THE LABOUR AMENDMENT BILL, 2021 HAS BEEN GAZETTED

A. INTRODUCTION

On the 29th of September 2021, the Minister of Information, Publicity and Broadcasting Services announced that Cabinet had approved a draft of the Labour Amendment Bill.

On Friday the 19th of November 2021, a 23-page ***Labour Amendment Bill, 2021*** was published with the Government Gazette, as House Bill H.B. 14, 2021.

The Bill shall be tabled in Parliament, debated in the National Assembly, and the Senate where it must also be approved by a majority of the Representatives and Senators, respectively. Thereafter, it shall be sent for Presidential Assent, after which it shall be Gazetted as an Act of Parliament before it comes into law. It may undergo some amendments through these processes.

Below are some of the key highlights of the Bill.

1. Violence and harassment at the workplace

1.1. Violence and harassment will be regulated at both the workplace and areas associated with the workplace such as; work-related trips, events and social activities; in employer-provided accommodation such as farm compounds; and when employees are commuting or travelling to and from work.

1.2. Such violence includes actions or behaviours that may result in physical, psychological, sexual, or economic harm, and includes gender-based violence and harassment.

1.3. There is a criminal sanction for perpetrators which goes up to 10 years imprisonment or a level 12 fine.

1.4. This provision seeks to place a greater onus on employers to stem gender-based violence and sexual harassment at and around workplaces,

which is reported to be very rampant. Employers must therefore craft policies or put in place measures to combat such as the Bill compels them to act against harassment.

2. Termination of an employment contract

2.1. The Bill seeks to outlaw termination of contracts on notice. The 2015 amendment permitted termination on notice for fixed term contracts in certain circumstances. In terms of this Bill, an employer will only be able to terminate a contract in the following circumstances:

a. Disciplinary action in terms of a code of conduct
b. By mutual agreement in writing
c. Upon the expiration of a fixed-term contract
d. Pursuant to retrenchment
e. In terms of section 14 (sick leave)
f. For a breach of contract, after which termination is in terms of a code or any manner agreed in the contract

3. Duration of a contract

3.1. Fixed term contracts will not be for less than 12 months, **except**

a. For casual/seasonal work
b. For a contract for the performance of a specific service

The agriculture sector may not have much trouble complying with this provision given that there is much scope in this sector for "casual/seasonal work or work for the performance of a specific task", than in other industries.

4. Retrenchment

Section 12C will undergo major changes. Amendments to this section span 5 pages and shall be re-named '*Retrenchment and Compensation for Loss of Employment*'. There will no longer be the requirement to pay "compensation

for loss of employment where one is terminated by mutual agreement or in terms of a code of conduct.

Restrictions will be introduced in regard to an employer's claimed incapacity to pay a 'minimum or enhanced' Retrenchment Package, which will 'include any action done at any time up to 12 months before the retrenchment.'.

5. Maternity leave

5.1. There will be no minimum service for an employee to be entitled to maternity leave on full pay. Even if she proceeds on maternity leave after, for example serving for only 2 months, such leave will be on full pay. This will be a departure from the current Act which requires an employee to have served for at least one year to qualify for paid maternity leave.

5.2. Furthermore, the limit of paid maternity leave to 3 periods with one employer will also be removed.

5.3. This provision seeks to comply with the provision in the Constitution which provides, without limitations that, "*women employees have a right to fully paid maternity leave for a period of at least three months*."

5.4. Employers may realise increased cost related to maternity leave.

6. Contracts for hourly work

6.1. Contracts for hourly work shall not be permitted where;

a. The employer does not require the employee not to work for another employer

b. The employee's wages in 2 consecutive months are less than provided in the collective bargaining agreement (CBA).

This will not impact on farmers given that section 13 (3) of the CBA for Agriculture already prohibits work on a ticket system.

However, where an employer intends to have an employee engaged on hourly contracts, he must allow or make arrangements for the employee to work for another employer.

7. Labour broking

7.1. This is now defined and regulated. In simple terms, a labour broker (employer A) engages employees to perform services for employer B.

7.2. The advantages realized by those currently practicing it is that they argue that such employees do not fall under the industry of employer B because the “real employer (employer A) does not fall under employer B’s industry. Resultantly employees working in a particular industry were being paid less than the CBA minimum under the pretext that their real employer (the labour broker/employer A) does not fall under that industry. Employers were therefore cutting on labour costs using this practice.

7.3. The draft Bill provides that such employees must be paid not less than what is paid in terms of the CBA of employer B’s industry.

7.4. The effect is that labour broking may not survive because there will be no incentive for it. A labour broker may not realize any profit because he can no longer underpay his employees to create his profit margin.

7.5. More so, both the labour broker/employer A and employer B shall be liable for damages jointly or severally in case of a claim of unfair labour practice. This may discourage bona fide employers from engaging labour brokers unless they are so sure about their reputation.

8. Paid education leave

Works councils are now required to deliberate and agree on paid education leave, among the other things they are currently required to deliberate on. The Act in its current form does not give room for paid education leave.

9. Registration of trade unions and employers’ organizations

The Registrar is compelled to issue a registration certificate within 60 days failure of which the Administrative Court can be requested to compel him/her to issue same.

This will result in the expediting of the registration process for trade unions and employers' organisations.

10. Duty for trade unions and employers' organizations to provide information to the Registrar

10.1. It will be a requirement for trade unions and employers' organisations to provide the Registrar with

a. Audited financial statements
b. Number of members as of 31 December of the preceding year, by the 31st of March
c. A response, within 30 days, regarding the above after the Registrar's request
d. A written statement of a new address after any change, within 30 days of such change.

10.2. The Registrar will also be empowered to suspend a trade union or employers' organization which fails to comply.

11. Employment Councils (NECs)

11.1. Seats shall be allocated according to size of membership of the parties (trade unions and employers' organisations)

11.2. Allocation of seats shall be reviewed every year

11.3. Where a dispute arises regarding allocation of NEC seats, this shall be referred to the Registrar, whose determination is subject to appeal at the Labour Court.

11.4. An employers' organisation or trade union whose membership is not enough to be allocated a seat may be admitted to NEC only as an observer.

12. Designated agents of NECs

12.1. The Registrar can withdraw their appointment after due inquiry into allegations of failure to exercise their mandate properly.

13. Binding nature of NEC CBAs

Every employer/employee shall be bound by such regardless of lack of his/her direct or indirect participation in negotiating such CBA. This means even if one does not belong to an employers' association which negotiates a CBA at NEC, he is still bound by that CBA.

14. Settlement of Disputes

The old system of conciliation, arbitration shall be brought back, and the procedure of Labour Court confirmations shall cease to apply.

15. Codes of conduct

These shall be reviewed after every five years, failure of which the code shall be deemed deregistered.

All appeals arising from the proceedings under a code of conduct shall be directed to labour officers or designated agents of NECs, as opposed to the Labour Court. This may result in the faster disposal of appeals.

16. Strikes

There will be criminal sanctions to those guilty of recommending or inciting unlawful strikes, which is a marked departure from the current Labour Act.

B. THE QUESTIONS AND ANSWERS

Before the Bill was gazetted, the above highlights were shared with some farmers. Below, we reproduce their questions and comments, as well as our responses to those questions.

1. **Question on the legal effect of the Bill**

   'Is this just a draft and not yet law?'

   Answer

   Yes, this is still a Bill. The Minister of Public Service Labour and Social Services can now proceed to table it in Parliament where it will go through;

   a. debate in the National Assembly

   b. public hearings by the Parliamentary Portfolio Committee on Labour

   c. debate in the Senate

   d. scrutiny by the President before signing it into law (presidential assent)

   It is possible that some changes may result as it goes through these processes.

2. **Comment on the definition of 'violence and harassment'.**

   "The definition of *violence and harassment* to include 'economic harm' is vague and may be abused leading to allegations on account of not receiving things like incentives, bonus etc."

   Answer

   To quote the definition in the draft Bill verbatim,

   > "violence and harassment" in the context of section 6(3) and section 8 refers to **a range of unacceptable behaviours and practices, or threats** thereof, whether a single occurrence or repeated**, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm**, and includes gender-based violence and harassment; (emphasis is mine)

   So, this definition is in the context of workplace violence and harassment. A behaviour, practice, or threat which, among other things, result in economic harm, may be deemed violence or harassment. It is highly unlikely that an employer who is paying what is provided for as a minimum condition in terms of the law can be deemed to be causing violence if he fails to provide other

incentives and bonuses which are after all, discretionary. The context of this definition implies that this refers to instances whereby, for an example, an employer without justifiable cause, withholds benefits due to an employee thereby causing the employee to suffer economic harm. Further to that, the practice, behaviour or threat by the employer must be unacceptable. There is no room for this definition of violence and harassment to be interpreted too broadly to make employers susceptible to allegations of violence whenever an employee claims economic difficulties.

3. **Question regarding termination of contracts on notice**
"What contracts are they referring to?"

Answer

All kinds of contracts. The Bill seeks to restrict termination on notice in general. You may recall that after the famous Supreme Court judgment in *Nyamande & Another v ZUVA Petroleum (Pvt) Ltd* SC 43/15 sometime in 2015, many employers immediately terminated the contracts of several employees on notice. At that time, government had to respond by promulgating Labour Amendment Act, 2015 which categorically and in explicit terms outlawed the termination of an employment contract on notice except where one is on a contract of fixed duration.

In a further restriction, this Bill now seeks to outlaw termination on notice even for contracts of fixed duration. Termination on notice will only be permitted in the following circumstances;

(i) Disciplinary action in terms of a code of conduct
(ii) By mutual agreement in writing
(iii) Upon the expiration of a fixed-term contract
(iv) Pursuant to retrenchment
(v) In terms of section 14 (sick leave)

(vi) For a breach of contract, after which termination is in terms of a code or any manner agreed in the contract

So once an employer enters a contract of employment with an employee, there will be little room to terminate such contract. Such termination will only be permissible in the above circumstances.

4. **Comment on limitation on the duration of contracts**

   "This is a serious problem. We need fixed term contracts to be totally void of time."

   Answer

   Most employers have expressed the same concerns. The provision generally undermines the freedom to contract which investors prefer. For example, someone starting a business will need time to assess whether certain jobs are suitable or relevant. Such employer may realise after just 2 months, that certain posts are not necessary or that the demand for his products cannot sustain the jobs. He must have the latitude to terminate such contracts after those 2 months. However, this Bill will force that employer to hold on with the employee for 12 months! The only alternative available to him will be retrenchment, which comes with various other terminal benefits and time-consuming procedures.

5. **Comment on maternity leave**

   "It is harsh. An employee who has not even completed probation can get maternity leave. We should then have a clause that allows us to get a worker to sign that they don't want children and if they want children, they void maternity leave."

   Answer

This provision indeed makes employing women of child-bearing age expensive, and unattractive. Child- bearing is indeed a great act of national service, but the cost of such cannot be borne by employers alone.

On the other hand, however, the problem may be on the manner in which the Constitution vests the right to maternity leave. Section 65 (7) of the Constitution provides;

> Women employees have a right to fully paid maternity leave for a period of at least three months.

This constitutional provision guarantees the right to maternity leave without exceptions. The right is framed in such a manner that it is not limited. The government has, since 2013 when the Constitution was adopted through a referendum, been under pressure to "align" various legislation with the Constitution. This clause is simply a manifestation of that alignment process. You may be aware that there is currently a matter pending at the Constitutional Court where the constitutionality of the current provisions which limit the right to maternity leave is being challenged.

In a post-cabinet briefing on the 29th of September 2021, the Minister of Information, Publicity and Broadcasting Services, Monica Mutsvangwa, remarked;

> "Clause 11 seeks to amend section 18 to align the Labour Act to Section 65(7) of the Constitution to ensure that women employees have the right to fully paid maternity leave for a period of three months by removing qualifying periods, prescribed intervals for maternity and a number of times for enjoying the right to maternity leave under one employer."

In my view, and as alluded to above, the solution probably lies in lobbying government to assist meeting the cost of the unlimited maternity leave benefit.

6. **Comment on paid education leave**

"I don't understand. Are they implying a worker gets paid leave to go back to school, then it needs the same clause as point 5 (maternity leave)."

Answer

This also is an additional cost to employment. However, there are instances where an employee's further studies may greatly benefit the employer where that employee returns after the completion of his or her studies. In such cases, education leave increases the loyalty of the employee to the organisation as he or she is unlikely to leave for "greener pastures" immediately after the completion of his or her studies.

7. **Comment on the provision regulating NEC allocation of seats and on the criminalisation of recommending or inciting illegal strikes**

   "Point 11 and 16 look good for us."

Answer

The issue of representation at NEC is a hot issue in most NECs and the NEC for Agriculture is not an exception. This provision will surely address the current irregular seat allocation regime whereby certain employers associations or trade unions are entitled to a proportion of seats that do not represent the size of their membership.

8. **Comment on the dispute settlement process**

   "Point 14 needs more clarification"

Answer

After the *Zuva* judgment, as already alluded to above, government promulgated Labour Amendment Act, 2015. One of the changes that resulted from this amendment was with regards to the dispute settlement process.

<u>Before Labour Amendment Act, 2015</u>

Before this amendment, the procedure was that a labour officer/designated agent who is seized with a labour dispute would attempt to resolve the dispute through conciliation. If parties fail to reach a settlement, he would then appoint an arbitrator to hear the matter. The arbitrator would then come up with an award to dispose of the dispute. Anyone aggrieved with the arbitrator's award would appeal to the Labour Court. This process was faster and normally resulted in the expeditious resolution of disputes.

Labour Amendment Act, 2015

Labour Amendment Act, 2015 which is the current law, removed the role of the arbitrator. It provides that once a labour officer/designated agent fails to make the parties reach a settlement at conciliation, he must write a ruling called a "draft ruling". The labour officer/designated agent must then make an application straight to the Labour Court to have that ruling confirmed with or without amendments. The Labour Court will invite the labour officer/designated agent concerned, together with both parties to the dispute and enquire into the circumstances of the case *vis-à-vis* the ruling. After that, the Labour Court judge would then decide whether to confirm the labour officer's draft ruling, after which the ruling becomes final, subject to appeal at the Supreme Court. This process is very time-consuming, too technical, legalistic, and expensive. It has also increased the workload of Labour Court judges as every small dispute potentially ends up before a judge. These delays are against the spirit of the framework of Alternative Dispute Resolution (ADR).

The proposed Bill

The Bill seeks to take us back to where we were before Labour Amendment Act, 2015 by doing away with the Labour Court confirmations procedure. This will once again make labour dispute settlement cheaper, faster, and less complicated for the ordinary employer and employee.

C. CONCLUSION

Since the draft Bill went into circulation a few weeks ago, CFU has so far attended two interface meetings with the Employers Confederation of Zimbabwe (EMCOZ), which is the major employers grouping representing employer interests under the auspices of the Tripartite Negotiating Forum (TNF). In these meetings, employers have expressed the above concerns and compiled a position paper. Employers, through EMCOZ, pledged to continue engaging government and lawmakers regarding these issues.