COVID-19,

COST CONTAINMENT

AND

LABOUR LAWS IN MALAWI

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ABSTRACT

The outbreak of COVID-19 has presented unprecedented challenges in as far as the application of labour laws in Malawi is concerned. The laws do not provide for frustration or force majeure provisions that would allow employers to terminate the employment contract, without any pay. Currently, every employer is frantically devising cost containment measures that will see their businesses sail through the pandemic. However, most of the measures seem to be outside the ambit of the law. Such measures include advance annual leave, unpaid leave, furlough, salary cuts and salary deferment. This paper attempts to contextualize the law and assess the extent to which such cost containment measures can be implemented within the existing labour laws. Insolvency, although not necessarily a cost containment measure is also considered as a solution of last resort.

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I. INTRODUCTION

On 12 January 2020, the World Health Organisation (WHO) confirmed that a novel coronavirus was the cause of a respiratory illness in a cluster of people in Wuhan City, Hubei Province, China, which was reported to the WHO on 31 December 2019.¹ The virus has since spread widely across the globe. In Malawi, the first case of COVID-19 was reported on 2 April 2020 and the number has risen in excess of 100 infections.² The outbreak has presented unparalleled challenges in as far as the application of labour laws in Malawi is concerned.

For a start, labour laws in Malawi, unlike the general law of contract, do not provide for a force majeure situation except to a limited extent in relation to hours of work.³ Force majeure literally means a ‘superior force’ that prevents the performance of a contractual obligation due to causes which are outside the control of the parties and could not be avoided by exercise of due care.⁴ It is rare for a force majeure clause to be drafted into a contract of employment but not impossible.⁵

On the other hand, frustration is a common law doctrine where a contract is treated as discharged by operation of law when an event has occurred which renders continued performance impossible, illegal or radically different to that contemplated by the parties when they entered into the contract.⁶

The outbreak of COVID-19 would most likely constitute frustration under the general law of contract.⁷ However, this is not the case with employment contracts under existing labour laws. In fact, considering that employees have a property right in their jobs,⁸ the courts in Malawi, are most unlikely to apply the doctrine of frustration in labour matters.⁹

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¹ See https://covid19.who.int/  
² Ibid.  
³ The Minister of Labour may grant temporary exemption from provisions on hours of work in the case of an accident, force majeure or in the event of abnormal pressure of work or in order to prevent loss of perishable goods - section 38(1) of the Employment Act (2000) (Cap 55:02 of the Laws of Malawi).  
⁵ Force majeure clauses are most common in construction contracts covering events such as acts of God, war, insurrection or riots; fires; pandemics; governmental actions; strikes or labour disputes or any other cause beyond the parties’ control.  
⁶ The doctrine of frustration was first established in Taylor v Caldwell (1863) 3 B&S 826, where a music hall had been destroyed by fire before a performance, the court held that the owner of the hall was not liable to damages. A term must be implied into the contract that the parties would be excused if performance became impossible, without the fault of the contractor, through the destruction of the subject matter.  
⁷ However, frustration is a fact-specific determination that will be made on a case-by-case basis and the burden of proof will rest with the claimant. Mere hardship or inconvenience to one of the parties is not sufficient to justify discharge – see Tsakiroglou & Co Ltd v Noble Thori GmbH [1961] 2 All ER 179.  
⁹ Even in the United Kingdom, the doctrine of frustration in relation to employment contracts is of decreasing relevance – see Sarah Bowen, COVID-19: Frustration & Contracts of Employment (2020).
Accepting the novelty of the situation, the Ministry of Labour, has aptly advised that the COVID-19 threat presents an opportunity to rethink the manner in which business is done and explore innovative ways to enhance resilience.¹

This article, therefore analyses the extent to which an employer can legally cushion themselves through various cost containment measures, within the law. Much as insolvency is not a cost containment measure, it will be considered as a measure of last resort.

II. ADVANCE ANNUAL LEAVE

Every employee is entitled to annual leave with pay. An employee who works six days a week is entitled to a minimum of eighteen working days as annual leave while an employee who works five days a week is entitled to a minimum of fifteen working days.² The leave must be taken within six months of the entitlement to the leave falling due. Nevertheless, the leave may be deferred and accumulated by mutual agreement.³

The leave must be granted by the employer, in consultation with the employee, as from a date determined by the employer. This should not be later than six months after the end of the year in respect of which the leave entitlement arose.⁴ Conditions of service may lawfully provide for forfeiture of leave days not taken at the expiry of the said six months, thus reducing provisions.

The law above strictly indicates that annual leave must be taken after it has accrued. However, there is nothing in the law that prohibits the employer and the employee from agreeing that the employee should go on leave that has not yet accrued or which accrues in the future. This means that during the COVID-19 outbreak, it is permissible for the employer, in consultation with the employee, to ask the employee to utilise leave days which have not yet accrued or accrue in future.

This must, nevertheless, be implemented reasonably. For instance, asking employees to apply for leave days for the years 2021 and 2022, and so forth, in the current year of 2020, would arguably constitute an unfair labour practice.⁵ Unfair in the sense that the employee will be deprived of statutory rest to re-energise in the subsequent years.

III. WORKING FROM HOME

The employer may allow an employee to work from home as long as the employee is paid the same remuneration as when he or she works from their duty station. Depending on the type of employment, this may turn out to be a cost containment measure since certain operational costs may be saved.⁶ Individual organisations need to draft ‘A Work From Home Policy’ that clearly defines the expectations and responsibilities for employees who work from home. It may also

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² Section 44(1)(a) and (b) of the Employment Act.
³ Section 44(1)(b) of the Employment Act.
⁴ Section 45(a) of the Employment Act.
⁵ A breach of section 31(1) of the Constitution of Malawi (1994).
⁶ Such may include staff transport, electricity, water, internet charges, toiletries, teas et cetera.
define who is eligible to work from home, the process for requesting any work from home privileges, as well as the approval process.

IV. UNPAID LEAVE AND FURLOUGH

The Employment Act does not provide for unpaid leave. That said, more often than not, conditions of service for a particular organisation may lawfully provide for unpaid leave. An employee can apply for it to attend to some personal matters which may include studies, where study leave is not provided for or where the employee has exhausted his or her study or annual leave entitlement. This has been entrenched in human resources practice, such that an unpaid leave initiated by the employer is considered a form of unfair labour practice.¹

An unpaid leave initiated by an employer operates similar to a furlough. A furlough is the placement of an employee in a temporary non-duty and non-pay status for a stated period. This is due to the fact that the employer cannot afford to pay the employee’s wages during that period. A furlough is neither a redundancy nor a termination of employment and so the chain of continuous employment is not broken. Since a furlough is not provided for in the Employment Act, each organisation must develop its own ‘Furlough Policy’.

The area of concern is whether with the looming COVID-19, an employer can unilaterally decide that an employee proceeds on unpaid leave or a furlough. The current position of the law is that the employer cannot do so. However, it is argued that if the unpaid leave and the furlough are implemented with the consent of the employee, they will be lawful; the employee will have saved his or her job whilst allowing the employer to recover from the harsh effects of COVID-19.

V. SICK LEAVE AND QUARANTINE

An employee is entitled to sick leave after completing a year of continuous service. The minimum period of leave is four weeks with full pay and eight weeks sick leave on half pay during each year.² During sick leave, an employee must be paid the normal rate of wages.³ An employer is not bound to grant the sick leave unless the employee produces a certificate from a registered medical practitioner stating the nature of the employee's incapacity.⁴ In addition, it is submitted that some evidence from a traditional doctor should also be acceptable.

Where an employee is quarantined for COVID-19, the same must be treated as sick leave. If the employee is not due for sick leave, for instance, he or she has not completed a year of continuous service or indeed he or she has already exhausted their entitlement, they should be allowed to use their annual leave instead or ‘advance sick leave’.

¹ A breach of section 31(1) of the Constitution of Malawi (1994).
² Section 46(1) of the Employment Act.
³ Section 46(2) ibid.
⁴ Section 46(3) ibid.
In its guidelines, the Ministry of Labour encourages employers to introduce pandemic leave,¹ with pay, in addition to the normal sick leave. However, this would end up exposing the employer to further costs and so it is submitted that pandemic leave is unnecessary.

Where all that fails, the employer must initiate a termination based on incapacity arising from the illness, backed by a medical report. Contractually, the contract of employment will have been frustrated.²

VI. SALARY CUT

The Employment Act provides that no employer should require or permit a deduction from the employee’s wages for the purpose of obtaining or retaining employment.³ The employer is also prohibited from taking some action that results into withdrawal of benefits or any remuneration.

One could argue that the above provisions have the effect of prohibiting salary cuts. However, it is submitted that, like all contracts,⁴ the employer and the employee may, by agreement, review the provisions of the contract of employment resulting in a reduction in the salary or other benefits. In the renegotiating process, employers must adequately consult with the affected employees or and their trade union and must not be seen to have coerced the employees into agreeing to the new terms.⁵ Any agreement amending the employee’s remuneration must preferably be in writing and should explain the circumstances that necessitate the reduction to the employee’s wages.⁶ Where the agreement is imposed, the employee may decide to leave immediately and successfully claim that he or she has been constructively dismissed.⁷

VII. SALARY DEFERMENT

The Employment Act⁸ provides that the wages payable to an employee must be paid in accordance with the terms of the employment contract. However, the wages must be paid not less often than once during the period by which the wages are fixed. For example, where the wages are fixed on a monthly basis then the wages must be paid once a month.

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¹ Pandemic Leave is leave granted to an employee who is unable to attend to work or is unable to perform work under flexible working arrangements because he or she has an actual viral infection and has exhausted their sick leave or is required to care for immediate family or household members who have an actual or suspected viral infection and have exhausted their sick leave - Ministry of Labour, Skills and Innovation, April 2020, Workplace Covid-19 Guidelines, p. 7.
³ Section 52(1)(c) and (d).
⁴ The Supreme Court has previously held that contracts of employment in Malawi are also governed by the general principles of the law of contract – see Council for the University of Malawi v Urban Mkandawire Civil Appeal No. 569 of 2000.
⁵ Mbwana v Blantyre Sports Club Civil Cause No. 1430 of 2009.
⁶ Ibid.
⁷ Section 60 of the Employment Act provides that an employee is entitled to terminate the contract of employment without notice or with less notice than that to which the employer is entitled where the employer's conduct has made it unreasonable to expect the employee to continue the employment relationship.
⁸ Section 50(1).
Salary deferment entails that instead of paying the whole salary at once, as provided for in the law, the employer pays part of the salary on the due date and the other part later. It is submitted that this is a cost containment measure as it would assist with management of cash flow. However, to ensure the legality of salary deferment, it must be freely consented to by the affected employee.

VIII. REDUNDANCY

Where the above cost containment measures have failed, the contract of employment may have to come to an end based on operational requirements.\(^1\) In the COVID-19 era, this may as well be viewed as *force majeure* or frustration of contract save that certain statutory payments must be made.

However, temporary or partial suspension of business due to the COVID-19 outbreak is likely insufficient to constitute a redundancy. This will have to be measured on a case by case basis depending on nature of the business. For instance, COVID-19 has had an immediate and devastating impact on learning institutions and the tourism sector as compared to financial institutions, as an example.

There is conflicting case law whether employees should be consulted about their redundancy,\(^2\) however, it is most advisable to do so.\(^3\) That said, the employer, already adversely affected by COVID-19, may be concerned about exit costs. These include, costs in relation to accrued leave days, notice pay, repatriation and severance allowance. These exit costs coupled with other operational costs may lead to insolvency, discussed below.

IX. INSOLVENCY

Insolvency is not a cost containment measure, however, it will be considered here as a measure of last resort. Insolvency can be defined broadly as the inability to meet one’s debts either because of a lack of available cash at the relevant time or, more profoundly, because total liabilities exceed the assets which can be made available to meet them.\(^4\)

In terms of the Employment Act, the insolvency or winding-up of the employer’s business causes the contract of employment of any employee to terminate automatically by operation of the law.\(^5\) However, the termination happens one month from the date of the insolvency or winding-up.\(^6\) This ensures that employees are given a month’s notice or payment in lieu thereof.

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\(^1\) Section 57(1) of the Employment Act.

\(^2\) In *FMB v Mkaka* Supreme Court, Civil Appeal No. 19 of 2017 it was held by a majority of 2:1 that consultation was not a requirement of the law, however it could be contractual. This case overruled *Malawi Telecommunication Limited v Makande* 2008 MLLR 35 which earlier held that there was a legal requirement for consultation.

\(^3\) In line with international requirements – International Labour Organisation - Convention 158. It is also argued that consultation is a legal requirement in terms of the constitutional right to fair labour practices – section 31 of the Constitution of Malawi (which is Chikopa J.’s dissenting judgement in the *Mkaka Case* - above).


\(^5\) Section 34(1).

\(^6\) Unless the employee is dismissed on other grounds under section 57 of the Employment Act.
to alleviate the subsequent economic hardship. The one-month’s notice overrides any contractual notice that an employee may have been entitled to under a contract of employment.¹

In any event, the above provisions do not apply where the business continues to operate or has been transferred as a going concern; in that event, the existing contracts of employment will subsist.² This is an important statutory exception to the general common law rule³ which used to provide that the sale of the business to another company terminated the contract of employment, thereby relieving the new owners from liability over former employees’ claims.⁴

The law recognises the principle that a worker’s remuneration is sacrosanct and can be seriously threatened by the insolvency of the employer, a situation in which the wage earner risks losing not only his job but also part of the wages due to him or her. Therefore, in terms of priority, once a business is declared insolvent,⁵ the claim of an employee and other payments to which he or she is entitled under the Employment Act⁶ or any contract have priority over all other creditors, including the State and the social security system, for stated amounts.⁷

X. CONCLUSION

COVID-19 has presented new legal challenges especially in the application of labour laws. The laws do not provide for frustration or force majeure provisions that would allow employers to terminate the contract of employment, without any pay. Labour laws in Malawi permit some limited cost containment measures. These include advance annual leave, working from home, salary cuts and deferment, unpaid leave and furlough, all of which must be mutually agreed by the parties, failing which, the employee can successfully claim compensation for unfair labour practice. Another option is redundancy which brings the contract of employment to an end based on operational requirements. Much as insolvency is not a cost containment measure, it has been discussed as a measure of last resort, to salvage what is left, for the benefit of the employer, employee and the general body of creditors.

The most important thing to take home is to appreciate that as long as a particular, reasonable course of action is decided upon by the employer in order to cut on costs, it should be backed by an unequivocal agreement. Employers must engage employees soberly so that the parties should

¹ Chata Chata v Import and Export Malawi Ltd (In liquidation) IRC Matter No. 44 of 2004.
² Section 34(2) of the Employment Act.
⁵ In Nyirenda & Others v Benard Rop (Receiver and Manager of Charged Property) and Simama General Dealers Limited Supreme Court, Civil Appeal No. 51 of 2015, the Supreme Court held that since the employer had not been declared insolvent, the employees could not claim priority over secured creditors. Similarly, the High Court (Com. Div.), In Re Citizen Insurance Commercial Case No. 55 of 2011, dismissed an employees’ claim for priority before the employer had been declared insolvent.
⁶ Section 34(3)(d).
⁷ Section 34(3) of the Employment Act and section 297(b) of the Insolvency Act (Cap 11:01 of the Laws of Malawi). The priority list is in tandem with the requirements of the International Labour Organisation - Protection of Workers’ Claims (Employer’s Insolvency) Convention 1992 (No. 173) even though Malawi is yet to ratify it.
navigate safely the situation in which we find ourselves which is without the fault of neither the employer nor the employee.

To crown it all, lawmakers must review applicable labour laws in a crisis of this magnitude. There is urgent need to further balance the needs of both the employer and the employee. Even though the employer has a deeper pocket, the requirement to limit his liability, in a pandemic, cannot be overemphasized. That would go a long way in protecting jobs, hence success of the economy as a whole, in this difficult time.