-workers-in-covid-19-storm>

⁷ https://www.zambiahc.org.uk/news_events/statement-by-the-hon-minister-of-finance-on-covid-19

wage subsidies to prevent massive layoffs and fee waiver in basic services such as water and electricity.

The government has further urged employers to send non-essential service workers on annual paid leave or work from home. The private sector is encouraged to emulate government in its responses to COVID-19 and let non-essential workers work from home.

The initial weakness in this step taken by government is the complete lack of guidelines in the identification of what constitutes essential and non-essential services offered by an employee. It would be expected that government would offer some kind of framework or factors to be considered in deciding whether an employee's service to an entity are to be regarded as essential or not. This becomes important because the phrase "essential service" seems to be employed differently in the current set up from its legal meaning as defined under the Industrial and Labour Relations Act⁸. In the circumstances, this decision to determine who and who is not an essential service worker has been left to employers. This directive lends itself to abuse as there is no yardstick to arrest arbitrariness and abuse of the directive.

Secondly, it is highly unreasonable for government to offer directives that are somewhat 'one size fits all' in the labour market. The Labour market is not homogenous in its outlook; there are big, financially and resilient entities that can negotiate their survival through difficulty times such as these. There are also small, delicate and budding enterprises whose survival is strictly measured by daily cash inflows. It is such enterprises or employers that may not afford to pay workers once the business is in abeyance. Consequently, the directive by government to send non-essential workers on paid leave is fallacious, as some employers cannot simply afford. These employers needed to be painstakingly identified with a view to tailoring a model of buffering their labour market shocks.

These expectations and responsibility thrown on the labour market are simply unrealistic and utopian; it smacks of an estranged regime; a regime that is completely aloof from the lived realities of its people. But further than that, it also demonstrates how prostrated an inefficiently managed government can be in providing a safe bridge at critical junctures such as this to its people.

Recognising that employers are left unaided in this rough terrain of COVID-19, the Minister of Labour now intends to issue a Statutory Instrument that will, by suspending some provisions of the Employment Code Act, allow employers to declare employees redundant without notice. Further, the same Statutory Instrument intends to do away with the need for an employer to pay a lump sum benefit as required by law. The question is: what is the government seeking to achieve through this intended statutory instrument? The clear picture seems to be that the government seeks to aid employers in declaring

⁸ Section 107 subsection 10 provides "For the purpose of this section, "essential service" means- (a) any service relating to the generation, supply or distribution of electricity; (b) any hospital or medical service; (c) any service relating to the supply and distribution of water; (d) any sewerage service; (e) any fire brigade; or (f) any service for the maintenance of safe and sound conditions in a mine of- (i) underground working and drainage; (ii) shafts and shaft installations; or (iii) machinery and plant; (g) such other service which the Minister may, in consultation with the Tripartite Consultative Labour Council, prescribe by statutory instrument as an essential service. (As amended by Act No. 13 of 1994 and Act No.30 of 1997)"

employees redundant by removing the protective mechanisms that shield employees from loss of employment. This is contrary to the genuine hopes and expectations of the labour market; the labour market hopes and expects government through social engagement and deliberate efforts to act decisively to avert job losses during this time. It would be shocking and irresponsible of any government to be seen to be removing barriers that insulate loss of employment through suspensions of rights and obligations of employers and employees during a crisis like this one.

A more problematic thought is how the Minister of Labour seeks to achieve the suspension of rights of employees without breaching individual contracts of employments that employees are serving under. Before addressing the potential breach that would arise from this proposed step by the minister, it is important to scrutinize the provision that, seemingly, empower the minister to suspend employees' rights under the Employment Code Act. Section 2 of the Employment Code Act, upon which the Minister seeks to rely, enacts:

(1) This Act does not apply to— (a) persons in the Defence Force, except locally engaged civilian employees; (b) members of the Zambia Police Service; (c) members of the Zambia Correctional Service; and (d) persons in the Zambia Security Intelligence Service.

(2) *The Minister may, after consultation with the Tripartite Consultative Labour Council, by statutory instrument, exempt any person or class of persons or any trade, industry or undertaking from any of the provisions of this Act.* (emphasis added)

This provision is about coverage; it is about who and who is not covered by this Act. It must be put on record that subsection 2 is a new creature that came with the new Employment Code Act that repealed and replaced the Employment Act, Chapter 268 of the Laws of Zambia. This provision did not appear in the repealed Act. The wisdom behind the introduction of this provision is highly suspicious. A comparative study of other countries in the region reveals an interesting picture. Malawi has no such provision. Kenya and Botswana have a similar provision, but it is carefully worded so as to eschew arbitrariness in its usage. Both Employment Acts of Botswana and Kenya vest powers of exemption in the minister, but such power is subject or is exercised by taking into account international conventions that these countries have entered into as well as other domestic obligations.⁹ Further, the exemption must demonstrate that employees in respect of whom the exemption has been made, special problems of a substantial nature would arise if the provisions since exempted were to apply to such class of workers. In the case of Zambia, however, there is simply a lumping of an 'almighty' omnibus provision couched so dangerously wide that a statutory instrument is capable of rendering nugatory all the

⁹ Section 3 (4) of Kenya's Employment Act provides "The Minister may, after consultation with the Board and after taking account of all relevant conventions and other international instruments ratified by Kenya, by order exclude from the application of all or part of this Act limited categories of employees in respect of whom special problems of a substantial nature arise."

Section 7 of the Employment Act of Botswana provides "The Minister may, by order published in the Gazette, declare that this Act or any provisions thereof shall not apply to any premises or to premises belonging to any class or description of premises specified in the order: Provided that the Minister shall, before making such an order- (i) consult the Labour Advisory Board; and (ii) take every reasonable step to ensure that the order contemplated does not conflict with any international agreement or other obligation to which Botswana or the Government is a party or by which Botswana or the Government is otherwise bound.

provisions of the principal Act. This provision is potentially dangerous, especially, if placed in inhumane hands, as the case appears to be today. The submission here is that this provision is unnecessary as it is too wide and seems to give the minister carte blanche power to nullify a principal law through a statutory instrument.

Secondly, a careful reading of the provision seems to suggest that a statutory instrument born out of this subsection cannot apply to all employees in a wholesale fashion. The minister can only exempt a person or class of persons or trade, industry or undertaking from any of the provisions of the Act on case by case basis. Such an exemption must be justified by having had regard to the nature of the services offered by such a person, class of persons, trade or industry from which a conclusion can be reached that the enjoyment of the rights under the Act is not compatible with the services offered by such a person, class of persons or trade as the case may be. In the premises, the minister cannot use this provision to suspend rights of all workers to notices and lump sum payments in times of redundancy. Such is not the purpose of this provision. There must be something peculiar; something unique about the class of person exempted from the enjoyment of the provisions of the Act. Under the present circumstances, there is no justification at all. The only motivation for the minister in coming up with the Statutory Instrument is to ease the redundancy declaration procedure so that employers are no longer encumbered by the protective clauses during the time of the pandemic.

Thirdly, the language of the provision does not seem to permit the suspension of rights of employees or indeed obligations of employers. The provision, instead, permits “exemption,” that is to say, to make certain provisions or parts of the Act inapplicable to a certain class of employees. The Minister seems to be labouring under the impression this provision can be used as a response in dealing with a crisis by suspending rights of employees. The true implication of suspension, as suggested by the minister, would entail that after the pandemic withers, the minister would issue another statutory instrument to lift the suspension of the rights. That is not the designed usage of the provision, and such a position is highly untenable at law as it makes the enjoyment of rights uncertain, unpredictable, and subject to the minister’s wishes. The golden thread here is that the Act does not allow the minister to suspend, but only exempt the application of the Act to a given class of persons. The two words, “suspension” and “exemption” carry different meanings and have different effects, and as such cannot be used interchangeably like synonyms.

Fourthly, be it exemption or suspension, both offend the principle of accrued rights under a contract of employment. Protective labour legislation and its provisions become part of the terms and conditions of employment binding and governing relationships between the employers and employees. Therefore, although, an employee’s entitlement to notice and lump sum payment on redundancy are statutory based, they form part of the personal terms and conditions of employment. The Employment Code Act has, consequently, conferred terms and conditions, amounting to accrued or acquired rights, which accrued rights are capable of surviving even the repeal of the Employment Code Act

itself according to the Supreme Court in the case of *Miyanda v the Attorney General*¹⁰. In reinforcing this point regarding the survival of accrued rights under a repealed Act, the Interpretation and General Provisions Act, provides to the effect that where a written law repeals in whole or in part any written law, the repeal shall not affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed¹¹. Further, the Supreme Court in reiterating and acknowledging the need to preserve the sanctity of contractual relations in employment relationships stated:

The law is not intended to trap the unwary or the unsuspecting by insisting that today the relations shall, without more, be governed and determined on the basis of a future law, or conversely, that the law that comes into effect today shall generally apply to relations of parties consummated in the previous year¹².

The inescapable key issue is that when employees executed their contracts of employment incorporating the statutory right to notice, and lump sum pay in the event of being declared redundant, the said statutory rights became an entrenched condition of the contract of service which cannot be altered by any change in the law.

The effect of the authorities cited above is that it is not possible for the Minister to suspend or exempt employees from being entitled to provisions of the Code because employees have accrued or acquired rights under this law which are incapable of being extinguished by suspension, exemption and amendment or indeed repeal of the principal law vesting such rights.

It is also important to note, regrettably, that the measures Zambia has crafted to address the labour market upheavals precipitated by COVID-19 depart radically from the International Labour Organisation recommendations. For instance, the Employment Policy Recommendation, 1964 (No. 122). This recommendation obliges governments to implement steps that enable recovery and promote employment and decent work through selective measures to stabilize economies and address employment problems, including fiscal and monetary stimulus measures aimed at stabilizing livelihoods and income as well as safeguarding business continuity¹³. Further, the Employment and Decent Work for Peace and Resilience Recommendation, 2017 (No. 205) emphasizes that crisis responses need to ensure respect for all human rights and the rule of law, including respect for fundamental principles and rights at work and for international labour standards. Against the backdrop of this guidance from the International Labour Organisation, the minister's proposed suspension of workers' rights demonstrates disdain, contempt and scorn for the rule of law and workers' rights.

¹⁰ (1985) ZR 185

¹¹ Section 14 (3) (c) & (e) of the Interpretation and General Provisions Act Chapter 2 of the Laws of Zambia

¹² *Jacob Nyoni v Attorney General* (Judgment N0.11 Of 2001) SCZ

¹³ Para. 8 and the Annex of the Employment Policy Recommendation, 1964 (No. 122) and Paras 1, 6 and 10 of the Employment Policy (Supplementary Provisions) Recommendation, 1984 (No. 169).

5. Conclusion

In the grand scheme of things, the Zambian government has not offered any effective response/solution to the labour market aimed at ameliorating the current debilitating conditions that employers and employees are grappling with in the uncharacteristically octane environment. There are no guidelines on what services constitutes essential and non-essential workers to ensure uniform behavior of employers in deciding who to send on leave or to continue working. There is no single stimulus package as guided by the International Labour Organisation targeted at the most hit sectors such as the hospitality industry and institutions of learning whose operations have grounded to a halt. The government, strangely, wishes to add more sorrows to employees by allowing employers to declare employees redundant without notice, and to further nullify the lump sum payments. None of the key principles sine qua non to the continuity and recovery of the labour market is manifest in the incoherent, ineffective and half-heated measures taken by the Zambian government.

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