



Mandatory Procedural Requirements for Terminating Employment due to Unsuccessful Probation: Insights from the Saviours Mundia Case

Introduction

Section 27(3) of the Employment Code Act No 3 of 2019 (the “**Employment Code**”) permits an employer to terminate an employment contract of an employee upon giving a minimum of 24-hours’ notice if, it determines after an assessment, that the employee is not suitable for the job.

In practice, employers have adopted a literal interpretation of section 27(3) of the Employment Code when assessing an employee’s suitability.

During the probation period, it is common for employers to conduct unilateral evaluations of an employee's performance and if found unsuitable, provide notice of the unsuccessful probation and terminate the employment contract upon the provision of 24 hours’ notice.

The High Court in a recent decision intitled **Saviours Mundia v Consolidated Farming Limited – Comp/IRCLK/442/2019** (the “**Saviours Mundia Case**”) has provided detailed guidance for the procedure to be followed on the termination of an employee for unsuccessful probation.

This article outlines the steps an employer must comply with before deciding to terminate an employee for unsuccessful probation, based on

the guidance from the **Saviours Mundia** case.

Facts of the Case

The facts of the case are that Saviours Mundia (the “**Complainant**”) filed a complaint against his former employer Consolidated Farming Limited (the “**Respondent**”) on the grounds that he was employed as a Centre Pivot Management Supervisor on a 6 month’s written employment contract commencing on 23 May 2019 and expiring on 24 November 2019.

In his complaint, the Complainant alleged that the Respondent on 25 July 2019, dismissed him on the grounds of unsuccessful probation without assessing and writing the assessment results to him or giving him 24 hours’ notice contrary to section 27(2) and (7) of the Employment Code thereby breaching the rules of natural justice.

Consequently, the Complainant sought the following reliefs from the High Court:

1. notice pay;
2. damages for breach of contract (unpaid total sim of the contract);
3. allowances conferred on the Complainant by law;
4. costs and interest at current banking rate; and
5. any other reliefs that the Court may deem fit.

The Respondent denied the assertions by the Complainant and stated that:

1. he was not entitled to notice pay;

2. he was paid the value of the notice period, and
3. he was not entitled to any of the claims made as the same were frivolous and vexatious.

Issues for determination

Arising from the facts in the case, the Court had a number of issues to consider, *inter alia*:

- i. whether or not the Respondent followed the statutory procedural requirement for termination on the ground of unsuccessful probation.*

Decision of the Court

The Court held that the employment contract must explicitly provide for probation, otherwise the employee will be considered confirmed from the start of their employment. To that end, the Court added that if the employment contract includes a probation clause, the employer is obligated to abide by the requirements set out in section 27 of the Employment Code.

Coming to the procedural requirements for terminating an employee due to unsuccessful probation, the Court emphasized that section 27 of the Employment Code outlines mandatory steps an employer is required to follow. These include assessing the employee and communicating the results of the assessment before the end of the probationary period.

The Court also highlighted the importance of informing the employee of the employer’s

performance standards at the beginning of the probation and then evaluating their suitability for confirmation against those standards. Additionally, the Court stated that, unless there is serious poor performance, the employer should provide the employee with a reasonable opportunity to improve during the probationary period and can extend the said period if necessary for further assessment. if necessary.

Consequently, the Court held that only where an employee has been assessed, informed of the results of the assessment and given an opportunity to be heard, can the employer exercise the right to dismiss the employee for unsuccessful probation or extend the probation period.

If the employer fails to conduct the performance appraisal or inform the employee of the results of the appraisal by the end probationary period, the employee shall be deemed confirmed.

In view of the above, the Court held that section 27(6) of the Employment Code, which governs termination due to unsuccessful probation, aligns with the requirements for dismissal based on poor performance. As a result, employers must follow a four-stage inquiry to ensure that a dismissal for poor performance is fair. This inquiry includes ascertaining whether:

1. the employee was aware, or ought to have been aware of the standard expected by the employer when performing his/ her duties;
2. the employee was given a fair opportunity to meet the standard;
3. whether the employee was given an opportunity to be heard prior to dismissal; and
4. the dismissal was the correct remedy for the poor performance.

Conclusion

In summation, before an employer can terminate an employment contract on the grounds of unsuccessful probation, the employer must undertake a four-staged inquiry.

It is worth noting that the Saviours Mundia is a High Court decision. Therefore, the decision is not be binding on another judge of the High Court or other superior courts and may be overturned if the matter goes on appeal.

The foregoing notwithstanding, the case serves as current guidance to employers regarding the procedure for termination of employment on account of unsuccessful probation.

MAY and Company.
759, Glass House, Independence Avenue,
Woodlands Roundabout.
Lusaka, Zambia. Tel: +260211250580.
info@mayandco.co.zm | www.mayandco.law

1. the employee was aware, or ought to have been aware of the standard expected by the employer when performing his/ her duties;