

# CYMBELL ADVOCATES

## FOREWORD

**By: Godwin M. Matsiko, Managing Partner**

It remains a challenging conversation for enterprises and individuals alike to adapt and navigate through these times. While lockdowns are easing up in some places, it will take a while and every ounce of diligence for businesses and lives to return to, or embrace the new normal. In this issue, we address some key conversations that most people are grappling with. We dive deep into employment issues and the impact that the pandemic might have on relations and contracts. We also invite you to digest the pieces on domestic relations, business ethics and cyber crime.

One of the key conversations happening at the moment is whether pension schemes and social security funds are prepared or willing to support their members who may have lost jobs, or are in special need of financial assistance due to pay cuts. In Uganda, we are representing petitioners in Agency for Transformation & another v NSSF at the Constitutional Court for an opinion on the suitability of the NSSF Act to cater to members' financial needs in times of crisis. Should you require specific updates on the case, do reach out to us.

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## HOW DO BUSINESS ETHICS AFFECT A COMPANY'S BOTTOM LINE?

By Alebar Kanyonza, Finance and Administration.

Most companies have human resource manuals and codes of conduct and in some cases, explicit guides on ethical conduct. Business ethics is a measure of business behavior based on standards of right and wrong rather than relying entirely on principles of particular areas of business. Basically, acting justly and honestly in the view of the society and the organization's stakeholders.

Addressing an ethical dilemma requires you to understand what the issue is, look at the issue from the perspective of those outside the organization, understand how you got there in the first place, to whom the organization's loyalties lie and the likely results of possible decisions.

### There are different ways an organization can excel ethically

Organizations tend to ignore ethical values however if such values are considered and incorporated in the workplace, they do so much in creating a harmonious and productive work environment. Values such as empathy, trust, mutual respect, transparency and accountable leadership go a long way in achieving ethical excellence. Employees need to receive candid feedback and positive criticism in regards to their performance, behavior/conduct and how they relate with colleagues and stakeholders, and so do the employers. The right communication lines in a workplace should always be open.

Ethical values identified by the organization should correspond to behaviors, and should be embedded in decision making. Identify scenarios that could occur within the organization that may have ethical implications, and moot or discuss a proposed approach to address the situation with team members, aligned with the organization's values. Organizations known for great integrity have leaders that put the needs of their employees and customers before their own. Such organizations practice responsible corporate governance in this regard by among others constituting an ethics committee within its management.

Having an ethics manual or code to which every member agrees to and signs, is an added tool to ensure that common ethical standards are practiced across the organization. Business ethics is usually tied to corporate social responsibility. It is vital for an organization to do something good outside as much as they do internally.

Provision of quality and affordable products or services to your customers, adherence to the necessary guidelines by authorities and generally being a good corporate citizen are very much part of business ethics.

### How does practicing business ethics affect the bottom line?

Good business ethics may require some financial sacrifices, or forfeiting certain business opportunities that may not align with the values of the organization. This may be seen as detrimental in the short term. However, the profitability of an organization and its sustainability should be viewed in the long term as well.

Organizations with high ethical standards often achieve huge financial benefits and are highly valued. They gain a stronger reputation in the market, higher employee retention and general goodwill with authorities, competitors and the industry at large.

On the other hand, a reputation for unethical dealings affects an organization's chances to obtain new customers or retain existing ones. A customer's satisfaction determines whether they will easily refer clients and invariably improve the organization's Net Promoter Score (NPS).

The best talent wants to be part of an organization whose management team is transparent or truthful. An ethical business environment retains great and productive team players.

Practicing business ethics helps the organization to avoid legal and regulatory complications. Failure to fully comply with authorities by breaching environmental regulations, labor laws or using substandard materials for their products present risk of penalties like legal fees and fines or sanctions by the government. The negative publicity that crops out of this can cause damage to the organization's reputation.

Business leaders must always remember that it is important to do the right thing even when it may not be the most profitable route. A strong foundation of trust is built when an organization consistently does the right thing rather than only the profitable thing. A culture of proper business in an organization makes it more credible and sustainable in the market.



## ARE “IRRECONCILABLE DIFFERENCES” ENOUGH TO END A MARRIAGE?

By Rita Auma, Legal Clerks.

Nobody gets married with the intention for it to end. In Fact we look forward to the beginning of this union. The start of forever. We are excited as we walk down the aisle and easily repeat after the priest as we say our vows.

“I, \_\_\_\_\_, take you, \_\_\_\_\_, to be my wedded wife/husband, and I do promise and covenant, before God and these witnesses, to be your loving and faithful husband/wife, in plenty and want, in joy and in sorrow, in sickness and in health, as long as we both shall live.

Just in case we don't take the religious route, we hold customary weddings (Kwanjula/Kuhingira) or for us the up beat millennials, we use the civil marriage option as people witness this union. We stand tall as we bravely register them. I mean there's a need to put it on paper that our love will stand the test of time.

We cross our fingers, take all the good vibes and blessings that our family and friends send us and we begin our journey to eternity since the only thing that will ever come between us is death. We choose to fight for each other despite what our economy dictates. God forbid if poverty comes knocking. Happiness is our holy grail until life actually happens.

I wish this was the course most marriages took but unfortunately there is a rise of divorce cases in Uganda. The courts of law are the only institutions that annul or end a marriage. So until it's dissolved, the two people remain married.

The Divorce Act provides a number of grounds one can base on to bring a petition of divorce before the court which include abandonment, adultery and cruelty. The standard of proof for these grounds varies according to the gravity of the accusation. For the allegation of adultery, direct evidence of adultery should be available, and for the allegation of desertion, the desertion/abandon should have been in place for a period of two years.

These were recently revisited in the case of *Rebecca Naggide vs Charles Steven Lwasa C.A.No.160 of 2018* (delivered on 23rd January 2020), where the Court of Appeal made it clear that the petitioner had to prove the grounds of divorce laid out in the Divorce Act such as adultery or cruelty. The court noted as follows “... Before a grant of a decree nisi, the court must be satisfied that the petitioner's grounds as presented have been proved...this issue as to whether or not the respondent committed adultery therefore was up for trial with the appellant being obliged to present evidence to prove so, on a balance of probabilities...until the Divorce Act is amended or a new law promulgated which sets up “irreconcilable differences” as a ground for divorce. It is not the law for this jurisdiction however attractive it may be.

Its true most jurisdictions have amended their laws to encompass the “No Fault Marriage” due to irreconcilable differences. Which basically means; Your spouse and you have such strong fundamental differences that staying married is impossible. However Uganda hasn't recognised this as a ground yet or even amended the law to that effect.

The law in Uganda has not yet recognised “irreconcilable differences” as a ground for divorce. Where such ground exists, courts will be inclined to look for the legally provided for grounds before dissolving the union.

### Our family law practice areas:

- ◆ **Drafting, presenting and defending divorce petitions**
- ◆ **Drafting wills and letters of administration**
- ◆ **Applications for custody & maintenance**
- ◆ **Estate management**
- ◆ **Adoptions**

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## HOW EMPLOYERS CAN NAVIGATE THE CHALLENGES POSED BY COVID-19 ON EMPLOYMENT CONTRACTS

By Wanda Samuel, Corporate and Commercial

In March 2020, the World Health Organisation declared Covid-19 a world pandemic and thus a threat to humanity. The pandemic has greatly affected operations of organisations across the globe and thus financially crippling many organisations and businesses. Companies like Nation Media Group, Vision Group, Rwandair among others have taken measures such as informing employees of pay cuts while companies like ENHAS have laid off some staff due to financial challenges from slowing down business operations, and others such as Verma Limited have completely suspended payment of salaries for all employees until the situation normalises. These and many other decisions will have legal implications and may come with certain obligations for the employer in execution. Employers therefore need to keep in mind their contractual and legal obligations with regard to their employees during the and after the pandemic, in order to avoid a swarm of employment/labour related litigation.

### *Effect of the pandemic on employment contracts*

Some contractual aspects such as wages and availability of work have been greatly affected. The circumstances under which an employment contract may be terminated or have its terms revised, are specified in the Employment Act, 2006. They are also usually provided for employment contracts. Unless varied or terminated under such circumstances, the employment contract is valid and enforceable against either party.

Employers are encouraged to negotiate with staff to take salary cuts for purposes of continuity of the business. These negotiations should be specific that they are for a limited period of time and; as and when the situation normalises the original terms in the employment contracts shall be restored.

It remains the employer's obligation to provide work. For work that can be executed remotely, employers should encourage employees to stay home and work from home. This will not only reduce the risks associated with contracting Covid-19 but also reduce the overhead costs of having all staff at the workplace, and also keep the staff busy and productive in this period.

Typically employees stagger their annual leave across the calendar year. The Act however permits for the employer and employee to agree on how leave shall be taken. Therefore, employers are equally advised to ask the employees to take off their annual leave days during the lockdown so that when business begins to pick up, it will be all hands on deck.

Despite the best efforts, an employer may be left with no option but restructure its personnel resource. Termination should be handled carefully and in a way that complies with the law in aspects such as proper notice requirements. a

Collective termination is also possible for reasons such as restructuring, technology or economic challenges. However, if the number of employees who are collectively being terminated are more than ten, then the employer must to notify the commissioner responsible for labour giving reasons for the termination, the number of workers, their age, sex, occupation, wages, duration of employment and the exact date of termination. The employer is further expected to provide a report detailing the terminal benefits and plan of payments of those benefits to the affected employees.

The employer can also opt not to renew contracts which are expiring during this period of the lock down as the employer has the prerogative to renew employment contracts or not to. It is further advisable that while taking all the measures during this period, employers should not act arbitrarily but rather humanely and fairly to the employees.

However, before Organisations which are cash strapped think of downsizing on their staff, they should also look at available offers from their Bankers for purposes of supporting their investments and working capital requirements. For Example, the Managing Director of Bank of Africa Arthur Isiko, while talking to the CEO on the Banks response to covid 19 advised clients in the production of Personal Protective Equipment, Food, Clothing, Health facilities and a host of other essential service providers to approach the institution for credit assistance and this same measure has been aired by several banking institutions.

Lastly, it is imperative for employers to provide a safe working environment. This therefore means that employers should provide basic handwashing facilities in prominent places around the workplaces, provide masks and also ensure that social distancing is maintained at the workplaces.

The contractual and legal obligations of employers are not automatically suspended due to the pandemic. Employers are expected to put in place measures to ensure continuity of business, but also comply with employment terms. Where such is not possible, the proper procedures should be followed in putting in place measures such as salary cuts or laying off as advised by the Hon Minister Mwesigwa Rukutana statement on March 20, 2020 indicating that should the inevitable of laying off staff be the only remaining option, the cost cutting measures regarding employees should be carried out in accordance with the law, collective bargaining agreements and employment contracts.

## **PROBATIONARY CONTRACTS: WHAT YOU NEED TO KNOW**

**By Herbert Arinda, Dispute Resolution**

### **What is a probationary contract?**

A **probationary contract** means a contract of employment that runs for not more than 6 months duration and ordinarily meant to give certainty of the person's suitability for the role offered by the employer.

### **Probationary period**

A probationary period is the trial period that allows the employer to evaluate a new employee's performance before offering them a permanent position. Note that, if the employee is not found to be the right fit for the role, the employer has a right to terminate without legal ramifications.

The Industrial Court in Uganda while distinguishing probationary employment from temporary employment has also noted that probation is given to new employees to enable them learn the operations of their employers and to enable their employer assess whether the employee fits the job requirements. That, in probationary employment there are prospects of confirmation in appointment with better terms or done away with depending on one's performance.

### **The duration of the probationary period**

In Uganda, the Employment Act prescribes a period of 6 months as the maximum period on probation. The same law says that probationary period may be extended for longer but only with the consent of the employee. The law further prescribes that an employer is not allowed to employ an employee on probation more than once. In essence, the employer can either choose to extend an employee's probationary period for a longer period with the employee's consent or discontinue it upon unsatisfactory completion of the probationary period. However, after the end of the extension, the employer can not put the employee on probation again; the employee can only either confirm or terminate the engagement.

### **Can I quit during the probationary period?**

Probation periods work both ways. That is to say, both the employer and employee have the right to break free from the employment agreement within this allotted time. Therefore, it offers unhappy employees an escape without having to comply with a lengthy notice period unless a longer notice period was agreed to.

### **Can you get fired for calling in sick while on probation?**

If there is evidence that an employee has made it a habit to call in sick without justification, then it is possible to dismiss such an employee during the probationary period. Usually employers pay the employee for their notice period if they are dismissed during their probationary period.

### **Extending the probationary period**

The purpose for which a probation period can be extended is to allow the employee further time to improve in his or her performance and

demonstrate competence for the job and required behaviour. It follows that if the performance is substandard but the employer believes that additional training and support may bring the employee up to speed, an extension on a month by month basis may be considered for the employee.

However, a probationary period should ordinarily be extended only where there are exceptional conditions justifying such recourse and can only be made before the end of the original probationary period.

The High Court in Uganda has ruled that the employer is by law obligated to clearly inform the employee, after the three months' probation period have expired, that his or her performance was not satisfactory and the probation period is going to be extended for another period. Court also demanded that the employer must find out from the employee whether or not they agreed to the extension.

In the absence of such express communication from the employer to the employee, Courts have ruled that the employee is entitled to assume, and to carry on their duties on the assumption he or she was now a regular, full time employee subjected, like all other confirmed employees, to annual performance reviews, or such other reviews as the employment conditions of the time determined.

Based on decided cases, there is no requirement that the probation contract be separate from the employment contract. However, what the case law seems to confirm is that one can be handed a probationary contract first. Once the employee completes their probationary contract satisfactorily, then the employer can hand the employee the contract of employment. Where the employee fails to satisfy the required standard, then the very probationary contract can either be extended if deemed appropriate or terminated as discussed herein. Therefore, the employers can consider separating the probationary contract from the contract of employment.

### **Conclusion**

Where it is decided that the employee's probationary period be extended, the terms of extension must be clearly set out in writing indicating:-

- (i) The performance standards or goal that the employee is required to achieve by the end of the extension period.
- (ii) The duration of the extension with a clear end date.
- (iii) The reason why the extension was deemed necessary.
- (iv) The support such as further training that will be provided during the extension.
- (v) That the employment will be terminated if the employee does not meet fully the required standards, by the end of the extension period.

It is not prudent to make extension of the probationary periods a norm. The extension must be decided only if there are special factors that justify it.



## **RESOLVING LABOUR DISPUTES; IMPORTANT POINTS TO REMEMBER**

**By Owen Henry, Banking, Real Estate & Finance**

An employment relationship is contractual in nature in the sense that it is freely entered into by the employer and employee and the parties are also at liberty to exit from the relationship, in accordance with the terms they agreed on.

When entering into any contractual relationship, it is important to contemplate the end of the relationship, and how that process will be managed. This is necessary to ensure a smooth transition for both parties. The separation between the employer and employee may however be complicated if there is an underlying dispute, which may also have led to the separation.

Correctly managing an employment dispute can have ramifications for the employer and the employee. For the employer, a poorly managed employment dispute may harm the reputation of the company and even lead to legal liabilities or ramifications. For the employee, it may result in a poor or a non-favourable reference which may affect future opportunities.

The Employment Act of 2006 has put in place measures and procedures on how to manage employment disputes. The Act puts in place a phased approach which ends up with court litigation in the event that the dispute has not been resolved amicably. Whether the dispute results in litigation or not, employers are encouraged to keep in mind the following when dealing with an employment dispute.

### **Transparency**

It is absolutely crucial that there is transparency between the parties. This means that the employer should provide the employee with all relevant information or facts concerning the dispute. Some of this may involve performance related information, communications between the parties as well as human resource records involving the employee. Transparency is considered should the matter result in litigation, to assess whether the employee was given a right of a fair hearing.

### **Fairness**

The actions of the employer in relation to the employee or the dispute should not impute any unfairness or partiality. For example, the measures applied to the employee in question should be the same for other employees caught in the same situation. Factors such as race, sex, religion, political affiliation, among others, should not be imputable in the employer's decision making process or the conduct of the dispute. The employer should be afforded opportunities to defend themselves without fear of intimidation. As a rule of thumb, the employee always feels intimidated in the presence of his superiors, and

therefore, if possible the dispute should be managed by an independent committee or person.

### **Proper notices and good communication**

This is a legal requirement which has its roots in the right of a fair hearing. Ample notice should be given to the concerned employee regarding the dispute so that he or she has ample time to prepare for the same. Along with this is communication. The lines of communication and protocols should be clear for all the parties. For the employer's case, this may be handled by the human resource department or the immediate supervisor of the employee in question. Any communication regarding the dispute should be limited to those concerned and as private as possible, in order to protect the reputation of the firm or the privacy of the employee.

### **Refer to the employment contract, the law and the HR Manual**

It is important that disputes are resolved in accordance with the Employment Act, the employment contract and any human resource manuals. However the Employment Act takes precedence over all the others. The employer should constantly refer to the Act, self assessing whether they are in breach or compliance thereof, and also the employment contract or manual. This will help the employee know that the dispute is not personal in nature and the employee will also rely on the same to defend themselves.

### **Always be appreciative**

Both parties need to recognise and bear in mind the mutual benefit enjoyed or obtained prior to the dispute. They should be appreciative, although this may be difficult in certain conditions. Nonetheless, being polite, professional, and appreciative will preserve the relationship even after the dispute and may result in good references for both parties. Employees should avoid publicising the dispute and employers should as much as possible avoid shaming or embarrassing the employee in question.

### **The role of legal counsel**

Disputes can quickly escalate into legal issues or litigation if not managed properly. The employer needs to involve legal counsel and heed to legal advice. The advice in this case would usually be given in light of the law and in order to minimise legal exposure or liability.

### **Conclusion**

In conclusion, although there are various ways of resolving employment disputes under the various labour laws, both parties should opt for the most humane, and least invasive method to amicably resolve the dispute. This will ensure long term good will benefits for both parties.



## THE OFFENCE OF CYBER CRIME AND HOW YOU CAN PROTECT YOURSELF

By Karuhanga Brenda, Private Investigations, Research and Due Diligence

Cybercrime occurs where a computer is the object of the crime or is used as a tool to commit an offence. A cybercriminal may use a device to access a user's personal information, confidential business information, government information, or disable a device.

Cyber crimes may be committed via the internet or otherwise aided by various forms of computer technology, such as the use of online social networks, spam emails or computer virus transmittable through storage devices like flash disks.

There are majorly three different categories of cyber crimes;

1. Crimes against the person which includes offences like cyber harassment and stalking, credit card fraud, human trafficking, identity theft and online slender;
2. Crimes against property which includes offences like virus transmission, cyber and typo squatting, computer vandalism, copyright infringement, and hacking; and
3. Crimes against government which includes offences like accessing confidential information unlawfully, cyber warfare, cyber terrorism, hacking and pirated software.

Cyber crime is on the rise and almost 5 percent of the users of the internet fall victim to cyber crime whether they are aware of it or not. Understanding cyber crime can help you protect yourself from security breaches. The criminals are able to gain access to your computer or phone by hacking it. They do this with an intention to exercise unlawful control over the victims property and information by depriving the victims of their personal data. Cyber criminals hide behind fake promotions or accounts to tempt people into giving away their personal information. They do this for example by asking one to verify their online banking password or account number on the pretence of there being an issue with one's account which one must login to resolve.

There are many incidences of cybercrime on marketing, production, and operations, human resources, and finance and investment activities within digital organisations which may result in the damage of the brand of those companies, costs of countermeasures and insurance, loss of trade and competitiveness, disruption of trade, job loss, costs of mitigation strategies and recovery from cyber attacks, loss of intellectual property and sensitive data, and penalties and compensatory payments to customers or contractual compensation.

Many businesses globally are increasingly aware and concerned about both fraud conducted internally by staff as well as fraud perpetrated externally against the business, its agents and customers through cyber crime. Black swan events like the covid-19 pandemic expose what can go wrong when information services don't prepare for the unexpected. With the increased use of computers in Uganda, new types of crimes have also increased that target computers or the use of computers to commit crimes this has a direct impact on people's lives where data is lost, a person's privacy infringed on or money is stolen.

With these kinds of risks Uganda has put in place a legal framework to fight cybercrime of which the Computer Misuse Act of 2011 is the forerunner. It was enacted to prevent unlawful access, abuse or misuse of computers. It provides related penalties for cyber offences, ranging from a fine to imprisonment. And it also introduces a number of procedural measures to allow the authorities to fight cybercrime. Although there are different initiatives in place to address information security issues, companies and institutions should ensure more online safety and invest in cyber security.

### Conclusion

It is worthwhile for every business which may interact with computer technology to put in place measures to guard against cybercrime. These measures may range from simple antivirus software to more standardised interventions such as hiring cyber security firms. The expense incurred is justifiable in light of the potential risk averted if no such measures are put in place.