

**THE RIGHTS OF PERSONS WORKING UNDER PROBATION PERIOD IN  
AN EMPLOYMENT SETTING: A COMPARATIVE ANALYSIS BETWEEN  
TANZANIAN AND SOUTH AFRICAN JURISDICTIONS**

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**A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE  
REQUIREMENTS FOR THE DEGREE OF THE MASTER OF LAWS (L.L.  
M-C & D) OF THE OPEN UNIVERSITY OF TANZANIA**

**2019**

**CERTIFICATION**

The undersigned certifies that he has read and hereby recommends for acceptance by the Open University of Tanzania a dissertation titled, *“The Rights of Persons Working under Probation Period in an Employment Setting: A Comparative Analysis Between Tanzanian and South African Jurisdictions”* in partial fulfillment of the requirement for the Degree of the Master of Laws (L.L. M-C & D) of the Open University of Tanzania.

.....

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**Date**

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I, **Saada Abdul Salum**, do hereby declare that this dissertation is my own original work and that it has not been presented and will not be presented to any other University for a similar or any other degree award.

.....

Signature

.....

Date

## **DEDICATION**

I dedicate this work to my parents, who sent me to school and my husband LUCAS

WILLIAM

KAHABI, for his encouragement and support.

## **ACKNOWLEDGEMENT**

First of all, I thank God who gave me health and life during the preparation of this work and for the whole period of my academic life.

I would like to express my sincere gratitude to a number of individuals, organizations and authors who have contributed, to my field research and dissertation writing, but it is impossible to mention all of them here. However, to them all, I am grateful and thankful for their contribution, advice and assistance. I highly appreciated their valuable contributions. Special thanks should however be given to my supervisor Dr. Abdallah Mrindoko Ally for his assistance and encouragement to me throughout my study.

Lastly, I acknowledge my friends, classmates for their moral and academic support when I was preparing this work, their challenges and ideas have helped to improve this work.

May Almighty God Bless You all!

## **ABSTRACT**

It has been a common and to most jurisdiction a legal practice for employers to place newly recruited workers into a probation period. This act allows employers to have an opportunity to understand whether the intended persons are fit for the post or job they have been interviewed for or whether they fit in the employment relation system at that particular office. Tanzania employment legal system requires certain jobs to place their newly employed workers into probation period. Placing certain employees in a probation period which is a trial period, it is likely to subject such employees into problems related to access of certain employment rights and standards. The history of South African laws on Employment and Labour Relations has passed through various draconian stages which clearly resemble the colonial legal relations Tanzania has passed. The author of this study explores the rights of employees under probation period between the two African democratic states of Tanzanian and South Africa in order to compare the rights they enjoy during their engagement as probationers. The author of this study has decided to take a comparative study between the two countries in order to establish whether Tanzania, with 58 years practicing democracy guarantees more rights to Probationary employees than South Africa which has only 25 years practice. The study has covered an introduction part in chapter one while An Overview of the Protection of Probationary Employees under various International instruments has been covered under chapter two is covered under chapter Two. A Comparative study of the Rights of Probationary Employees in Tanzania and South African has been covered under chapter three, while Research Findings and interpretation has been covered under chapter Four. Then this study completes with a Conclusion and recommendations under chapter Five.

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**LIST OF ABBREVIATIONS**

ATE	Association of Tanzanian Employers
CAP	Chapter
R.E	Revised Edition
CAT	Court of Appeal of Tanzania
H.C	High Court
LRT	Law Report of Tanzania
HCD	High Court Digest
TLR	Tanzania Law Report
UK	United Kingdom
UN	United Nations
UNDP	United Nation Development Programme
UNICEF	United Nations Children and Education Fund
UNO	United Nations Organization
UPE	Universal Primary Education
WDC	Workers Development Corporation

## LIST OF CASES

*Commercial Bank of Africa (T) Ltd v. Nicodemus Mussa Igogo, Lab. Div. MZA,*

*Revision No. 40 of 2012*

*IBM South Africa (Pty) Ltd V. Commission for Conciliation, Mediation and*

*Arbitration (CCMA), Daizy Manzana N.O & Shamala Pillay, Case no: JR 64/2014*

*Kwena Darius Mangope V. South African Football Association, CASE NO: J2752-09,*  
*2010*

*Mtenga v. University of Dar es Salaam, HCD 1971*

*Mwaitenda Ahombokile Michael v. Interchick Company Limited, Labour Dispute, No.*  
*30 of 2010*

*Mwita Magani and Another v. Mganga Mkuu Hospitali Teule Biharamulo, Lab. Div.*  
*BKB, Revision No. 09 of 2013*

*National Microfinance Bank v. David Nzaligo, Lab. Div. DSM, revision No. 347 of*  
*2013*

*Palace Engineering (PTY) LTD v. Thulani Ngcbo, Commissioner for Conciliation,*  
*Mediation & Arbitration, Case no: JA20/2012*

*Sella Temu v. Tanzania Railways Authority, Civil Appeal No. 72 of 2002*

*Wajibika Project v. Joseph Mandago and Edwin Nkwanga, Lab. Div., DV, DSM,*  
*Revision No. 208 of 2014*

## **LIST OF LEGISLATIONS**

### **A: Tanzanian Legislations**

The Employment and Labour Relations Act of 2004

The Code of Good Practice of 2007

The Law of Contract Act, 2002 RE.

The Constitution of the United Republic of Tanzania, 1977

### **B: South African Legislations**

The Labour Relations Act, No. 66 of 1995

The Constitution of the Republic of South Africa of 1996

The Basic Conditions of Employment Act, No 75 of 1997

The Unemployment Insurance Act, 2000

### **C: International Instruments**

Termination of Employment Convention, 1982 (ILO Convention No. 158)

The Discrimination (Employment and Occupation) Convention, 1958

The ILO Philadelphia Declaration, 1944

The Universal Declaration of Human Rights, 1948

The Termination of Employment Recommendation, 1982 (No. 166)

The Protection against unjustified dismissal” (1995)

The Vocational Rehabilitation and Employment (Disabled Persons) Convention, 1983  
(No. 159).

## **CHAPTER ONE**

### **GENERAL INTRODUCTION**

#### **1.1 Introduction**

Probationary periods is defined as periods of time that employees are exempt from certain contractual items, most importantly the notice period required for termination. The probationary period allows both employee and employer to see if they are a 'good fit' and to make things easier if they need to terminate the contract.<sup>1</sup>New employees commonly join on initial probationary periods of between three and six months, although some companies will extend this to a new year. Contract workers or those working part-time may be given shorter probationary periods.

The purpose of a probationary period is to provide a trial period for the employee to learn the job and for the supervisor to observe and evaluate the employee's performance. An employee may be typically be removed from a position at any time and for any reason prior to the completion of the probationary period, as long as it doesn't constitute illegal discrimination. A probationary employee is generally an at-will employee who has no expectation of continued employment. The probationary employee may be dismissed at any time during the probationary period, for good cause or without cause or reason, depending on the employer's policy.<sup>2</sup>

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<sup>1</sup>Robert Upex, Richard Benny and Stephen Havety Labour Laws 5<sup>th</sup>Published in United State by Oxford University Press Inc, New York (2005) p. 78

<sup>2</sup> Observation made by Dr. Abdallah Mrindoko Ally, during the Supervision Process of this study, October, 2019.

This study analyzes the rights granted by employment law to employees engaged into probation period. Probationary period is an initial period of employment during which an employee is evaluated.<sup>3</sup> It is a period, which an employee is not yet employed but he or she is in a trial if he or she fits on that particular work. This does not only apply to the employees but also to the employers, where the prospective employees will have time to check out their prospective employers if they are fit to work with them. The two jurisdictions in this study, in their legal provisions or regulations provides for requirements for certain job posts to place their newly enrolled employees into probationary period.<sup>4</sup>

Employment practice reveals it clear that, it is imperative that employees follow not only a strict safer recruitment process but also carry out employee probation periods. Likewise, it is important to communicate with other staff who work within the same room as the new employee as often things can be identified during everyday practice and these will need to be shared during the employee's probationary review meeting, among others. The Labour Relations Act of 1995 of South Africa do provide direct provisions guaranteeing various rights<sup>5</sup> of employees under probation while the Employment and Labour Relations Act of 2004 does not precisely provide such rights in its provisions.

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<sup>3</sup><https://financial-dictionary.thefreedictionary.com/Probationary+Period> retrieved on 16th January 2018 at 9:47 Am

<sup>4</sup> Both Tanzanian and South African jurisdictions does not directly in their Acts of Parliament provide the compulsory Newly Employees probation engagement but such a requirement is provided in their Codes of Good Conducts.

<sup>5</sup>Schedule 8; Code of Good Practice in the Labour Relations Act 66 of 1995

The research has invoked a comparative study between the two jurisdictions in order to identify a possible gap which exists between the two countries regarding rights of probationary employees. At the end the researcher has provided recommendation on what should be done to make sure that such rights are clearly guaranteed in Tanzanian legal system.

## **1.2 Background to the Problem**

In the desire to accumulate maximum production profit employers for a long time in history have been attracted to exercise long working hours policy to employees, harassment, use of bondage labourers, child labourers, discrimination at workplace, sex, age or disability discrimination, unlawful termination even practicing unlawful work-related illegal practices. This the stage points where often where the misconception surrounding probation employees arises. Many employers believed and some still believe today that once the probation period is over or nearing its end, that they can simply inform the employee that their performance is less than satisfactory and terminate their employ.

The historical development of employment laws in both Tanzania and South Africa has been uniform, in the sense that, they have both passed through discriminatory and exploitative legislations where employees were discriminated and some denied most employment rights.<sup>6</sup> Employment relation in Tanganyika prior to 1956 was made compulsory (criminal in nature) until when the Employment Ordinance was passed in 1956 and allowed some voluntary negotiations between employer and Employee. The

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<sup>6</sup> The Study of the History of Working Class in Tanzania during Colonialism and South Africa during Apartheid Regime, prior 1961 and 1994 respectively



ordinance was passed to give a way for the ILO Conventions passed to protect working people. Labour Relations become more of a contractual than criminal in nature as the Ordinance provided for rights and obligations of both employers and employees.<sup>7</sup> Under the former colonial legislations employers had only rights while the employees had no rights but obligations only.<sup>8</sup> Employment relationship existed on the notion of hire and fire wherein the environment to have any right to a probationary employee was not possible.

Employees security of employment was improved after independence of Tanzania whereby some laws were passed to enhance job security for workers.<sup>9</sup> The new law tempered with the employers' Common Law right to "hire and fire" by limiting the employers' right to discipline. The Act established one Conciliation Board in each District, constituted by a chairman and two other members, to oversee compliance with its provisions, hear grievances and grant appropriate remedies. Likewise, another new law imposed a duty on every employer to pay Severance Allowance to an employee who had been in continuous employment with the employer for at least three months when the employment contract expires/terminated.<sup>10</sup>

Basson provides that, prior to the discovery of gold and diamonds in South Africa, the economy could by and large be described as agrarian, with the main economic activity

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<sup>7</sup> The Employment Ordinance, 1956

<sup>8</sup> The Master and Native Servant Ordinance of 1927 and 1931; The Factories Ordinance of 1950, the Employment Ordinance of 1948, Among others

<sup>9</sup> The Security of Employment Act of 1964

<sup>10</sup> The Severance Allowance Act of 1962

being agriculture.<sup>11</sup> They further state that the relationship between employers and domestic workers and farm workers was governed by various Acts, including the Master and Servants Act 15 of 1856. At this time, the employment relationship was regarded as being a “master and servant” relationship. As the mining industry developed, the difference in political power between whites and blacks became entrenched as trade unions, catering largely for white workers, mobilized increasingly on the basis of race. In 1911, the Mines and Works Act was passed which reserved various types of work for white workers only.<sup>12</sup>

In the narration of the history of South Africa working class Du Toit comments that, after the general strike of 1914, martial law was declared and trade union leaders were deported from South Africa.<sup>13</sup> They further say that, the so called “labour peace” which ensued was short lived as the circumstances of the mines worsened due to the economic depression, a large foreign debt and the rising costs of living. The mines responded by restructuring. This led to a number of white workers being retrenched, which in turn led to the abolition of the ratio between skilled white workers and unskilled black workers on the mines. This situation gave rise to the 1922 strike, one of the watershed moments in South African labour history. The result of this strike was the passing of the Industrial Conciliation Act in 1924. This Act was the direct forefather of the Industrial Conciliation Act of 1956, which was later, renamed the Labour Relations Act of 1956. In terms of this Act, trade unions representing white

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<sup>11</sup> Basson et al., *Essential Labour Law*, Volume One, Second Edition, Labour Law Publications, 2000

<sup>12</sup> Basson, *supra*

<sup>13</sup> Du Toit et al., *The Labour Relations Act of 1995- A Comprehensive Guide*, Second Edition, Butterworths, 1998.

workers were accorded recognition, while a separate system for Black workers were created.<sup>14</sup>

It may be observed that, the period between 1991-1994 saw the birth of the new democratic South Africa. In 1994, the Interim Constitution, Act 200 of 1993, came into effect. The Act totally changed the constitutional basis of the South African legal system and it became clear that the Labour Relations Act of 1956 was not in line with the new constitutional order.<sup>15</sup> In this previous oppressive working situation, it was very difficult to find probation employees been accorded rights.

### **1.3 Statement of the Problem**

It is very common for every employer before accepting a new employee, to have a time to assess the ability of that person who is about to be employed, if he or she can fit in that position. From the manager's point of view, they can use the probationary period to evaluate the worker's performance, skills and abilities and also whether they engage with the existing organizational culture.<sup>16</sup> The employment laws of both South Africa and Tanzania, does not compel every new employees to go through probation period but the laws of both jurisdiction provides a guidelines regarding maximum duration of probation.<sup>17</sup> The two laws also has provided certain guidelines regarding termination of employees serving probation period.

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<sup>14</sup>Du Toit, Ibid

<sup>15</sup>Thompson B, Benjamin P, South African Labour Law, Volume One, Juta Law, 2001

<sup>16</sup><https://www.hrzone.com/hr-glossary/what-is-a-probationary-period> retrieved on 15th January 2018 at 5:42 pm

<sup>17</sup> No probation period that should go beyond 12 Months (The Code of Good Practice)

Since protection of employees gives them certain working rights which are also regarded as employers' duties, and since employees' rights are supposed to be inherently and freely granted to all employees, denying employment rights to an employee who serves his/her probation period is not justifiable. As stated in the previous chapter that the two acts of parliaments of both jurisdictions are silent on certain rights of person under probation period. So long as it has been established above that the two laws grant protection of probationary employees only of matters regarding termination of their employment.

Dismissal, in the South African Code of Good Practice was made as part of the legislative text as a schedule to the Labour Relations Act. Its provisions including those requiring justification and procedural safeguards in cases of termination effectively carry the force of law in so far as any person considering whether or not a termination is fair must take its provisions into account. Meanwhile, the probationary periods of employment are provided for in South Africa; protections against unjustified termination are unaffected during these periods.<sup>18</sup> Meanwhile, the provisions of the Basic Conditions of Employment Act dealing with termination of employment do not apply to an employee who works less than 24 hours in a month for an employer.<sup>19</sup>

In the case of probationary employees in South Africa, the Code of good practice on dismissal permits a reasonable period of probation during which an employer must provide appropriate evaluation, instruction, training, guidance and counselling to the

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<sup>18</sup> The Code of Good Practice, section 8(2).

<sup>19</sup> Basic Conditions of Employment Act, section 36.

employee. The Code also provides that any person (such as a judge or arbitrator) who must make a decision about the fairness of a termination for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period. This approach has been criticized for the lack of certainty in the “less compelling standard” and because it does not apply to assessing an employee’s suitability in the workplace.<sup>20</sup> The procedure prior to or at the time of termination, the Code of good practice on dismissal outlines the “fair procedure” to be followed. It calls for employer investigation of grounds for dismissal, employee notification of the allegations, allowance for employee defense, and employer communication of the decision after the inquiry.<sup>21</sup>

In Tanzania legal system, the rights of employees under probation are not adequately provided in the law governing employment and employee relations. The only right to be enjoyed by a probationary employee is the right to fair termination of employment which provided under section 35 of the employment and labour relations Act of 2004. However, this right is only enjoyable to probationary employees with more than Six months employment. This means that employees with less than 6 Months of employment may not bring an unfair termination claim against the employee so under that point of view the law appears to be unjust since it hinders employee right to claim where the employer did violate the employment standard against them. The

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<sup>20</sup> H. Cheadle: *Regulated flexibility: Revisiting the Labour Relations Act and the Basic Conditions of Employment Act* (2006), 27 ILJ 663.

<sup>21</sup>Section 8 of the Code, *supra*

provisions of section 35 above have been well explained in the Code of Good Practice of Tanzania.

The Commission for Mediation and Arbitration (CMA) and the Labour Court of the High Court Division have often held that probationary employee is not entitled to challenge fairness of termination<sup>22</sup> it's also addressed in the case of *Patrick Tuni Kihenzile vs. Stanbic Bank Tanzania Limited*<sup>23</sup> the labour court exclude employee under probation with less than 6 months not covered by section 35 of employment and labour relation Act. It was held that a probationary employee may challenge termination only under certain circumstance other than unfair termination. This study explores the legislative gap that exist between Tanzanian and South African jurisdictions by conducting a comparative study at suggest to the end what need to be adopted by Tanzanian legal system.

#### **1.4 Significance of the Study**

It has been a common practice that a probationary employee being an employee who is in a probationary period, his employment depends on his good performance, during the probationary period. Or he may be defined as a newly hired employee who is undergoing a trial period, and who usually has no seniority right or job protection under the contract.<sup>24</sup> With this view in mind, the foregoing study will give a significant light to the policy and law makers to amend the existing employment laws in both jurisdiction so as to allow these employees to enjoy the available rights to

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<sup>22</sup> Redstone B. Ezekiel Termination of Probationary Employee; Debunking some Myths about Tanzania Labour Legislation page 142

<sup>23</sup> Labour court revision no 47 2011 high court( labour division) Dar es salaam unreported

<sup>24</sup> <https://definedterm.com> retrieved on 16th day of January 2018 at 2:15 Pm

other employees. The foregoing study will send a message to all employers in both jurisdiction that when they treat employees under probation similarly to the rest of employees, they are likely to maximize their performance hence enrollment to their establishment. This study will as well inform all employers in both jurisdictions not to use poor performance as a justification for non-employment of employees serving their probability periods.

## **1.5 Objectives of the Study**

### **1.5.1 General Objective**

To investigate the legal framework governing employees working under probationary period in Tanzania with comparative perspective with South Africa with the view to disclose the existing legal gaps and bridging the gap.

### **1.5.2 Specific Objectives**

The study comprises of the following specific Objectives:

- (i) To identify the legal framework governing rights of probationary employees in Tanzanian and South African jurisdictions
- (ii) To examine the legal provisions that should be employed to mitigate the existing gap in the two jurisdictions.
- (iii) To conduct a survey of international instruments, model laws and best practices with a view of learning and getting wider experiences on related issues.

## **1.6 Research Questions**

The foregoing study has been covered by the following Research Questions:

- (i) What is the legal framework governing rights of probationary employees in Tanzania and South Africa?
- (ii) What are the legal provisions that should be employed to mitigate the existing gap in the two jurisdictions?
- (iii) Are there any international instruments, model laws and best practices which guarantees the rights of probationary employees which can assist to improve the existing Tanzanian and South African legal systems?

## **1.7 Research Methodology**

This study applied the doctrinal research method, comparative legal research method and field research method in the collection of data.

### **1.7.1 Doctrinal Legal Research Method**

This study applied the doctrinal method as the main and prominent methodology in the legal research. It looked at the legal materials, legal history, philosophy and the sociology of law from the objective point of view. The study also extracted and examined the analysis of law from legal texts, cases, and materials published in world-leading publications authored by the eminent legal academics. The study also extracted and examined the analysis of law from legal texts, cases, and materials published in world-leading publications authored by the eminent legal academics. The method involved the analysis of legislations, books and various materials from both local and international sources. This methodology entailed the use of various statutory interpretation methods such as rules of statutory legal interpretations and legal reasoning both inductive and deductive in order to critically analyze the materials



collected against the backdrop of the research questions. In order to supplement the data, field research method was conducted. Various research tools such as questionnaires and interviews were used in the collection of data.

### **1.7.2 Comparative Study Method**

This study has applied a comparative study between Tanzanian and South African legal systems to make this study complete. This is a methodology for measuring differences in the labour standards enjoyed by probationary employees between the Tanzania and South Africa. This methodology is then used to identify the existing gap between the two countries on the extent probationary employees can enjoy labour standards. The main focus employed in this study is the laws governing Employment and Labour Relations and the Codes of Good Practice of the two mentioned jurisdictions.

### **1.7.3 Field Study Methodology**

Primary Data as first-hand information were collected from the field by the assistance of interviews and questionnaires administered to respondents from Tanzania such as; Commission for Mediation and Arbitration of Tanzania; Advocates and Members of the Academic field, Members of the Association of Tanzanian Employers. Legislations and Judicial Decisions from both jurisdictions have been collected as part of Primary Data by the researcher.

## **1.8 Review of Related Literature**

Different scholars have made a critical analysis of the probationary period and rights of probationary employees. Their analysis is divided into two groups, namely; those

who consider probationary employees as applicants of work and they are not entitled any rights, and those who consider them as employees and they are entitled to some rights. The analysis is hereby provided hereunder.

In their report to the President and the Congress of the United States, the **U.S. Merit Systems Protection Board**<sup>25</sup> has stated that, the probationary employees are still an applicant of work until the probationary period has been completed. According to them the probationary employees are still an applicant to the work, and therefore they are entitled no protection rights as other employees in law. To them probationary employees are not distinguishable with a person who is not in the employment though they are on sites producing for the employers. The author has appreciated the need for right coverage of probationary employees but did not analyze the extent Tanzanian laws and South African laws protect employees during probation. This gap has been covered by the researcher of this work.

**Dale and Lessmann**, in their article<sup>26</sup> have stated generally that, in the employment context, a probationary period is widely understood to mean the initial period of an employee's employment during which time certain special terms may apply. They have added that, in respect to termination, there is no common law exemption to provide reasonable notice on termination, regardless if the termination occurs in the first few months of employment or thereafter. So according to them, the probationary employees have rights to get a notice prior to the termination of his or her

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<sup>25</sup>The U.S. Merit Systems Protection Board, The Probationary Period: A Critical Assessment Opportunity, <https://www.mspb.gov/About/members.htm>

<sup>26</sup> Perspective on the probationary period and termination rights in Ontario, February 14, 2017

employment. The same protection is granted in both Tanzania and South Africa, but the author has touched only termination protection and did not mention other employment rights probationary employees supposed to enjoy. This holds the justification of this study.

On his research paper **Privott Daryl R.**<sup>27</sup> has tried to show how the issue of probationary employees and period is not certain. He has stated that many authors have different opposing views concerning the probationary period as well as probationary employees. Some do consider probationary period as nothing else but a test period, and that there should have been employed counseling process to the probationary employees, the task which could have improved the working ability of these probationary employees.

Therefore, they blame the employers who ran to terminate the probationary employees, instead of counseling and teaching them on how to perform the work better. For others do consider that probationary period is important and is required so as to complete the hiring process, so the management is vested with responsibility to provide the new recruit with training and appropriate work assignments. That the authors felt that training in evaluation, counseling, positive discipline, the legalities of the probationary employment, and the role of the probationary period in the overall selection process should be mandatory if the probationary period is to be effective. A gap on the need to reform the existing laws in Tanzania and South Africa still exists. The author of this work has covered this need.

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<sup>27</sup> Probationary periods-promoting excellence or Legal loophole?" (1999). UNLV Theses, Dissertations, Professional Papers, and Capstones. 210. <http://digitalscholarship.unlv.edu/thesesdissertations/210>

When citing the work of **Robert Vaughn**<sup>28</sup> in his book states that the probationary period can and does serve a valuable purpose, but the lack of standards and the lack of requirements for a meaningful statement of the reasons for removal means that removal can be made on emotion or caprice.<sup>29</sup> The researcher of this work has made a comparative analysis of the employment rights enjoyed by probation workers in Tanzania and South Africa.

In his article **Alan, P.**<sup>30</sup> stated that the probation periods have no legal standing and if the concept is not built into the contract of employment, the employer cannot rely on it. That is to say if the employment contract does not contain the clause of how probationary period shall be and for how long therein, it is not mandatory for the employer to consider it to the employees who have worked few months after employment. He proceeded to say that during a probation period, an employer should not assume that the employee does not have any employment rights. To him the employees in their probationary period have statutory day-one-rights and it is not the case that the individual is not a 'proper' employee until they have passed their probationary period, or until they have been given their contract of employment. A study on employment rights covered in Tanzania and South Africa was still mandatory after reading this paper.

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<sup>28</sup> Robert Vaughn (1975), *The Spoiled System - A Call for Civil Service Reform*"

<sup>29</sup> Probation Period, *ibid*

<sup>30</sup> the rights of employees during their probationary period. April 25, 2016

**LEE Kiera**, in her article posted in Essential Guide to Employment Contracts, on 21 November 2016,<sup>31</sup> she said that there is no automatic or implied term in a contract for a probationary period so it must be stated as an express term. The employers are obliged to grant family-related leave, recognize pregnancy and maternity rights and consider reasonable adjustments for disabled employees on probationary period.

On his article posted on April 19, 2013 **GORRY Terry**,<sup>32</sup> stated that even employees on probation are entitled to natural justice and fundamentally fair procedures. So to him a person so terminated during probationary period still has a right under the umbrella of natural justice.

**Hivos Tanzania** in its policy<sup>33</sup> has put a mandatorily three months as a probationary period. Therefore, for every newly employee during the first three months shall be considered to be on probation. And soon after lapse of three mandatory months, the Director will inform the employee in writing as to whether he/she is confirmed to work or not. A lapse of the three-month period without confirmation of the post in writing does not constitute automatic confirmation. They proceed to say that, during the period of probation the employee shall accrue but not be entitled to take annual leave except for genuine emergencies. That during the period of probation either party to the contract may terminate the contract by providing seven (7) days notice in writing or payment of seven day's salary and allowances in lieu of notice, unless

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<sup>31</sup> Probationary Period and the contract of employment, Posted in : Essential Guide to Employment Contracts on 21 November 2016;

<sup>32</sup> Unfair dismissal during probationary period-the options open to the employee, 2013, retrieved from <https://employmentrightsireland.com> on 25th day of January 2018, at 1:00 PM

<sup>33</sup> Human Resource Manual, 2010

specified otherwise in the employment contract. A gap on the need to reform the existing laws in Tanzania and South Africa still exist. The author of this work has covered this need.

**The Decentworkcheck.Org/Tanzania**, in their article<sup>34</sup> they have stated that there is no explicit provision in the Employment and Labour Relations Act<sup>35</sup> about probation period. However, this act implicitly requires a probationary period of 6 months by saying that a worker with less than 6 months of employment may not bring an unfair termination claim against the employer.<sup>36</sup> In deed there is no specific probationary period under the said Act hereinabove, neither does it provide for probationary period at all. It only exempts the workers who are in employment for less than six months that is, those who are not yet attained six months in their employment to claim any rights for unfair dismissal regardless if he/she is fairly terminated or not. A study on employment rights covered in Tanzania and South Africa was still mandatory after reading this paper.

On the other hand, the Employment and Labour Relations (Code of Good Practice) Rules.<sup>37</sup> Do provide for probationary period but does not give as well specific time for it. Only that it gives limit that the probationary period should not exceed twelve months taking into consideration the nature of the job, standard required and customs and practice of the sector, as per Rule 10(4).<sup>38</sup> Therefore the issue of the length of

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<sup>34</sup>Regulations on work and wages, retrieved on [www.mywage.org/tanzania](http://www.mywage.org/tanzania), on 25/1/2018 at 5:15 PM

<sup>35</sup> Act No.6 of 2004

<sup>36</sup> Section 35 of Act No.6 of 2004

<sup>37</sup> GN No.42 of 2007

<sup>38</sup>GN No.42 of 2007, Ibid

probationary period depends on the expression provided in the employment contract. Also, the code does provide for some rights that are vested to the probationary employees, such as right to be heard and representation. As provided for under rule 10(7) and (9) of the Code.<sup>39</sup>

### **1.9 Scope of the Study**

Most of common law countries have not expressly provided in their statute as to the rights and period of probationary employee. Some few countries have tried to stipulate in their labour laws the length of probationary period as well as right and procedures to terminate the contract during the probationary period. This study has been conducted based on the area of rights enjoyed by employees under probation period in Tanzanian jurisdiction and South African jurisdiction.

The study has focused on the comparison between Tanzanian and South African jurisdiction in order to establish a comparison justification of the area of study. The study has been selected based on some literatures above which suggests that probationary employees does not necessarily enjoy the rights enjoyed by other employees of the establishment. The study has taken a survey on the Employment and Labour Relations Act, 2004 of Tanzania; the Constitution of the United Republic of Tanzania of 1977; The Labour Relations Act No. 66 of 1995 of South Africa, as well as the Constitution of The Republic of South Africa of 1995. A selection of certain Judicial pronouncements in both jurisdictions has been considered as well.

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<sup>39</sup> Op.cit

## **CHAPTER TWO**

### **AN OVERVIEW OF THE RIGHTS OF PROBATIONARY EMPLOYEES UNDER INTERNATIONAL INSTRUMENTS**

#### **2.1 Introduction**

Protection of employees' rights, generally, is an attribute of increasing productivity at work place. An employee feels protected when his/her working rights are protected. Most employers are hungry to maximize profit even to the point of depriving employees' rights. Employment rights and standards have for a long time been framed and guaranteed by some International Instruments and UN member states, including Tanzania and South Africa have signed these legislations, thus, became bound by such international standards. This chapter explores the protection guaranteed by international law on employees working under probation period.

#### **2.2 Rights of Probationary Employees under International Instruments**

Employment rights or workers' rights are a group of legal and human rights relating to labour relations between workers and employers, codified in national and international labour and employment law. In general, these rights influence working conditions in relations of employment. One of the most central is the right to freedom of association, otherwise known as the right to organize. Workers organized in trade unions exercise the right to collective bargaining to improve working conditions.<sup>40</sup> The UN itself backed workers' rights by incorporating several into two articles of the

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<sup>40</sup>Prior, Katherine (1997). *Workers' Rights*. New York: Franklin Watts



United Nations Declaration of Human Rights of 1948 which is the basis of the International Covenant on Economic, Social and Cultural Rights of 1966.

### **2.2.1 The Universal Declaration of Human Rights, 1948**

The declaration proclaims a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.<sup>41</sup>

The declaration (UDHR) further states clearly that, all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. It further declares that, “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.”<sup>42</sup>

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<sup>41</sup> The Preamble of the Universal Declaration of Human Rights (UDHR), 1948

<sup>42</sup> Article 1 & 2, *ibid*

The declaration (UDHR) has declared universally that “everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Everyone, without any discrimination, has the right to equal pay for equal work. Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection. Everyone has the right to form and to join trade unions for the protection of his interests.”<sup>43</sup>

Even though the Universal Declaration of Human Rights of 1948 not formally by itself legally binding, the Declaration has been adopted in or influenced most national constitutions including Tanzania and South Africa, wherein in its governments commit themselves and their peoples to progressive measures to secure the universal and effective recognition and observance of the human rights set out in the Declaration.<sup>44</sup> Thus, the declaration is obviously a fundamental document of the United Nations and a powerful tool when applying diplomatic and moral pressure to governments that violates and of its provisions.

### **2.2.2 The ILO Philadelphia Declaration, 1944**

The Declaration of Philadelphia is another international instrument which guarantee people working under probationary employment the necessary protection that other ordinary employees enjoy from their employers. The declaration is a statement of aims adopted by the International Labour Organization in 1944 and embodies basic

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<sup>43</sup> Article 23, Ibid

<sup>44</sup> The (UDHR) Preamble, ibid

principles of economic justice. It declares the following: that labour is not a commodity; that freedom of expression and of association are essential to progress; that poverty anywhere constitutes a danger to prosperity everywhere; and that all human beings, irrespective of race, creed, or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security, and equal opportunity. The Declaration continues to provide a focus for campaigners for international labour standards.<sup>45</sup>

When one adheres to the above submission that labour is not and should not be made a commodity will automatically bear the legal obligation to treat employees under probationary period equal to the ordinary employees of the establishment. The same obligation will impliedly be vested into an employer to grant other working fundamental rights such as freedom of association and expression and other related workers social welfare rights to all employees including those under probation.

The declaration recognizes further that, as "the solemn obligation of the ILO to further among the nations of the world" those principles which would achieve full employment and the raising of standards of living; the employment of workers in the occupations in which they can have the satisfaction of giving the fullest measure of their skill and attainments and make their greatest contribution to the common well-being; the provision, as a means to the attainment of this end and under adequate guarantees for all concerned, of facilities for training and the transfer of labor, including migration for employment and settlement; Policies in regard to wages and

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<sup>45</sup> Principle I & II of the Philadelphia Declaration, 1944

earnings, hours, and other conditions of work calculated to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection; The effective recognition of the right of collective bargaining, the cooperation of management and labor in the continuous improvement of productive efficiency.<sup>46</sup>

The declaration sets out a standard path of legal obligation all states in the world should follow when dealing with workers welfare. The rejected discrimination among workers is focused towards granting a broader utilization of the world productive resources which are necessary to the achievement of the objectives set forth in this declaration. The international working standards which are declared by this declaration are made to be protected so as to protect weak employees such as those in probation who are also considered to be in lower bargaining power. This is in line with the fact that law always protect the weaker members of the society.

### **2.2.3 Discrimination (Employment and Occupation) Convention, 1958**

The International Labour Organization having considered the declaration of Philadelphia and the discriminations prohibited by the Universal Declaration of Human Rights, convened at Geneva by the ILO Governing Body in 1958, passed a Convention on Discrimination (Employment and Occupation). The Convention defines discrimination as any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in

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<sup>46</sup> Principle III of the Philadelphia Declaration, *ibid*

employment or occupation; and that, such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies.<sup>47</sup>

The Discrimination (Employment and Occupation) Convention of 1958 has been ratified by Tanzania on 26<sup>th</sup> February, 2002 and by South Africa on 13<sup>th</sup> March, 1997.<sup>48</sup> Thus, the contents of this convention are binding on both Tanzania and South African jurisdictions. Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.<sup>49</sup>

The Convention further requires member states for which this Convention is in force to undertake, by methods appropriate to national conditions and practice: to seek the co-operation of employers' and workers' organizations and other appropriate bodies in promoting the acceptance and observance of this policy; to enact such legislation and to promote such educational programmes as may be calculated to secure the acceptance and observance of the policy; to repeal any statutory provisions and modify any administrative instructions or practices which are inconsistent with the

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<sup>47</sup> Article 1 of the Discrimination (Employment and Occupation) Convention, 1958

<sup>48</sup> [https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312\\_256](https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312_256), retrieved on 22<sup>nd</sup> June, 2018

<sup>49</sup> Article 2 of the Convention, Ibid

policy; to pursue the policy in respect of employment under the direct control of a national authority; to ensure observance of the policy in the activities of vocational guidance, vocational training and placement services under the direction of a national authority; to indicate in its annual reports on the application of the Convention the action taken in pursuance of the policy and the results secured by such action.<sup>50</sup>

However, it should be noted that, the general protection given to workers by this convention is not absolute in general rather there are exceptions given on certain categories of employees. For example, it is stated that any measures affecting an individual who is justifiably suspected of, or engaged in, activities prejudicial to the security of the State shall not be deemed to be discrimination, provided that the individual concerned shall have the right to appeal to a competent body established in accordance with national practice.<sup>51</sup>

The Convention further stipulate that, any Member may, after consultation with representative employers' and workers' organizations, where such exist, determine that other special measures designed to meet the particular requirements of persons who, for reasons such as sex, age, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance, shall not be deemed to be discrimination.<sup>52</sup>

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<sup>50</sup> Article 3 of the Discrimination (Employment and Occupation) Convention, *supra*

<sup>51</sup> Article 4, *ibid*

<sup>52</sup> Article 5, *ibid*

#### **2.2.4 Termination of Employment Convention, 1982 (ILO Convention No. 158)**

Although this convention may exclude certain categories of employees including probationary workers, the convention is generally applicable to all branches of economic activity and to all employed persons.<sup>53</sup> This provision suggests that member states have been given options to apply or to skip the application of certain contents of this convention when dealing with certain category of employees, but before such neglect certain requirements should be considered.

The Convention stipulates clearly that, in so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organizations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof categories of employed persons whose terms and conditions of employment are governed by special arrangements which as a whole provide protection that is at least equivalent to the protection afforded under the Convention.<sup>54</sup>

It is further provided that, in so far as necessary, measures may be taken by the competent authority or through the appropriate machinery in a country, after consultation with the organizations of employers and workers concerned, where such exist, to exclude from the application of this Convention or certain provisions thereof other limited categories of employed persons in respect of which special problems of a

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<sup>53</sup> Article 2 of the ILO Convention No. 158

<sup>54</sup> Article 2(4) of the ILO Convention No. 158

substantial nature arise in the light of the particular conditions of employment of the workers concerned or the size or nature of the undertaking that employs them.<sup>55</sup>

From the above provision it should be learnt that, exclusion of the probationary employees, among others, stated in the Convention is not a compulsive requirement upon member states. This suggests that some members will opt to apply the stipulated Convention provisions to probationary employees expressly or impliedly.

### **2.3 Situations where an Employee can be Placed into Probationary Period**

Rights available to probationary employees originate from the above-mentioned international instruments, among others, and have been guaranteed to protect employees who engage into employment relationship, which is always held at will of the parties. This means that the employer or the employee may terminate the employment relationship at any time, for any reason, as long as the reason is not illegal. It does not make a difference whether the employee actually did anything wrong. If the employee is at-will, any reason, including no reason, is a proper basis for termination.<sup>56</sup>

The said employment relationship is created at the will of both parties to the contract. However, an employer, having higher bargaining power, may require an employee to undergo a probationary period for various reasons, such as:

Firstly, the employer may place a Newly hired employees into probationary period. A promising new employee may be evaluated to determine their set of skills, how they

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<sup>55</sup> Article 2(5) *ibid*

<sup>56</sup> <https://www.legalmatch.com/law-library/article/at-will-employment.html>, retrieved June, 2018



perform, and the way that they interact with other workers. Outstanding performance may result in a permanent position with the company, or a higher pay rate.<sup>57</sup>

Secondly, a probationary period may be given to Promotions or first-time supervisor employees. Probationary periods can help determine whether the worker qualifies for a promotion to a higher position. Employees who have recently been appointed as supervisors may initially be placed under probation before they are allowed to perform more demanding tasks.

Thirdly, a probationary period may be issued to a Poor performance of existing employee. This is an Employee who demonstrates poor performance may undergo probation in order to determine exactly where they are deficient, and how to correct errors.<sup>58</sup>

Fourthly, probation periods are issued during termination of employment. The probationary periods are often used as grounds for determining whether termination is necessary. In this type of situation, the probationary period may act as a “last chance” for the employee to improve or as a transition period before they are finally terminated.

## **2.4 Conclusion**

ILO was founded in the conviction that social justice is essential to universal and lasting peace and thus, should give special attention to the problems of persons with special social needs, particularly the unemployed and migrant workers, and mobilize

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<sup>57</sup><https://www.legalmatch.com/law-library/article/at-will-employment.html>, supra

<sup>58</sup> Ibid

and encourage international, regional and national efforts aimed at resolving their problems, and promote effective policies aimed at promotion of social justice at work. The above discussed ILO provisions from various instruments are geared towards promotion of conducive working tranquility to weak categories of employees such those working under probation. The next chapter discusses on the effectiveness of the domestic laws governing probationary employees with special comparison between Tanzanian and South African jurisdiction.

# CHAPTER THREE

## COMPARATIVE ANALYSIS OF THE RIGHTS OF PROBATION EMPLOYEES BETWEEN TANZANIAN AND SOUTH AFRICAN JURISDICTIONS

### 3.1 Introduction

South Africa and Tanzania are members of the Commonwealth Countries Association<sup>59</sup> which adheres to the British legal system set up, among others. The Commonwealth is a voluntary international organization in which countries with diverse social, political, and economic backgrounds are regarded as equal in status, and cooperate within a framework of common values and goals,<sup>60</sup> as outlined in the Singapore Declaration issued in 1971. Such common values and goals include the promotion of democracy, human rights, good governance, the rule of law, individual liberty, equality before the law, free trade, multilateralism, and world peace, which are promoted through multilateral projects and meetings. This may be one of the reasons to why there is much similarities between the employment laws of these two jurisdictions. This chapter provides as comparative analysis of the rights enjoyed by employees under probation period between Tanzanian and South African jurisdictions.

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<sup>59</sup> Tanzania became a Commonwealth member on 9<sup>th</sup> December, 1961 while South Africa became a member on 19<sup>th</sup> November, 1926

<sup>60</sup> A framework of common values and goals, as outlined in the Singapore Declaration issued in 1971

### **3.2 The Legal Context of Probationary Employees Rights in Tanzania and South Africa**

#### **3.2.1 The Code of Good Practice of Tanzania and South Africa**

Most of common law countries have not expressly provided in their statute as to the rights and period of probationary employee. Some few countries have tried to stipulate in their labour laws the length of probationary period as well as right and procedures to terminate the contract during the probationary period. Both Tanzania and South Africa have provided most of the rights for employees under probation period through their Code of Good Practice.<sup>61</sup> As opposed to South African jurisdiction, the rights of employees serving their probation periods in Tanzania are provided in the Code of rules (Code of Good Practice), and not direct provisions of the statutes like in South African jurisdiction.

The Code of Good Practice of South Africa is within the Labour Relations Act No. 66 of 1995, which is the law governing employment and labour relations in South Africa.<sup>62</sup> This means that the rights provided in the Code of Good Practice regarding probationary employees are directly rights guaranteed and protected by the Act of parliament of South Africa. However, there is a requirement in the Employment and Labour Relations Act of 2004 of Tanzania, which provides that, the provisions of the Act shall be read in line with the provision of the Code of Good Practice of 2007.

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<sup>61</sup>The Employment and Labour Relations (Code of Good Practice) Rules, G.N. No. 42 of 2007 (Tanzania) and the Schedule 8 of the Code of Good Practice in the Labour Relations Act 66 of 1995 (South Africa)

<sup>62</sup>Schedule 8 of the Code of Good Practice in the Labour Relations Act 66 of 1995

This requirement is specifically when interpreting provisions regarding termination of employment in the Employment and Labour Relations Act of 2004.<sup>63</sup>

### **3.2.2 The Constitution of the United Republic of Tanzania, 1977**

The Constitution of the United Republic of Tanzania provides protection of all persons and make them are equal before the law and be entitled, without any discrimination, to protection and equality before the law.<sup>64</sup> It is further provides that, no law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect. That no person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office.<sup>65</sup>

The expression “discriminate” means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion, sex or station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications except that the word “discrimination” shall not be construed in a manner that will prohibit the Government from taking purposeful steps aimed at rectifying disabilities in the society.<sup>66</sup>

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<sup>63</sup>Section 36-37 of the Employment and Labour Relations Act of 2004

<sup>64</sup> Art. 13(1) of the Constitution of the United Republic of Tanzania of 1977

<sup>65</sup> Art. 13(2,4), Ibid

<sup>66</sup> Art. 13(5), Ibid

Employment rights and protection are incorporated as the object of the Constitution which is to facilitate the building of the United Republic as a nation of equal and free individuals enjoying freedom, justice, fraternity and concord, through the pursuit of the policy of Socialism and Self Reliance which emphasizes the application of socialist principles while taking into account the conditions prevailing in the United Republic. Therefore, the state authority and all its agencies are obliged to direct their policies and programmes towards ensuring that every person who is able to work does work, and work means any legitimate activity by which a person earns a living.<sup>67</sup>

The URT Constitution further provides that every person has the right to work and that every citizen is entitled to equal opportunity and right to equal terms to hold any office or discharge any function under the state authority.<sup>68</sup> However, without discrimination of any kind, every citizen is entitled to remuneration commensurate with his work, and all persons working according to their ability shall be remunerated according to the measure and qualification for the work. Every person who works is entitled to just remuneration.<sup>69</sup>

The Constitution further guarantees every person with the equality and non-discrimination to all human beings because they are born free, and are therefore all equal. Further that, every person is entitled to recognition and respect for his dignity.<sup>70</sup> That, no law enacted by any authority in the United Republic shall make any provision that is discriminatory either of itself or in its effect. The civic rights,

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<sup>67</sup> Art. 9, of the URT Constitution, *supra*

<sup>68</sup> Art. 22, *Ibid*

<sup>69</sup> Art. 23(2) *Ibid*

<sup>70</sup> Art. 12, *Ibid*

duties and interests of every person and community shall be protected and determined by the courts of law or other state agencies established by or under the law. However, no person shall be discriminated against by any person or any authority acting under any law or in the discharge of the functions or business of any state office.<sup>71</sup>

The Constitution further provides that, every person in the United Republic has the right to enjoy fundamental human rights and to enjoy the benefits accruing from the fulfillment by every person of this duty to society, as stipulated under Article 12 to 28 of this Part of this Chapter of the Constitution. In order for this to happen every person has the duty to so conduct himself and his affairs in the manner that does not infringe upon the rights and freedoms of others or the public interest.<sup>72</sup> It is further provided that, the human rights and freedoms, the principles of which are set out in this Constitution, shall not be exercised by a person in a manner that causes interference with or curtailment of the rights and freedoms of other persons or of the public interest.<sup>73</sup>

### **3.2.3 Constitution of the Republic of South Africa of 1996**

The Constitution of South Africa guarantee equality and non – discrimination to all persons including South African employees under probation period. There is equality to everyone before the law and has the right to equal protection and benefit of the law in South Africa. In this regard, equality includes the full and equal enjoyment of all rights and freedoms. In order to promote the achievement of equality, legislative and

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<sup>71</sup> Art. 12, Ibid

<sup>72</sup> Article 29, Ibid

<sup>73</sup> Article 30, The URT Constitution, supra

other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.<sup>74</sup> The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. It is further provided that, no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.<sup>75</sup>

The Republic of South Africa is one, sovereign, democratic state founded on the values of human dignity; the achievement of equality and the advancement of human rights and freedoms; Non-racialism and non-sexism. The Constitution enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom. The Constitution calls upon courts, tribunals or forums, when interpreting these Constitutional rights must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.<sup>76</sup>

The Constitution is made itself clear on its preamble that the Constitution lays the foundations for a democratic and open society in which government is based on the

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<sup>74</sup> Section 9(1-3) of the Constitution of the Republic of South Africa of 1996

<sup>75</sup> Section 9(4-5), of the Constitution, Ibid

<sup>76</sup> Section 39, Ibid



will of the people and every citizen is equally protected by law.<sup>77</sup> Further that, every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.<sup>78</sup>

### **3.3 Right Against Unfair Termination of Probationary Employees in Tanzania and South Africa**

#### **3.3.1 Tanzanian Jurisdiction**

There is no explicit provision in the Employment and Labour Relations Act 2004 about probation period. However, the act implicitly requires a probationary period of 6 months by saying that a worker with less than 6 months of employment may not bring an unfair termination claim against the employer.<sup>79</sup>

Many employers opt to begin new employees or those whose performance seems deteriorating in probation so as to prove themselves, giving chances to employers to evaluate performance and assess the suitability of these employees especially those who have enrolled for permanent employment contract. The Employment and Labour Relations Act of 2004 does not explicitly possess a provision regarding probationary employees. However, probationary employees have been implied mentioned under section 35 of the Act which requires a probationary period of six months. It provides that a worker with less than six months of employment may not bring an unfair termination claim against the employer.

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<sup>77</sup> The Preamble of the Constitution of the Republic of South Africa, Ibid

<sup>78</sup> Section 22, Ibid

<sup>79</sup> Section 35, Ibid

The above provision impliedly suggests that a probationary employee whose probation period is beyond six months may exercise the rights provided under sub part E of the Employment and Labour Relations Act of 2004.

However, the said protection is not expressly provided and interpretation of this provision it will depend on the discretion of the court. This situation presents probationary employees into probable situation compared to the other ordinary employees. Since it takes away an employee's usual rights, a probationary period must be expressly agreed to by the employee.

It cannot be implied into the relationship.<sup>80</sup> The principles of equity thus compel employers to clearly indicate what will happen if the relationship ends before the probation terminates the employment and Labour Relations (Code of Good Practice) provides some guidelines through which termination of probationary employees of not less than six months must be followed. Since probation periods are used by employers as a 'trial period' to make sure that the employee appears to be a good fit in the organization, the terms of probation must be made known to the employees before the employee commences employment.<sup>81</sup> This provision is geared toward compelling employers to be bound to the terms of service during probation period because the probationary period does not in fact affect an employee's statutory rights. The provision also protects employees under probation from the colonial perception of employers of hire and fire.

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<sup>80</sup>*Easton v. Winslow Properties Corp.*, [2001] O.J. No. 447 retrieved from <https://www.lawnow.org/employees-probation/>

<sup>81</sup>Rule 10(2) of the Employment and Labour Relations (Code of Good Practice) Rules, 2007

The code further stipulates the purpose of probation period being to enable the employer to make an informed assessment of whether the employee is competent to do the work and suitable for employment.<sup>82</sup> In order for the employer complete his assessment successfully and fairly he must subject the probationary employee into full swing of all rights same to those enjoyed by other employees. Although the employer may have the right to withhold certain rights to a probationary employee taking into consideration the duration of the probation itself, the employee is normally subjected to all necessary rights enjoyable by employees of the organizations.

The code further stipulates that, the period of probation should be of reasonable length of not more than twelve months, having regard to the factors such as the nature of the job, the standards required, the custom and practice in the sector.<sup>83</sup> This requirement grants a candid protection to probationary employees to demonstrate their skills and standards that are eagerly waited to be seen by the employer. During probationary period the employee may have a chance to attend further in-house training which will add up his value and chances of being taken by the employer. This provision also gives fair treatment to probationary employees as they get exempted from being utilized for unknown period by the employer in the name of evaluating, testing employee's suitability of the job.

However, the practice shows that a less skilled or more junior job may only require a short period of time for the employer to assess competence for work whereas a senior

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<sup>82</sup> Rule 10(3) of the Code of Good Practice, *ibid*

<sup>83</sup> Rule 10(4) of the Code of Good Practice, *ibid*

role may require the employee to fit in culturally and show leadership, both of which may take much longer.

The employer, may after consultation with the employee, extend the probationary period for a further reasonable period if the employer has not been able to properly assess whether the employee is competent to do the job or suitable for employment.<sup>84</sup>

This provision protects employees who have been on probation where there were many employees and the employer may not be careful enough to establish each employers' suitability and capacity. By been given another probationary period it is a positive chance for an employee on probation to work even more to convince the employer rather than being terminated.

Employers should clearly set out what terms do and do not apply at this time. It is common for employees not be enrolled in benefits schemes until completion of the probationary period. Employers should be careful that such exclusions are not discriminatory.<sup>85</sup> On the other hand, during probation period, the employer shall monitor and evaluate the employee's performance and suitability from time to time. The employer shall meet with the employee at regular intervals in order to discuss the employee's evaluation and to provide guidance if necessary. The guidance may entail instruction, training and counseling to the employee during probation.<sup>86</sup> This provision protects employees under probation period to allow them sail smoothly on the work they have been subjected for testing.

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<sup>84</sup> Rule 10(5), of the Code of Good Practice, *supra*

<sup>85</sup> <https://www.legal-island.com/articles/uk/features/essential-guide-to-employment-contracts/2016/nov/probationary-periods-and-the-contract-of-employment/> Retrieved on 25<sup>th</sup> July, 2018

<sup>86</sup> Rule 10(6) of the Code of Good Practice, *ibid*

The code further provides that, where at any stage during the probation period the employer is concerned that the employee is not performing to the standard or may not be suitable for the position the employer shall notify the employee of that concern and give the employee an opportunity to respond or an opportunity to improve.<sup>87</sup> Thus, the probationary employee in Tanzania cannot easily be terminated just at the will of the employer, fair procedures must be followed including be granted the right to be heard. This is a protection granted to probationary employees in Tanzania.

Termination of a probationary employee is also under protection under Tanzanian laws. Employment of the probationary employee shall be terminated if the employee has been informed of the employer's concern and also the employee has been given an opportunity to respond to those concerns and further that, the employee has been given a reasonable time to improve performance or correct behavior and has failed to do so.<sup>88</sup> It further allows probationary employees to be represented by members of union representatives.<sup>89</sup>

The above provisions clearly demonstrate how probationary employees are protected in Tanzania. Although the Act has not clearly stated how they should be protected, the Code of Good Practice has expressly listed the protection of probationary employees. However, the stipulated protection in the code targets generally probationary employees who are beginning their job carriers. Employees who are on probationary period due to promotion of new position or for poor performance enjoys all rights enjoyed by other ordinary employees.

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<sup>87</sup> Rule 10(7), *ibid*

<sup>88</sup> Rule 10(8), *supra*

<sup>89</sup> Rule 10(9), *ibid*

### 3.3.2 South African Jurisdiction

Probationary employees in South Africa are governed by the Labour Relations Act, No. 66 of 1995 specifically schedule 8 of the Act<sup>90</sup> which deals with probationary employees. In the general context, a probationary employee is understood to be a newly appointed employee who has a conditional employment contract (written or unwritten) in South Africa. This suggests that the continuation of the contract is conditional on whether the employee's work performance during the probationary period shows that the employee is able to carry out the work properly, or not. This being the purpose of the probationary period, it does not mean that the employer has a free license to fire the probationer if the employer believes the employee's performance to be unsatisfactory. This is the same position to probationary employees in Tanzania.

Probationary period to a newly hired employee in South Africa is a voluntary process to employers based on certain reasonable given the circumstances of the job. This period may be determined by the nature of the job, and the time it takes to determine the employee's suitability for continued employment.<sup>91</sup> The purpose of probation is to give the employer an opportunity to evaluate the employee's performance before confirming the appointment. During probationary period the employee will be issues instructions, training, guidance and counseling which in return help them to win the evaluation process by the employer. The given training may be said to be indirect protection to probationary employees in South Africa.

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<sup>90</sup> Item 8 of schedule 8 of the Labour Relations Act 66 of 1995

<sup>91</sup> Item 8(1)(a & b), of schedule 8 of the Labour Relations Act, *supra*

The Code further clearly protects probationary employees by prohibiting employers to use the probationary period for their own benefit contrary to what has been provided in the code. For example, a practice of dismissing employees who complete their probation periods and replacing them with newly-hired employees, is not consistent with the purpose of probation and constitutes an unfair labour practice.<sup>92</sup>

The duration of the probation must be determined in advance and be through reasonable duration. This looks similar to the position in Tanzania as well that to the jobs which does not need skilled labourers be given not more than six months while those jobs demanding high skilled labourers be given no more than twelve months. The length of the probationary period should be determined with reference to the nature of the job and the time it takes to determine the employee's suitability for continued employment.

During the probationary period, the employee's performance should be assessed. An employer should give an employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service. However, if the employer determines that the employee's performance is below standard, the employer should advise the employee of any aspects in which the employer considers the employee to be failing to meet the required performance standards. If the employer believes that the employee is incompetent, the employer should advise the employee of the respects in which the employee is not competent.

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<sup>92</sup> Item 8(1)(c), *ibid*

The employer may either extend the probationary period or dismiss the employee after complying with subitems (g) or (h), as the case may be.<sup>93</sup>

The period of probation may only be extended for a reason that relates to the purpose of probation. The period of extension should not be disproportionate to the legitimate purpose that the employer seeks to achieve. This is a protection to employees who have not shown enough skills to allow the employer hire them permanently. The option of extending probationary period to certain employees on probation tends to protect them from being immediately terminated after completion of their probationary period.

The code has further stipulated the reason and procedures how an employee under probation can be fired. That an employer may only decide to dismiss an employee or extend the probationary period after the employer has invited the employee to make representations and has considered any representations made.<sup>94</sup> A trade union representative or fellow employee may make the representations on behalf of the employee. This protection of employee reflects the protection guaranteed under by the principle of natural justice, the right to be heard which goes together with a right to fair presentation and representation. However, If the employer decides to dismiss the employee or to extend the probationary period, the employer should advise the employee of his or her rights to refer the matter to a council having jurisdiction, or to the Commission.

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<sup>93</sup>Item 8(1)(i), of the code, *supra*

<sup>94</sup>Item 8(1)(h), *ibid*



Any person deciding about the fairness of a dismissal of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.

There is similar protection of probationary employees to that of Tanzanian jurisdiction when the employee has completed his probationary period. The law provides that, employee should not be dismissed for unsatisfactory performance unless the employer has given the employee appropriate evaluation, instruction, training, guidance or counselling; and after a reasonable period of time for improvement, the employee continues to perform unsatisfactorily.<sup>95</sup>

It is further stipulated that the procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other ways, short of dismissal, to remedy the matter.<sup>96</sup> In the process, the employee should have the right to be heard and to be assisted by a trade union representative or a fellow employee.

### **3.4 Probationary Employees' Rights in the Doctrine of Equity**

The term equity refers to a particular set of remedies and associated procedures involved with civil law. These equitable doctrines and procedures are distinguished from legal ones. A court will typically award equitable remedies when a legal remedy is insufficient or inadequate. The doctrine of equity is one of the sources of law in Tanzania.

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<sup>95</sup>Item 8 (2) of schedule 8 of the Labour Relations Act, *supra*

<sup>96</sup>Item 8(3), *ibid*

Bearing in mind the doctrine of equity, during a probation period, an employer should not assume that the employee does not have any employment rights. For instance, in Tanzania, employees in their probationary period have statutory implied rights. The justification of this is that it is not the case that the individual is not a ‘proper’ employee until they have passed their probationary period, or until they have been given their contract of employment, they are an employee and therefore have employment rights and protections from day one. Then it is obvious that other rights and protection will only apply once the employee has reached certain milestones in their length of service. As stated above, probation periods have generally no clear stipulation in the Act and if the concept is not built into the contract of employment, the employer cannot rely on it. However, though it is not there, the probation period itself which dictates parameters of statutory rights, but the length of service is what matters.

### **3.5 Judicial Pronouncement on the Rights of Probationary Employees in the Tanzanian and South African Jurisdiction**

#### **3.5.1 The Tanzanian Judiciary**

The judiciary in Tanzania have been given a duty by the Constitution to protect the civic rights, duties and interests of every person and community and determined by the courts of law or other state agencies established by or under the law.<sup>97</sup> Following this requirement, the judiciary in Tanzania has interpreted the various provisions of law governing employment through cases that has been lodged through appeal to the High Court Labour Division and the Court of Appeal of Tanzania.

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<sup>97</sup> Art. 13(3) of the URT Constitution, *supra*

Justice Rweyemamu in the case of *Commercial Bank of Africa (T) Ltd v. Nicodemus Mussa Igogo*<sup>98</sup> stated that fair termination principles are not applicable to employees on probation. Expiry of a specific period of probation of an employee renders such an employee eligible for termination. The position remains same even where an employee continues to work after expiration of the probation period, is given salary increment or further training. A probationary employee remains with that status until confirmed by the appointing authority.

Justice Rweyemamu further provided that an employee on probation is entitled to fair labour practices. Under the Code of Good Practice<sup>99</sup> a probationary employee is entitled to be represented in the process referred to in sub-rule 7 by a fellow employee or union representative. It reads that: *Where at any stage during the probation period, the employer is concerned that the employee is not performing according to the standard or may not be suitable for the intended position the employer shall notify the employee on that concern and give the employee an opportunity to respond or an opportunity to improve.*

In another instance Justice Rweyemamu in *National Microfinance Bank v. David Nzaligo*,<sup>100</sup> observed that whether or not an employee on probation is protected and covered by section 36(a)(ii) of the Employment and Labour Relations Act (ELRA). That, an employee on probation does not assume employment status on expiry of period of probation as expiry of the specific period of probation render such an

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<sup>98</sup>Lab. Div. MZA, Revision No. 40 of 2012

<sup>99</sup> Rule 10(7) (8) and (9) of GN 42/2007

<sup>100</sup>Lab. Div. DSM, revision No. 347 of 2013

employee eligible for confirmation. He further pointed out that being kept on after expiry of probation period does not amount to confirmation.<sup>101</sup>

However, in *Sella Temu v. Tanzania Railways Authority*,<sup>102</sup> wherein the Court of Appeal was dealing with an appeal from the High Court decision considered whether an employee on probation had a right to be heard before termination. It was held by the court that there was no right of hearing because there was no termination of employment contract but rather merely a non-confirmation while the appellant remained in the employment. The court declared that probation is a practical interview.

In the National Microfinance bank case above the court also determined whether an employee on probation is entitled to fair labour practices, which includes fair treatment from the employer. The court held that, fair treatment is a labour right of every employee, during the various employment processes including during job selection and interviews. Since probation is a practical interview, and that, an employee under probation is not protected under Part E of the Employment and Labour relations Act (ELRA), such employee cannot be compensated for in a manner employee are entitled to by the Act.

In *Mwita Magani and Another v. Mganga Mkuu Hospitali Teule Biharamulo*,<sup>103</sup> the court was required to determine whether or not under the Tanzanian law, an employee on probation automatically assumes employment status where the stipulated period of

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<sup>101</sup> He cited this from Mtenga v. University of Dar es salaam, 1971 HCD 247

<sup>102</sup> Civil Appeal No. 72 of 2002

<sup>103</sup> Lab. Div. BKB, Revision No. 09 of 2013

probation has expired, without the employer deciding to confirm or not to confirm the employee. Justice Rweyemamu observed that being kept on after expiry of probation period does not amount to confirmation. The same had been held in *Mtenga v. University of Dar es Salaam, HCD 1971* wherein the issue of automatic confirmation was raised and the above answer was released.

Justice Mipawa in the Case of USAID *Wajibika Project v. Joseph Mandago and Edwin Nkwanga*,<sup>104</sup> stated that the purpose of a probationary period is to provide the parties with an opportunity to test one another and to find out whether they can continue working with each other for a long period of time in a healthy employment.<sup>105</sup> He was attempting to ascertain whether a probationary employee is protected under the provision of section 37 of the Employment and Labour Relations Act on unfair termination.

He further stated that in order for the probationary employee to benefit with the provision of section 37 of the employment and Labour Relations Act<sup>106</sup> on issue of unfair termination, and since section 35 of the Act exempt the employer from observing the mandatory provision of section 37, the Employment and labour Relations Act must be interpreted conjunctively with Rule 7, 8 and 9 of the Code of Good Practice.<sup>107</sup> This was justified by the fact that section 99 of the Employment and Labour Relations Act provides that the Employment and Labour Relations Act (ELRA) has to be interpreted in accordance with the Code of Good Practice and shall

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<sup>104</sup> Lab. Div., DV, DSM, Revision No. 208 of 2014

<sup>105</sup> Justice Mipawa cited this from the case of *Mwaitenda Ahombokile Michael v. Interchick Company Limited, Labour Dispute*, No. 30 of 2010 (unreported)

<sup>106</sup> Act No. 6 of 2004

<sup>107</sup> Employment and Labour Relations (Code of Good Practice) Rules No. 42 of 2007

take into account any Code of Good Practice or Guideline. The court then declared that interpreting protection given under section 37 of the Employment and Labour Relations Act (ELRA) without relating it with the Code of Good Practice was an error of law.

Justice Mipawa further stated in the above case that the probationary employees are beneficiaries of the fair termination and protected under the umbrella of unfair termination as per the Code of Good Practice quoted above through the International Labour Organization Conventions (ILO) on Termination of Employment Convention.<sup>108</sup> The fair labour practice entailed in the Code of Good Practice Rule 10(7) and 8 as regard to fair termination is by and large a big trek in the labour jurisprudence in Tanzania especially when it comes to the question of probationary employees or employees who are still in the engagement or probation.

### **3.5.2 South African Judiciary**

The judiciary of South Africa have been given a duty by the Constitution when interpreting the Bill of Rights, a court, tribunal or forum to promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law.<sup>109</sup> When interpreting the Bill of Rights, a court, tribunal or forum to promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law. When interpreting any legislation, and when developing the common law or customary law,

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<sup>108</sup> Convention No. 158 of 1982 and Recommendation No. 166

<sup>109</sup> Section 39(1) of the Constitution of South Africa, *supra*

every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.<sup>110</sup> It has further been provided that, anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.<sup>111</sup>

The South African judiciary has been more explicit on the reasons and justification of dismissal of a probationary employee. In the case of *IBM South Africa (Pty) Ltd V. Commission for Conciliation, Mediation and Arbitration (CCMA), Daizy Manzana N.O & Shamala Pillay*,<sup>112</sup> the court has observed that the requirements resting upon an employer when dealing with an employee on probation are set out at Item 8 (Probation) of Schedule 8 of the LRA (Code of Good Practice: Dismissal). “Any person making a decision about the fairness of an employee for poor work performance during or on expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.”<sup>113</sup>

The court observed that the employer has the right to ‘test’ the employee in different situations and determine whether she is capable of coping with the rigours of permanent employment. If a probationary employee is found to be wanting on key

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<sup>110</sup> Section 39 (2-4), of the Constitution of South Africa, *supra*

<sup>111</sup> Section 38, of the Constitution of South Africa, *Ibid*

<sup>112</sup> Case no: JR 64/2014

<sup>113</sup> Item 8 (1) (j) (Probation) of Schedule 8 of the LRA (Code of Good Practice: Dismissal)

aspects of the job description the employer is at liberty to follow its instincts and not appoint the employee permanently. These important but often intangible considerations are inherent in the context of ‘less compelling’ reasons.

The Court held that when dealing with a person on probation in a responsible position like a professional assistant, where the person claims to have the necessary experience to do the job, it is not unreasonable for the employer to simply point out the perceived shortcoming of the probationer and to emphasize the importance of improving her performance if she wants to be permanently employed. The Court found that the Bargaining Council Arbitrator had failed to appreciate this and appeared to believe that the employer had to treat such a probationer as someone who was still in training.

The judiciary has provided a clear interpretation of the provisions governing protection of probationary employees in South Africa especially in the situation where some employers tried to hid behind probationary period to terminate employee’s employment contract. In the case of *Kwena Darius Mangope V.South African Football Association*,<sup>114</sup> The Labour Court of South Africa ordered the respondent (Employer) to pay the applicant in the amount of R1 777 000, 00 as damages occasioned by the unlawful repudiation of the contract of employment of the applicant. The employer extended the employees probation period claiming for the purpose of giving the applicant an opportunity to improve on his performance. The applicant’s version is that he was told that the probationary period was extended because there was a break in the three months’ probation he had to serve. The break in

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<sup>114</sup>CASE NO: J2752-09, 2010



the period occurred apparently because the applicant took ill for some days during that period. The applicant says that the deponent to the opposing affidavit gave him the letter of the extension of the period and said he should take it to Mr. Hack for approval of the extension. According to the applicant Mr. Hack told him that he approved the extension and that he had no problems with his performance.

Justice Molahlehi<sup>115</sup> observed that clause 5.2 of the employment of contract indicates very clearly that the intention of the parties was not to use the probationary period to deny the applicant the opportunity for a permanent employment. In other words, the proper reading of the contract is that whilst the respondent had the right to terminate the contract for failure to meet the standard of performance required of the applicant, that would be done sparingly and only after certain processes have been complied with. One of those processes entailed the respondent having to properly evaluate the performance of the applicant prior to taking a decision not to permanently appoint him.

Molahlehi, J. further stated that the principle in clause 5.2 is taken further in clause 5.3 where it is stated that the employee will be given reasonable evaluation, training and counseling to afford him the opportunity to improve on his performance. The argument of the respondent that the applicant was a senior manager appointed with the understanding that he has the necessary skills is not sustainable. The argument would have applied had the respondent firstly conducted the evaluation and thereafter informed the applicant that the evaluation indicated that he has failed in arrears where

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<sup>115</sup> Molahlehi, J. Judge of the Labour Court, Johannesburg

a person of his qualification, skills and experience ought not to have had difficulties in meeting the standard of performance expected of him.

The Labour Appeal Court of South Africa, Johannesburg on *Palace Engineering (PTY) LTD v. Thulani Ngcho, Commissioner for Conciliation, Mediation & Arbitration*,<sup>116</sup> provided that with regards to probationary employees, Item 8(1)(e) of the Code of Good Practice: Dismissal (“the Code”) stipulates that during the probationary period, the employee's performance should be assessed and an employer should give an employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service. Item 8(1)(h) of the Code enjoins the employer to dismiss an employee or extend the probationary period only after the employer has invited the employee to make representations and has considered any representations made. Item 8(1)(j) of the Code provides that „any person making a decision about the fairness of a dismissal of an employee for poor work performance during or on the expiry of the probationary period ought to accept reasons for dismissal that may be less compelling than would be the case in dismissals effected after the completion of the probationary period.

Waglay, J.P.<sup>117</sup> further stated that although a senior employee is indeed expected to be able to assess whether he is performing according to standard and accordingly does not need the degree of regulation or training that lower skilled employees require in order to perform their functions, an employer is not absolved from providing such an

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<sup>116</sup>Case no: JA20/2012

<sup>117</sup>Judge President of the Labour Appeal Court, Johannesburg

employee with resources that are essential for the achievement of the required standard or set targets. The acceptance of less compelling reasons for dismissal in respect of a probationary employee as contemplated in item 8(1)(j) of the Code does not, in my view, detract from the trite principle that the dismissal must be for a fair reason. Even though less onerous reasons can be accepted for dismissing a probationary employee, the fairness of such reasons still needs to be tested against the stipulations of item 8(1)(a) (h) of the Code of Good Practice. At the end of the day, the onus rested on the employer to prove that the dismissal was substantively fair. The conspectus of the evidence proved the opposite, that the dismissal was substantively unfair.

### **3.6 Conclusion**

The above discussion presents the fact that there is substantial guaranteed substantial guarantee of the rights of probationary employees which require a mere effort of interpretation. Probationary employees in Tanzania and South Africa enjoys a number of legal protections including protection against unlawful discrimination, detrimental treatment, automatically unfair dismissal in the usual way, among others. The judiciary has played a significant role when interpreting the laws governing employees on probation period and discussed above. The next chapter discusses on the findings from the data collected from the field.

## **CHAPTER FOUR**

### **RESEARCH FINDINGS AND INTERPRETATION**

#### **4.1 Introduction**

The foregoing study ventures on the comparative analysis of the rights enjoyed by employees under probation period in Tanzanian jurisdiction and South African jurisdiction. The study has been governed by the research questions that; What is the legal framework governing rights of probationary employees in Tanzania and South Africa? Also, the question that, what are the legal provisions that should be employed to mitigate the existing gap in the two jurisdictions? And that, are there any international instruments, model laws and best practices which guarantees the rights of probationary employees which can assist to improve the existing Tanzanian and South African legal systems? The study has focused on comparative study of the labour laws of Tanzanian and South African jurisdictions.

#### **4.2 Research Findings**

The findings from various literatures involved in this study suggests that an employee may be subjected to probationary period when he/she is about to engage into new job as a new employee. Similarly, an ordinary employee may be subjected to probation period when his employer is of the view that he needs some evaluation, training and guidance in order to stabilize his declining performance. On the other hand, an employee may be subjected to probation period when he is about to assume new job title after promotion. This is the practical interview an employee is subjected before being confirmed into his new post or former post which he was deprived due to

declining performance. An attempt to respond to the above hypothesis has been made hereunder.

#### **4.2.1 What is the Legal Framework Governing Rights of Probationary Employees in Tanzania and South Africa?**

##### **4.2.1.1 Findings from Tanzanian Legal System**

It has been found that, there is no direct provision of the Act of Parliament in Tanzania which openly guarantees rights of employees serving their probation period. The Employment and Labour Relations Act of 2004 does not explicitly possess a provision regarding probationary employees. However, probationary employees have been implied mentioned under section 35 of the Act, which requires a probationary period of six months. It provides that a worker with less than six months of employment may not bring an unfair termination claim against the employer.

The above finding impliedly suggests that a probationary employee whose probation period is beyond six months may exercise the rights provided under sub part E of the Employment and Labour Relations Act of 2004. However, the said protection is not expressly provided and interpretation of this provision it will depend on the discretion of the court. Most of the rights and protection of probationary employees are found on a Code of Good Practice of 2007; The Constitution of the United Republic of Tanzania, as discussed in chapter three of this study. It has been found also that, most of the rights and protection of employees under probation in Tanzania are available under the Standing Orders for the Public Service for public servants.<sup>118</sup>

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<sup>118</sup>Standing Orders for the Public Service, 2009, Made Pursuant to S.35 (5) of the Public Service Act, Cap.298

It has been found that, the term “Probation Period” to mean the terms relating to training applicable to a public servant who is serving in the Public Service on permanent and pensionable terms (whether on probation or confirmed in his appointment) or on an agreement or contract or in the Operational Service. This is a training applicable to a candidate for entry into the public service who has not yet been appointed to the service on permanent, probationary or operational service terms. Such a candidate shall be appointed to the service after he has successfully completed his training course.<sup>119</sup>

It has been found also that the probation period for public servants have been stipulated by the Standing order as it provides that, where any person is first appointed to an office in the public service on pensionable terms, he shall serve a probationary period of twelve months. In the case of a public servant undergoing a course of instruction of six months or more in duration, the question of his confirmation shall be considered after the completion of the course i.e. the period of his probation shall be extended to cover the period of the course.<sup>120</sup>

It has been found that the purpose of the probation period is to ensure good performance and good conduct of a public servant. The first consideration with regard to public servants on probation shall be regarded to be on trial with a view to learning their work and being tested as to their suitability for it. They shall, therefore, not only be given every facility for acquiring experience of their duties, but also be kept under continuous observation, and may be posted where such observation is possible. If

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<sup>119</sup> D. 34, Ibid

<sup>120</sup> D. 40 of the Standing Order, supra

during the first few months of service a public servant shows failures, which make it doubtful whether he shall become suitable for permanent appointment, he shall at once be warned and be given all possible assistance to correct his faults.<sup>121</sup>

It is further found that, it is not a responsibility of a public servant to apply for confirmation but it shall be the duty of the Immediate Supervisor concerned to initiate necessary action, not later than three months before the expiration of the probationary period with view to enabling the appropriate appointing authority to consider whether: the public servant shall be confirmed in his post; the probationary period shall be extended so as to afford the public servant further opportunity to pass any examination, the passing of which is a condition of the appointment, his service otherwise being satisfactory.<sup>122</sup>

It has been found that, the probationary period shall be extended to afford the public servant the opportunity of improvement in any respect in which his work or conduct has been found to be unsatisfactory; or the public servant's appointment shall be terminated. In this connection, it should be borne in mind that it is desirable particularly if the action proposed is adverse to the public servant concerned, that this matter shall be finally settled before the period of probation ends. In forwarding their recommendations to the appropriate appointing authority, Chief Executive Officers shall include a copy of the final report (at the end of 9 months) referred to in Standing Order.<sup>123</sup>

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<sup>121</sup> D. 41, Ibid

<sup>122</sup> D. 43, Ibid

<sup>123</sup> D. 42, Ibid

Where the appointing authority is of the opinion that the probationary period should be extended or that the probationary appointment should be terminated, the appointing authority shall, before extending such period or terminating such appointment: inform the public servant in writing of his intention to do so; advising the public servant, if he so wishes, to make representations in the matter within the specified time-limit. The public servant concerned shall be required to acknowledge receipt of the communication in writing within the time-limit specified, provided that extension of probationary period should not be extended for more than six months.<sup>124</sup>

It has been found that the public servants under probation when is promoted to any post in the public service, that public servant shall for the period of six months (exclusive of any period of leave) from the date upon which the promotion became effective, be deemed to be on probation. Where the immediate supervisor is of the opinion that the public servant has failed to perform satisfactorily all the duties of the post to which he was promoted, he shall give the public servant a notice in writing calling upon him to show cause, in writing, why his promotion should not be withdrawn. Where a notice is given to a public servant under paragraph (2), the immediate supervisor shall: if the public servant has made any representations in writing pursuant to the notice, forward such representations together with his own report upon the public servant's conduct, ability, diligence, aptitude and any other relevant factor to the appointing authority; if the public servant fails to make any representation, report such failure to the appointing authority and also furnish the

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<sup>124</sup> D. 42 of the Standing Order, Supra



appointing authority with a report on the public servant's conduct, ability, diligence, aptitude and any other relevant factor.<sup>125</sup>

Further that, after considering the report and representations, forwarded under paragraph (3) if any, the appointing authority may direct that: (a) the public servant's promotion not be interfered with;

(b) a decision in the matter be deferred for such further period as the appointing authority may direct so as to allow the public servant further opportunity to prove his suitability for the post to which he was promoted; or the public servant's promotion be withdrawn. A public servant including a public servant on probation may resign his appointment by giving notice of not less than three months of his intention to do so. Such notice may include earned leave. Alternatively, he may pay a month's gross salary in lieu of such notice.<sup>126</sup>

#### **4.22 Findings from South African Legal System**

It has been found that Probationary employees in South Africa are governed by the Labour Relations Act, No. 66 of 1995 (LRA) specifically schedule 8 of the Act. Probation as regulated in terms of the LRA only applies to newly hired employees and not employees who are promoted on a trial basis. A probationary employee is newly employed on a conditional employment contract, to evaluate the employee's work performance during the probationary period to ascertain if he/she is able to perform the work at the required standard, before confirming the appointment. It has been

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<sup>125</sup> D. 44, Ibid

<sup>126</sup> F. 49, of the Standing Order, supra

found that the Tanzanian position is not certain as to what kind of probationary employees are covered by the Code of Good Practice.

It is as well found that statutory probation and the applicable requirements, period, etc. must be agreed upon up front in the contract of employment. These are one sided terms of employment whereby the employer drafts them without giving chance to a probationer to contribute anything. Tanzania also practices same thing which in fact is an evidence of less effectiveness of the law itself.

#### **4.2.2 What are the Legal Provisions that Should be Employed to Mitigate the Existing Gap in the two Jurisdictions?**

The study applied a methodology for measuring differences in the labour standards enjoyed by probationary employees between the Tanzania and South Africa. The methodology has been used to identify the existing gap between the two countries on the extent probationary employees can enjoy labour standards. The study has found that South Africa has a clear statutory provision on her Code of Good Practice which is embedded in the schedule of the Labour Relations Act of 1995.

It has been found in Tanzanian jurisdiction and that of South Africa that there is no prescribed probation period and the only requirement is that it must be “reasonable” and it depends on the nature of the job. Again, a great discretion is left to be exercised by the employer who also happen to be stronger in bargaining power. The possibility of abusing this discretion is high as the employer will always use this chance to gain profit from the labour force offered by the probationary employee during probation period. The law is less effective in this aspect as well.

It has been found also that the probationary status of an employee is only applicable to issues of work performance (competence) – it has no relevance to misconduct perpetrated by the employee during probation, nor can it be an easy way out for the employer on the basis of an arbitrary issue concerning the employee. All issues other than work performance (competence) must be dealt with in the same way as with any permanent employee. A probationary employee is still entitled to protection by labour law.<sup>127</sup>

Probation also does however also not mean that the employer can fire the probationer “at will” if it is not satisfied with his/her performance. There is a process to follow and legal requirements to be met. The dismissal must be substantively and procedurally fair. This position is same to Tanzanian jurisprudence. A probationer’s performance must be monitored continuously from commencement of employment with these guidelines in mind, although reasons for dismissal related to probation may be less compelling than would be required for the poor performance (incapacity) dismissal of a permanent employee who had already completed probation or who had been working for the employer for some time.

If it is found that both in Tanzania and South African jurisprudence a decision at the end of the probationary period not to appoint an employee, amounts to a dismissal. The employer must therefore be able to prove that all of the requirements in the Schedule have been met in order to succeed against a challenge of unfair dismissal relating to probation. The decision to dismiss an employee for unsuccessful probation

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<sup>127</sup><https://www.labourguide.co.za/probation>, retrieved on 31<sup>st</sup> August, 2018

must be supported by records so that the employer is able to justify its decision. The employer is also obliged to consider other ways, short of dismissal, to remedy the matter.

The probationary period could be extended to further assess the employee's performance, but this should only be done in exceptional circumstances, and only for reasons relating to probation, such as where the employee has potential but the employer is not yet sure if the employee has resolved all his/her performance issues. It should not be done because the line manager has failed to properly manage the probation in the first place.

#### **4.2.3 Are there any International Instruments, Model Laws and best Practices which Guarantees the Rights of Probationary Employees which can Assist to Improve the Existing Tanzanian and South African Legal Systems?**

A probationary period in an employment setting is a set period of time wherein an employee's performance is monitored closely in order to assess their capabilities. Probationary periods are often applied to new employees as a means of determining their capabilities in a new job. In the spirit of the ILO Conventions and Recommendations, governments should take initiatives to ensure that probationary employees and employees are afforded full protection as provided by the ILO Conventions, including providing a copy of the revised Labour Law as soon as it is adopted.

ILO through its systems has provided various judgements and recommendation upon the status of probationary employees. ILO have revealed that the reason for probation

is to enable an organization to assess the probationer's suitability for a position. For this reason, it has recognized that a high degree of deference ought to be accorded to an organization's exercise of its discretion regarding decisions concerning probationary matters including the confirmation of appointment, the extensions of a probationary term, and the identification of its own interests and requirements.<sup>128</sup>

The ILO Tribunal has consistently found that an organization which employs staff members on a probationary basis must not only provide guidance, instructions and advice on carrying out duties; it must also set objectives for such staff members so that they know what criteria will be used to appraise their performance. It must, in good time and in clear language, inform a staff member of any aspects of her or his performance that are deemed unsatisfactory and warn her or him of the risk of dismissal after the probationary period so that both parties can take appropriate steps to remedy the situation sufficiently early. These requirements flow from the general principles applicable in international civil service law, in particular the principle of good faith, the duty of care and the employer's duty to respect the dignity of its employees.<sup>129</sup>

For further reading, the researcher has discussed various international instruments which should be used by Tanzania and South Africa to fill the existing gap between the two jurisdictions.

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<sup>128</sup>ILOAT Judgment on Probation; No. 3844, consideration 4.J

<sup>129</sup>ILO Judgments on Probation No. 3481, under 6 and 7, 3482, under 11, and 3678, under 2, Consideration 8, 2018

### **4.3 Conclusion**

The above findings indicate that the rights of probationary employees both in Tanzania and South Africa are not directly provided in the Acts of parliaments in both jurisdictions. This is because both jurisprudence and provisions governing probationary employees have been given impliedly in a sense that one may opt to abandon using the provisions of the code by giving some reasons. Enjoyment of these rights depends on the interpretation of courts and tribunals when they make reference to the constitutions and other related regulations and policies on employment. The next chapter is about Conclusion and recommendations.

## CHAPTER FIVE

### CONCLUSION AND RECOMMENDATION

#### 5.1 Conclusion

Employment protection and promotion of employment security as an essential aspect of the right to work have been a major concern of the International Labour Organization (ILO) throughout its history.<sup>130</sup> This study has investigated the rights of Probationary employees guaranteed in the legal systems of Tanzania and South Africa.

The rights of employees serving their probation period in both Tanzania and South Africa have been lights provided in both Constitutions. These are general rights guaranteed by the Constitutions under the Bills of Rights, which are actually freely enjoyable by all people in both countries. These rights include, and not limited to, non-discrimination of people, equality before the law (Equality of all employees), right to remuneration, right to work, free access to judicially. Therefore, to enjoy these rights it depends to the effort of the courts and tribunals in interpretation these Constitutional rights granted to all people.

The Employment and Laour Relations Act of 2004, which governs, among others, employment and labour relations in Tanzania borrow heavily from the employment and labour laws which are currently in force in the Republic of South Africa. Indeed, the new laws further enact employment and labour standards, which, by and large,

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<sup>130</sup>The first International Labour instrument dealing specifically with this issue, the Termination of Employment Recommendation (No. 119) was adopted in 1963

conform to the labour standards set by the International Labour Organization. The two legislations (Tanzanian and South African's) have clearly provided for rights of a probationary employee regarding termination of employment. The two statutes are silent regarding the rest of the employment rights enjoyed by other employees whether they also applicable to probationary employees.

The above fact brings a large similarity of the law and procedures governing or protecting probationary employees both in Tanzania and South Africa. Both jurisdictions agree that a newly hired employee may be placed on probation for a period that is reasonable given the circumstances of the job. The period should be determined by the nature of the job, and the time it takes to determine the employee's suitability for continued employment. Tanzania jurisprudence requires that the probation period be of reasonable of not more than twelve months depending on the nature of the job, standard required and the custom and practice of that sector.

Both jurisdictions suggest that, the lawmakers have no desire to prescribe to employers regarding the duration of the probation period. Thus, they leave it to the employer to define the duration, stating only that it should be reasonable and in relation to the circumstances of the job. Thus, the employer decides this matter. There is nothing to indicate that the new employee must be employed on probation - that is for the employer to decide. Employees can also be employed without a stipulated probationary period. This is the weakest part of the law as far as protection of probationary employees' concerns.

When appropriate, an employer should give an employee whatever evaluation, instruction, training, guidance or counseling the employee requires to render



satisfactory service. Dismissal during the probationary period should be preceded by an opportunity for the employee to state a case in response and to be assisted by a trade union representative or fellow employee.

This means that the probationer's performance must be monitored from day one, and any shortcomings in work performance must be addressed, by giving the employee necessary evaluation, counselling, instruction, training and guidance in order to assist him to achieve and maintain the required work performance standard. In addition, the employee must be given an opportunity to state what he thinks is the cause of the nonperformance, and what he thinks should be done in order to overcome the problem.

Both Tanzanian and South African jurisdiction provide rights of probationary employees through their Code of Good Practice which is attached in schedule of the Labour Relations Act<sup>131</sup> of South Africa and the Employment and Labour Relations (Code of Good Practice) Rules<sup>132</sup> of Tanzania. Both laws emphasize on the application of the provisions of these given codes while making any interpretation of the laws governing employment and labour relations of these countries. This suggests that employers in both countries would be required to show, by documentary proof, that they have complied with all the requirements stipulated in the Code of Good Practice of their country.

The Employment and Labour Relations Act of Tanzania requires any person making interpretation of this Act, to consider the provisions of the Employment and Labour

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<sup>131</sup> Act 66 of 1995

<sup>132</sup> The Code of Good Practice of 2007

Relations (Code of Good Practice) Rules and whenever there is a necessary need of departure from this Code, must justify the reason of such departure.<sup>133</sup> This suggests that application of the Employment and Labour Relations (Code of Good Practice) Rules when reading the Employment and Labour Relations Act (ELRA) is based on discretion of the courts. That any person making interpretation of any provision of the Act may ignore reference to the Employment and Labour Relations (Code of Good Practice) Rules, so long as he/she has reasons and justification to do so. This makes protection of employees under probation period to be less protected because the law itself makes it to be less compulsory.

## **5.2 Recommendations**

There is a serious need to incorporate provisions, which protects probationary employees in Tanzania into the Employment and Labour Relations Act of 2004 so as to grant effective interpretation of the law. Such a provision should go hand in hand with removing the current discretion provided under section 99(3) of the Employment and Labour Relations Act (ELRA) which allows abandoning citing the Code of Good Practice provisions when reading the ELRA. The provision should provide expressly that when reading the Employment and Labour Relations Act (ELRA) should go hand by hand with reading the provision of the Code of Good Practice of 2007.

The Labour Relations Act 66 of 1995 of South Africa should be amended to allow a new provision through which protection of probationary employees should be made expressly clear without giving a chance of departure discretion. Currently, protection

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<sup>133</sup> Section 99 (3) of the Employment and Labour Relations Act, 2004

of probationary employees in South Africa is provided in the Code of Good Practice on dismissal which is provided under schedule 8(8)(1-9) of the Act. Section 1 of schedule 8 provides that departures from the norms established by the Code of Good Practice of South Africa may be justifiable in proper circumstances. This loop hole may be used during interpretation to deny protection of probationary employees who always made weak by their status of being on practical interview (probation).

Employment and Labour Relations disputes in Tanzania are determined by the Commission for Mediation and Arbitration (CMA) and the adjudication by the Labour Court of the High Court labour division. The Commission for Mediation and Arbitration is composed of six commissioners and one chairperson who are all appointed by the president. The high court labour division of Tanzania is as well composed of judges who are also presidential appointees.

Bearing in mind this kind of composition, the present partiality makes it hard to deliver fair and just decisions especially on cases and employment disputes, which involves the government as an employer. This means that, employees under probation period in working places where the employer is the government, are likely to be less protected by the provision of section 99(3) of the Employment and Labour Relations Act (ELRA) so as the provision of the Employment and Labour Relations (Code of Good Practice) Rules.

The Labour Relations Act 66 of 1995 of South Africa requires any person making interpretation of this Act, to consider the provisions of the Code of Good Practice especially when dealing with dismissal disputes. However, departure from the Code

of Good Practice provisions provided under schedule 8 of the Labour Relations Act 66 of 1995 may be justified under this Act.<sup>134</sup> This suggests that application of the provision of the Code of Good Practice in South African jurisdiction when dealing with interpretation of employment disputes on dismissal is based on discretion of the courts. That any person making interpretation of any provision of the Act is permitted by law to ignore reference to the Code of Good Practice so long as he/she has reasons and justification to do so. This makes protection of employees under probation period to be less protected because the law itself makes it to be less compulsory in South Africa.

Employment and Labour Relations disputes in South Africa are determined by the Commission for Conciliation, Mediation and Arbitration (CCMA) and the adjudication by the Labour Court of South Africa. CCMA is a well composed governing body with all degree of impartiality from the government. The Governing Body is the supreme policy making body of the CCMA and consists of a chairperson, three state representatives; three representatives from organized labour and three representatives from organized business; all of whom are nominated by NEDLAC and the Director of the CCMA nominated by the Governing Body. This body can well bring a fair interpretation of the Code of Good Practice with disregard the sense of biasness that can be brought by officials who are appointed by the president as the case of Tanzania.

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<sup>134</sup> Section 1(1) of Schedule 8 of the Code of Good Practice on Dismissal of the Labour Relations Act 66 of 1995

Interpretation of the Labour Relations Act 66 of 1995 specifically schedule 8 regarding the provisions of the Code of Good Practice by the labour courts under South African jurisdiction may be said to be of high degree of impartiality when compared to that of Tanzanian jurisdiction. This is due to the fact that judges who presides over the labour courts are appointed by the Judicial Service Commission which draws up a list of candidates that must have three more names than the number of vacancies.

The Commission does this after calling for nominations and holding public interviews. Then the President, after consultation with the Chief Justice and the leaders of political parties represented in the National Assembly, chooses the judges from this selection.<sup>135</sup> With this kind of impartial personnel, as their composition suggests, probationary employees in South Africa are more likely to be protected through the interpretation of the code of good practice provisions when compared to Tanzanian jurisdiction.

Protection of probationary employees under international instrument is as well uncertain to the extent that some important Convention on workers termination of employment expressly denying protecting them. Termination of Employment Convention, 1982 (No. 158) which is a Convention concerning Termination of Employment at the Initiative of the Employer which entered into force on 23 Nov 1985, clearly and expressly denies protection of probationary employees. The convention calls upon member states to excludes from all provisions of this

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<sup>135</sup>Sections 174 to 178 of the South African Constitution, 1995 which deal with the appointment of judicial officers

convention. This been the case countries have opted to give a moderate protection with much power of discretion given to law interpretations personnel.

Amendment to the Employment and Labour Relations Act of 2004 should be made especially on the composition of the Commissioners and chairperson of the Commission for Mediation and Arbitration (CMA) in Tanzania. Currently, the six Commissioners and the chairman of CMA are appointed by the president. With the interpretation discretion provided by section 99(3) of the Employment and Labour Relations Act (ELRA), which allow departure from referring to the Code of Good Practice, CMA officials are likely to be bias by citing simple reasons which justifies departure, especially on employment disputes wherein the government is the employer. Amendment should be made on composition of CMA Commissioners and Chairman so as to eliminate the above said discretion.

Amendment should also be made on the Constitution of the United Republic of Tanzania of 1977 regarding appointment of judges. The Labour Court is presided over by judges who are appointed by the president upon recommendation of the Judicial Service Commission. Following the provision of section 99(3) of the Employment and Labour Relations Act (ELRA), judges presiding over the labor court are likely attracted to avoid reading the provisions of the Code of Good Practice especially when they deal with employment disputes wherein the government is part of the party to the said dispute.

The South African lawmakers in 1995 when passing the Labour Relations Act 66 didn't find it necessary to prescribe to employers regarding the duration of the

probation period. They provided that the period of probation in SA should be determined in advance and be of reasonable duration. The length of the probationary period should be determined with reference to the nature of the job and the time it takes to determine the employee's suitability for continued employment. Section (8)(1)(d) of the Schedule on Code of Good Practice on dismissal should be amended so that the exact time for probation period is set by the law itself. When the probation period is left to be set by employers who happens as well to be strong in bargaining power, the probationary employee is subjected to total threat.

Tanzanian jurisprudence requires that the probation period be of reasonable of not more than twelve months depending on the nature of the job, standard required and the custom and practice of that sector. To remove any degree of doubt and varying employment standards Rule 10(4) of the Code of Good Practice of Tanzania must be amended so that the provision clearly and expressly states the exactly period of probation. This will remove the doubt of what is reasonable period stated in the provision.

The South African jurisprudence requires that an employer may dismiss an employee or extend the probation period after the employer has invited the employee to make representations and has considered any representations made. Provisions of section (8)(1)(h) of the South African Code of Good Practice should be amended to allow a fair procedure, fair reason and valid reason to be used as a parameter for dismissal of a probationary employees.

Section 35 of the Employment and Labour Relations Act (ELRA), requires that only employees under not less than six months can be protected by all provision of the Act

which concerns termination of employment contract. This means that employees who are employed under a less than six months' probation period engagement are not protected by the Act. Amendment should be made so that a minimum period of probation period should not be set instead a maximum period be set. This will give chance of protection of probationary employees engaged in less than six months period, a period mostly given to employees with job positions that require little skills and expertise.



## **REFERENCES**

### **A List of Text Books**

- Delpo, A. &Guerin, L.,Dealing With Problem Employees: How to Manage Performance & Personal Issues in the Workplace, 8th Ed, 2015.
- Atty, E. B. Labour Law Sample Forms, volume 1. LVS Publications Inc., 2016.
- Dr.Kapinga, W. Employment and Labour Law, Global Legal Insights, 1st Ed, Contributing, 2001.
- Steingold, F. S.Hiring Your First Employee: A Step-by-step Guide, 2008
- Yang, G. The China Employment Law Guide: What You Need to Know to Protect Your Company, TCK Publishing, 2017.
- Coallier, J. 6 - Month Probationary Employee Performance Evaluation: Forms Book, CreateSpace Independent Publishing Platform, 2017.
- O'Kane, M., Saudi Arabia Labor Law Outline, Al-Andalus Publishing, 2010

### **B List of Journals, Reports and Unpublished Materials**

- CLYDE & CO LLP, Employment law overview, London, L&E Global, 2017
- JHU.CCP TZ, Tanzania Personnel Policies and Procedures Manual, 2010
- Perspective on the probationary period and termination rights in Ontario, 2017
- Probationary periods-promoting excellence or Legal loophole?, 1999
- Vaughn, R., The Spoiled System, A Call for Civil Service Reform, 2004

### **C List of Websites**

- <https://www.labourguide.co.za/probation>

*[https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C111](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111)*

*[www.mywage.org/tanzania](http://www.mywage.org/tanzania),*

*<https://employmentrightsireland.com>*

*<https://financial-dictionary.thefreedictionary.com/Probationary+Period>*

*<https://www.hrzone.com/hr-glossary/what-is-a-probationary-period>*

*<https://definedterm.com>*

*<https://www.mspb.gov/About/members.htm>*

*<http://digitalscholarship.unlv.edu/thesesdissertations/210>*

*<https://www.lawnow.org/employees-probation/>*

*<https://www.legal-island.com/articles/uk/features/essential-guide-to-employment-contracts/2016/nov/probationary-periods-and-the-contract-of-employment/>*