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LEGAL ANALYSIS AND COMMENTRAY ON THE CONTEMPORARY LABOUR LAW DEVELOPMENTS UNDER THE ZIMBABWE LABOUR AMENDMENT BILL,2021 (H.B.14, 2021). Paper published 20 June 2021. © Copyright vests in the author.

By Labour & Commercial Lawyer Caleb Mucheche[1]

Introduction

Labour law in Zimbabwe has evolved and expanded from pre-colonial, colonial and post-colonial independent Zimbabwe to present day. The history of labour law development in Zimbabwe will be remiss or incomplete without giving due recognition to the supreme sacrifices made by early torchbearers for labour justice in Zimbabwe like the late independence forebears, nationalists cum trade unionist labour leaders like **Benjamin Burombo, Masotsha Ndlovu, Joshua Nkomo, Herbert Chitepo, Leopold Takawira, Edison Sithole, Samuel Parirenyatwa, George Silundika and Jason Moyo** to name but a few not in any hierarchy, order or superiority. One of the chief purposes of labour law is regulation of economic redistribution of wealth in society between the haves and have nots by addressing bread and butter issues of the stomach. The fight for the independence of Zimbabwe cannot be divorced from the fight for economic emancipation of the majority or masses, for without economic independence to access and enjoy the means of production in society, there is no meaningful independence for the majority people. This legal analysis and commentary of the **Labour Amendment Bill, 2021** traces the historical evolution and development of labour law in Zimbabwe before and after independence and the practical implications of such amendments to the dynamic employment relationship.

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Justification for regulation of labour law to counterbalance inherent unequal bargaining power between an employer and employee

The lopsided relationship of economic dependence by an employee on an employer coupled with higher economic bargain power of the employer makes a mockery and laughingstock any notion that an employer and employee are equal in such a relationship of employment as was proven by the common law power of arbitrary termination of employment that ensued pursuant to the Zuva Supreme Court judgment of 17 July 2015. The lack of equality in an employment relationship characterised by economic disparity between an employer and employee is an open secret or matter of public knowledge especially in a developing nation like Zimbabwe. Inequality is treating unequal persons equally and equal persons unequally. An employer who owns and controls the means of production has more weight and say in an employment relationship than an employee who is economically dependent on the employer. Labour law seeks to counterbalance the existing inherent inequality in the employment relationship and competing interests of employer and employee via statutory regulation. Consequently, this paper seeks to unearth, unravel and unpack the proposed law by availing an extensive commentary and intensive legal analysis of the Labour Amendment Bill, 2021.

International Law influence on Zimbabwean labour law under International Labour Organisation (ILO) Conventions and Recommendations

More than five amendments have been made to try and align Zimbabwean Labour Law with international best practice and the coming in of new trends. This is in order to give influence of the International obligations of the nation as a member state of the International Labour Organisation (ILO). This promotes the creation of a good and economical labour market that entices good investment opportunities and motivates investments in accordance to international developments such as ILO Conventions and Recommendations and Best Practices. In light of the above, one would appreciate that the development of Labour Law in Zimbabwe is not stagnant. This commentary is based on the review of the developments that the Labour amendment Bill of 2021 seeks to make on the existing provisions of the Labour Act [Chapter 28:01] and the effectiveness or efficacy of such developments.

Brief history of some post-independence labour law amendments in Zimbabwe

Prior to the current Labour Amendment Bill, there have been various efforts to amend the Act which had already been promulgated in 1985 as Labour Relations Act 16 of 1985. The Labour Relations Act 16 of 1985 was enacted as a comprehensive labour legislation as typical of liberation war victory trophy soon after Zimbabwe attained independence from colonial rule on 18 April 1980 after nearly 100 years of reeling under the yoke of colonial bondage since 12 September 1890 when the colonial system hoisted the British flag known as the Union Jack at then Fort Salisbury, present day Harare. This hosting of the British flag on 12 September 1890 was pursuant to colonisation of the country by the British South Africa Company (BSAC) owned by a British imperialist business tycoon Cecil John Rhodes. The colonisation of the country which took place around 12 September 1890 was preceded by the tricking of King Lobengula by some typical fraudulent misrepresentation into signing of a dubious exploitative contract agreement known as Rudd Concession between King Lobengula of the then Ndebele State and Charles Rudd as an agent of Cecil John Rhodes around 1888 ,in terms of which the country's natural resources like land and minerals were unfairly and oppressively expropriated from the local indigenous African people by the British South Africa Company. The following are some of the major amendments to the then Labour Relations Act and now Labour Act witnessed so far:

Labour Relations Amendment Act No.12 of 1992

The most comprehensive adjustment made by this Labour Amendment Act 12 of 1992 was to defeat the principle of 'one industry, one union'.[2] This amendment came hot in the heels of Economic Structural Adjustment Programme(ESAP) which the International Monetary Fund (IMF) and World Bank international financial institutions proposed to Zimbabwe as a blueprint for economic revival but unfortunately it was not successful. The decade from 1990 to 2000 witnessed some various labour strikes by both public service employees and private sector employees due to economic challenges that afflicted and affected the nation. There existed a trade union monopoly in any one industry influenced against labour market elasticity.[3] The Act eliminated the Labour Relations Board, Appeals against decisions of the registrar concerning the registration of unions and employment organisations, decisions of senior

[2] T. Kufa, "Brief history of Labour Law in Zimbabwe" Published in January 2021, https://www.linkedin.com/pulse/brief-history-zimbabwe-labour-law-understand-present-we-takudzwa-kufa

[3] Madhuku, 2015

hearing officers and against show cause orders now fell under the Tribunal.[4] Employment codes of conduct had already been introduced in 1990 terms of the **Labour Relations (Employment Codes of Conduct) Regulations, Statutory Instrument 379 of 1990 (S.I. 379 of 1990),** in terms of which government shifted from State corporatism by liberalising dismissal procedure through allowing employers and employees to come up with their own employment codes of conduct at works council or employment council registered in terms of **section 101** of the **Labour Act** to govern disciplinary and grievance procedures at work. The Labour Amendment Act 12 of 1992 constrained appeals to the Supreme Court against decisions of the then Labour Relations Tribunal to points of law only.[5] The old Labour Relations Tribunal was replaced with the Labour Court of Zimbabwe in 2002 as a specialist court to decide labour disputes. The legal filter position that appeals to the Supreme Court from any decision or judgment of the Labour Court is restricted or limited to a question of law only is now codified in terms of **section 92F** of the **Labour Act [Chapter 28:01]** worded in mandatory terms as follows;

"(1) An appeal on a question of law only shall lie to the Supreme Court from any decision of the Labour Court.

(2) Any party wishing to appeal from any decision of the Labour Court on a question of law in terms of subsection (1) shall seek from the President who made that decision or, in his or her absence, from any other President, leave to appeal that decision.

(3) If the President refuses leave to appeal in terms of subsection (2), the party may seek leave from the judge of the Supreme Court to appeal". (emphasis added by underlining)

Section 92F of the **Labour Act** means a party cannot appeal against a decision or judgment of the Labour Court to the Supreme Court on a question of fact which does not raise a question of law. See **Kiev Chamboko v Dorowa Minerals Limited SC 26/15.** A misdirection on facts amounting to a misdirection of law is a question of law that gives an aggrieved party

[4] n 1 above
[5] Ibid

legal recourse to appeal against a decision of the Labour Court to the Supreme Court as was stated by the Supreme Court in **Reserve Bank of Zimbabwe v Granger and Anor SC 34/01 at pages 5-6** as follows;

" ***An appeal to this court is based on the record. If it is to be related to the facts, there must be an allegation that there has been a misdirection on the facts which is so unreasonable that no sensible person who applied his mind to the facts would have arrived at such a decision. And a misdirection of facts is either a failure to appreciate a fact at all or finding of fact contrary to the evidence actually presented."***

There is no magic in determining what constitutes a question of law because a question of law simply means a legal issue or what the law says. Any ground of appeal from the Labour Court to the Supreme Court which does not conform to or comply with **section 92F** of the **Labour Act** by reason of failure to raise a question of law is a stillbirth. A ground of appeal attacking factual findings of the Labour Court which do not amount to legal errors is legally invalid for purposes of giving a basis of an appeal to the Supreme Court. See **Kiev Chamboko v Dorowa Minerals Limited SC 26/15.** The crux of the matter is that the substance of the grounds of appeal must disclose a question of law not necessarily the form or style of such grounds of appeal. Law is more concerned with substance over form. What is important is that the nub of any ground of appeal against any decision of the Labour Court must reveal a question of law for resolution by the Supreme Court. See **Muzuva v United Bottlers (Pvt) Ltd 1994 (1) ZLR 217 (S), Hama v National Railways of Zimbabwe 1996 (1) ZLR 664 (S).**

In the case of **Zvokusekwa v Bikita Rural District Council SC 44/15** the Supreme Court further eloquently expounded the question of law in the following forceful manner:

"***In my view, the remarks made in Granger's case(supra) need to be qualified, to the extent that they may be interpreted as saying that, to constitute a point of law, in all cases where findings of fact are attacked, there must be an allegation that there was a misdirection on the facts which was so unreasonable that no sensible person properly applying his mind would have arrived at such a decision. One***

must, I think, be guided by the substance of the grounds of appeal not form. Legal practitioners often exhibit different styles in formulating such grounds. What is important is that the grounds of appeal must disclose the basis upon which the decision of the lower court is impugned in a clear and concise manner."

The amendment also removed state controls on minimum and maximum wages and it ushered in National Employment Council sectorial bargaining and introducing employer controlled code of conducts. The act also extended the definition of 'managerial employees' who were prohibited from trade union membership.[6] These stated 'managerial employees' were not allowed to be part of the same workers' committees as non-managerial employees but could now establish their own.[7] Measures concerning the activities of trade unions and industrialized action, however, remained intact.

Labour Amendment Act No. 17 of 2002

This Labour Amendment Act of 2002 mainly renamed the 'Labour Relations Act' to the 'Labour Act'. This Act ended the Labour Relations Tribunal and came up with the Labour Court and in order to avoid inconsistences, the Act gave the Labour court the jurisdiction of first instance to hear any issue over which the Labour Court had jurisdiction.[8] Labour officers remained only with the powers to of conciliation of disputes. The amendment introduced the Retrenchment Board to govern retrenchment issues and the protection of the rights of employees in the event that an employer is seeking to retrench employees. A major change was the introduction a new system of dispute resolution in the form of arbitration dealing with cases that labour officers failed to conciliate.

Social justice and democracy in the workplace as heart and soul chief purpose of the Labour Act

Labour Amendment Act 17 of 2002 birthed an indelible legal imprint in the form of social justice and democracy in the workplace as heart and soul chief purpose of the Labour Act

[6] Ibid
[7] Madhuku, 2015
[8] T. Kufa, "Brief history of Labour Law in Zimbabwe" Published in January 2021, https://www.linkedin.com/pulse/brief-history-zimbabwe-labour-law-understand-present-we-takudzwa-kufa

located in terms of **section 2A** of the **Labour Act [Chapter 28:01]** couched in compulsory terms as follows:

"2A Purpose of Act

(1) The purpose of this Act is to advance social justice and democracy in the workplace by-

(a) giving effect to the fundamental rights of employees provided for under part II;

(b) .....[Paragraph repealed by section 3 of Act 7 of 2005]

(c) providing a legal framework within which employees and employers can bargain collectively for the improvement of conditions of employment;

(d) the promotion of fair labour standards;

(e) the promotion of the participation by employees in decisions affecting their interests in the workplace;

(f) securing the just, effective and expeditious resolution of disputes and unfair labour practices.

(2) This Act shall be construed in such manner as best ensures the attainment of its purpose referred to in subsection (1). (emphasis added by underlining).

Furthermore **section 2A (2)** of the **Labour Act** exalt and places the Labour Act on an ivory tower or rock solid pedestal as supreme or mother legislation in labour matters prevailing over any other enactment other than the Constitution of Zimbabwe, typical of biblical Moses's staff before magicians in ancient Egypt, in the following salutary mandatory provisions:

"(2) This Act shall prevail over any other enactment inconsistent with it" (my underlining for emphasis). The supremacy of the Labour Act over any other enactment or legislation other than the Constitution of Zimbabwe was given an unequivocal thumps up by the Supreme Court of Zimbabwe in the leading case of **Tamanikwa and Others v Zimbabwe Manpower Development Fund SC 33/13.** See also related case of **Tendayi**

Tamanikwa and Frank Tinarwo v Zimbabwe Manpower Development Fund SC 73/17.

The Constitution of Zimbabwe is the only legislation that supersedes or prevails or takes precedence over the Labour Act by operation of the law set out in terms of the cover all **section 2(1) & (2) of the Constitution of Zimbabwe Amendment (No.20), 2013** worded in clear and unambiguous terms as follows:

" ***(1) This Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of inconsistency.***

(2)The obligations imposed by this Constitution are binding on every person, natural or juristic, including the State and all executive, legislative and judicial institutions and agencies of government at every level, and must be fulfilled by them."

Application of the Labour Act to all employers and employees except public service members and members of a disciplined force

The Labour Act applies universally and broadly to all employers and employees except those specifically excluded by the same Act from its application such as public service members and members of a disciplined force for Zimbabwe or a foreign State on Zimabwean soil by virtue of a treaty or agreement between the foreign State and Zimbabwe as the host country. Members of a disciplined force in Zimbabwe are members of army, air force, prisons and correctional services and central intelligence organisation. Conditions of service for members of the public service like teachers are governed by the **Constitution of Zimbabwe, Public Service Act [Chapter 16:04], Public Service Regulations, Statutory Instrument 1 of 2000.** On the other hand, conditions of service for other State workers like members of a disciplined force are governed partly by the **Constitution of Zimbabwe** various applicable pieces of legislation like **Defence Act, Police Act, Prisons Act** e.t.c. In relation to members of the public service, the State has a dual role characterised by wearing two hats of being employer and regulator which sometimes may create a conflict of interest due to the inherent competing interests of employer and employee. Some basic labour rights like right to collective bargaining, right to organise and right to strike are not provided for in the respective dry

pieces of legislation governing members of the public service and other State workers but some of those labour rights apply universally[9] to those groups of workers in terms of **section 65** of the **Constitution of Zimbabwe** subject to any limitations contained therein[10].

Basic essentials of a contract of employment and legal definition of employer

The basic essentials of a contract of employment are that one person freely and voluntarily makes his/her labour or working capacity available for hiring out to another person for payment of compensation known as wage or salary. A contract of employment is a contract of service by one person to another person known as the employer thereby creating an employer-employee relationship, unlike an independent contractor relationship which is a contract of service. It is important to note that a managerial employee or some agent of the employer (e.g labour broker, employer runner, proprietor of a management contract e.t.c) are defined as employer on the basis of assuming bestowed responsibility at the workplace. Also the list of other persons categorised as employer is wide enough to include an executor of a deceased estate authorised by the Master of the High Court, liquidator or trustee of any insolvent estate authorised by either creditors or Master of the High Court, curator for a mental patient legally endowed with such authority in terms of the Mental Health Act. With the repeal of the old **Companies Act [Chapter 24:03]** with effect from February 2020 and replacement of that legislation with the **Companies and Other Business Entities Act [Chapter 24:31]**, judicial management was abolished meaning that a judicial manager is no longer legally defined as an employer after that abrogation. The definitions of employee, employer and managerial employee are fully captured in **section 2** of the **Labour Act** as follows:

"employee" means any person who performs work or services for another person for remuneration or reward on such terms and conditions as agreed upon by the

[9] See section 65(1),(4),(6) & (7) of the Constitution of Zimbabwe with a universal application to all workers or employees in Zimbabwe drawn from private and public sector, be they members of public service, security service and any other State workers.

[10] See section 65(2), (3) & (5)of the Constitution of Zimbabwe which specifically exclude members of security services from the application of the labour rights stipulated therein. Section 86 of the Constitution of Zimbabwe gives a legal framework for justifiable limitation of some fundamental rights.

parties or as provided for in this Act, and includes a person performing work or services for another person-

(a) in circumstances where, even if the person performing the work or services supplies his own tools or works under flexible conditions of service, the hirer provides the substantial investment in or assumes the substantial risk of the undertaking; or

(b) in any other circumstances that more closely resemble the relationship between an employee and employer than that between an independent contractor and hirer of services

"Employer" means any person whatsoever who employs or provides work for another person and remunerates or expressly or tacitly undertakes to remunerate him, and includes-

(a) the manager, agent or representative of such person who is in charge or control of the work upon which such other person is employed, and

(b) the judicial manager of such person appointed in terms of the Companies Act [Chapter 24:03];

(c) the liquidator or trustee of the insolvent estate of such person, if authorised to carry on the business of such person by-

(i) the creditors; or

(ii) in the absence any instructions given by the creditors, the Master of the High Court;

(d) the executor of the deceased estate of such person, if authorised to carry on the business of such person by the Master of the High Court;

(e) the curator of such person who is a patient as defined in the Mental Health Act [Chapter 15:12] (No.15 of 1996), if authorised to carry on the business of such person in terms of section 88 of that Act.

"managerial employee" means an employee who by virtue of his contract of employment or of his seniority in an organisation, may be required or permitted to hire, transfer, promote, suspend, lay-off, dismiss, reward, discipline or adjudge the grievances of other employees."

Historically from 1980 to 2005, there existed a two-tiered labour law regime for public service sector and private sector employees which was later temporarily erased by Labour Amendment Act No. 17 of 2002 via harmonisation of labour laws and the attendant removal of reminiscent" Berlin wall" distinction between public sector and private sector labour law application. The harmonisation of labour laws for private sector and public sector employees was short-lived as it was dealt a lethal blow by Labour Amendment Act No. 7 of 2005 which removed public service sector employees from the purview or application of the Labour Act. At the present moment, public sector employees who are classified as members and not employees and members of a disciplined force of State or State security are completely excluded from the application of the Labour Act in crystal clear terms. **Section 3** of the **Labour Act** deals with the application of that Act in peremptory terms as follows:

(1) This Act <u>shall</u> apply to all employers and employees except those whose conditions of service are otherwise provided for in the Constitution.

(2) For the avoidance of any doubt, the conditions of employment of <u>members</u> of the Public Service <u>shall</u> be governed by the Public Service Act [Chapter 16:04].

(3) This Act <u>shall not apply to or in respect of-</u>

(a) members of a disciplined force of the State; or

(b) members of a disciplined force of any foreign State who are in Zimbabwe under any agreement concluded between the Government and the Government of that foreign State; or

(c) such other employees of the State as the President may designate by statutory instrument." (emphasis added by underlining)

Employee express right not to be unfairly dismissed under Zimbabwean labour law

Also Labour Amendment Act 17 of 2002 revolutionised labour law by introducing practical, legally binding and enforceable anti-unfair dismissal legal protection and affording an **employee express legal right not to be unfairly dismissed in terms of section 12B of the Labour Act** explicitly worded as follows;

12B Dismissal

(1) Every employee has a right not to be unfairly dismissed.

(2) An employee is unfairly dismissed-

(a) if, subject to subsection 3, the employer fails to show that he dismissed an employee in terms of an employment code; or

(b) in the absence of an employment code, the employer shall comply with the model code made in terms of section 101(9). (emphasis added by underlining).

In the case of **City of Gweru v Masinire Judgment No. SC 56/18**, the Supreme Court clarified the import and ambit of **section 12B(2)** of the **Labour Act** to the effect that procedural fairness in a dismissal of an employee from employment for any allegation of misconduct or fault requires an employer to follow due process in terms of an employment code of conduct registered in terms of **section 101** of the **Labour Act** or by default where no registered code of conduct exist, the employer must comply with the disciplinary procedure set out in the national employment code of conduct, **Statutory Instrument(S.I.) 15 of 2006**[11]. Unfair dismissal is proscribed under Zimbabwean labour law and punishable by either reinstatement or payment of damages in lieu of reinstatement in favour of the aggrieved or prejudiced employee[12].

Ushering of constructive dismissal into Zimbabwean labour law

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[11] C. Mucheche, A Practical Guide to Labour Law, Conciliation, Mediation and Arbitration in Zimbabwe (2014), 2nd Ed, Zimlaw Trust Publications.

[12] C. Mucheche, Labour Law Dismissal Remedies in Zimbabwe: Reinstatement and Damages in Lieu of Reinstatement, (2013), 1st Ed, Zimlaw Publications.

Constructive dismissal if a form of unfair dismissal at work which is involuntary termination of employment by an employee with or without notice because the employer directly or indirectly made continued employment intolerable or unbearable for the affected employee who throws in a towel or quits work or job. Constructive dismissal came as new part species of unfair dismissal distinct from the traditional forms of dismissal. Unlike under traditional dismissal where the employer directly authored an employee's dismissal from employment, under constructive dismissal, the law allows an employee to terminate the employment relationship under protest or with a heavy heart. In the eyes of the law, there is no constructive dismissal to legally sustain or talk about if an employee's employment is terminated by an employer as constructive dismissal only happens in a reverse situation where an employee pulls the trigger to terminate employment. Constructive dismissal may arise from a myriad of events or even one incident where an employee may allege intolerable or unbearable employment at the hands of the employer.

Legal test for constructive dismissal

The test to determine whether or not the employer has constructively dismissed an employee is objective so as to avoid some cry-babies or job deserters falsely alleging constructive dismissal to escape or run away from lawful and fair work responsibility, rigour or demands. The facts of each particular case will be scrutinised in terms of substance not form to decide whether or not there is a case of constructive dismissal. Each case will be decided on its own facts and merits and not a one-size fits all approach. Constructive dismissal may be authored by an employer or employer's agent or proxy but there has to be a nexus between that employer and the agent or proxy for the employer to be liable otherwise an employer cannot be made legally liable for the actions of a third party acting on a frolic of his/her own to apply, mount or exert intolerable or unbearable pressure on an employee who later terminates employment with or without notice in a spur of a moment after failing to withstand the heat in the kitchen. Also the employer is not liable if an employee is the author of his/her own misfortune at work giving rise to a complaint or allegation of constructive dismissal, by operation of the legal principle of he who consents to injury cannot be heard to complain (***volenti non fit injuria***). The legal protection of employees from the vice of constructive dismissal is afforded in terms of **section 12B (3)** of the **Labour Act** nicely worded as follows;

" ***An employee is deemed to have been unfairly dismissed-***

> ***(a) if the employee terminated the contract of employment with or without notice because the employer deliberately made continued employment intolerable for the employee."***

Leave conditions were improved for employees, including granting paid leave for trade union officials and mandating full pay for a female employee on maternity leave[13]. The amendment did not alter the restrictions on the right to strike and on freedom of unions remained intact but was slightly relaxed. Public Service workers were now placed under the ambit of the Labour Act meaning that all workers in Zimbabwe were to be under the same labour legislation.

Labour Amendment Act No. 7 of 2005

This Labour Amendment Act 7 of 2005 came with three major amendments, firstly wherein in the old position of a two-tier labour relations system was reinstated, wherein Public Service workers were not administered and regulated by the Labour Act. Secondly, there was the extension of the jurisdiction of the Labour Court. This was attained by granting the Labour Court 'the same powers of review as are exercisable by the High Court in respect of labour matters' **section 89(d) of the Labour Act [Chapter 28:01].**[14]

The last amendment was the repeal of **section 56 of the Export Processing Zones Act [Chapter 14:07]** so that employees in EPZs were brought within the ambit of the Labour Act.[15]

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[13] Madhuku 2015
[14] n 7 above
[15] Ibid

Constitution of Zimbabwe Amendment (No. 20) Act, 2013

Since the history of Zimbabwean labour law, statute law began to provide for the regulation of wages based on normative values of fairness and reasonableness, something which is alien to common law and was omitted in the statutory framework.[16] This was done at the highest level of legislation in Zimbabwe, in the supreme law of the land introduced in 2013 through the constitution of the nation which may be cited as **Constitution of Zimbabwe Amendment (No.20) Act, 2013.** This was achieved as an enshrined fundamental right under the Declaration of Rights under section 65 of the Constitution. What was missing before was a specified fair labour standard was now provided for in 2013, as a constitutional right.[17]

Labour Amendment Act No. 5 of 2015

Labour Amendment Act No. 5 of 2015 is unique in that it was passed into law fast-track akin to first aid measure to stop legal haemorrhage arising from labour carnage or genocide, within a remarkable period of one month. Also Labour Amendment Act 5 of 2015 was backdated to offer legal protection and insulation from 17 July 2015 being the date of the unanimous Supreme Court judgment comprising a five (5) member bench led by the late former Chief Justice **Godfrey Chidyausiku** , after it was enacted into law in August 2015 to cure a mischief or ***lacuna*** that arose post or as a consequent the concerned Supreme Court judgment. This Labour Amendment Act 5 of 2015 made headlines or shockwaves since the pre-colonial, colonial and post-independence history of labour law in Zimbabwe because of the outcry made by members of the labour market as a result of the common law impositions which came under the back of the trailblazing Supreme Court case of **Don Nyamande and Anor v Zuva Petroleum SC 43/15, which the author actively participated in at the frontline as lawyer for employee appellant party in a quest for labour justice.** Through this case, at common law, an employer had the legal right to terminate a contract of employment for any employee at any given time even if that employee had not committed any wrong against the employer in what is described as no-fault based termination of employment typical of no-fault based divorce in family law.[18] The court gave a reasoning that

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[16] T. Kufa, "Brief history of Labour Law in Zimbabwe" Published in January 2021, https://www.linkedin.com/pulse/brief-history-zimbabwe-labour-law-understand-present-we-takudzwa-kufa

[17] Gwisai etal, 2019

[18] Ibid

because an employee had the right to terminate a contract of employment at any time by giving a notice of resignation from such employment, similarly, an employer was entitled to the same right to terminate such contract of employment by giving an employee notice of termination. The Zuva case which epitomises an epic long drawn legal battle, pitted two managerial employees and daring labour heroes **Don Nyamande** and the now late **Kingston Donga** whose contracts of employment were terminated on notice by their employer Zuva Petroleum in terms of the common law as read with **section 12(4)** of the **Labour Act**. The Supreme Court judgment in the Zuva case was anchored on a wrong legal premise or footing of equality between an employer and employee typical of a legal mirage or fantasy due to the lack of equilibrium in the economic muscle of employer and employee. With due respect, there was a clear omission or legal blackout in the judgment by not applying labour rights like right to fair labour practices and standards provided for in terms of **section 65(1)** of the **Constitution of Zimbabwe**[19]. In a later judgment arising from the Zuva Supreme Court judgment, the Constitutional Court of Zimbabwe in **Greatermans Stores and Anor v Minister of Public Service, Labour & Social Welfare CCZ 02/18** accepted as a fact and legal reality that the lack of equality between an employer and employee was a justification for the Parliament of Zimbabwe to backdate the application of **Labour Amendment Act 5** of **2015** from 17 July 2015 when the Supreme Court judgment was pronounced.

Parliament of Zimbabwe across the political divide of parliamentarians from Zimbabwe African National Union Patriotic Front (ZANU PF) led by the **late former President R.G. Mugabe**, Movement for Democratic Change (MDC) led by vibrant veteran trade unionist **late former Prime Minister Morgan Tsvangirai** and Independent Members of Parliament, was unanimous in burning the midnight candle and passing Labour Amendment Act 5 of 2015 to create labour justice for both employer and employee. The aftermath of Zuva Judgment which was delivered on 17 July 2015, was terrifying as there was a massive absurdity created because of the rampant, haphazard and willy-nilly macabre bloodbath indiscriminate termination of contracts of employment of some majority of employees by their respective employers, which quickly alerted both Parliament and the former President of Zimbabwe the late **Cde. Robert Gabriel Mugabe with the assistance of current President Cde. Emmerson D. Mnangagwa** as then **Minister of Justice, Legal and Parliamentary**

[19] C. Mucheche Labour Law Rights under the Constitution of Zimbabwe(2018) 1st Ed, Zimlaw Trust Publication.

Affairs to extremely move with the agility of a leopard and quickly to pass the Labour Amendment Act No. 5 of 2015.[20] The swift and sharp reaction by former **President** Robert **G. Mugabe** to the **17 July 2015** common law termination Supreme Court judgment was, ***"the law is an ass, we did not go to the liberation war for this to happen to our people. We are going to fix the problem."*** The former President of Zimbabwe sounded a cautionary statement to both employers and employees after the 17 July 2015 Supreme Court judgment to exercise restraint in the employment relationship and avoid spur of the moment decisions that created workplace pandemonium, distress and anguish. The period immediately after the Zuva judgment of 17 July 2015 witnessed some mammoth crowd critical mass of employees weeping and gnashing their teeth as some employers seized the moment to arbitrarily terminate contracts of employment on notice in terms of the common law in an unbridled ecstatic frenzy. Legal restraints from arbitrary termination of employment on notice by employers only surfaced with the enactment of **Labour Amendment Act No.5** of **2015** which reined in employer common law power to terminate an employee's contract of employment on notice by confining in to four scenarios under **section 12(4a) (a)-(d)** of the **Labour Act**.

Pursuant to section 12(4a) of the Labour Amendment Act No. 5 of 2015, an employer's right to terminate an employee's contract of employment on notice is now curtailed[21] and strictly limited to four scenarios[22] namely;

(a) termination in terms of an employment code or, in the absence of an employment code, in terms of the model code made under section 101(9); or

(b) the employer and employee mutually agree in writing to the termination of the contract; or

(c)the employee was engaged for a period of fixed duration or for the performance of some specific service; or

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[20] C. Mucheche, Zimbabwe Electronic Law Journal, 2017

[21] C. Mucheche, Legal Analysis of synchronised and seamless termination of employment and retrenchment under Labour Amendment Act 5 of 2015, Zimbabwe Electronic Law Journal.

[22] C. Mucheche, Implications of the Zimbabwean Labour Amendment Act of 2015, Zimbabwe Electronic Law Journal, 2017.

(d) pursuant to retrenchment, in accordance with section 12C.

Outside the aforementioned four scenarios, an employer does not have any legal right to terminate a contract of employment on notice. The common law right that existed formerly in favour of employers to terminate a contract of employment on notice is now a thing of the past as it was abolished by **section 12(4a)** of the Labour Amendment Act No. 5 of 2015 with effect from 17 July 2015.[23] See **Air Zimbabwe (Pvt) Ltd v JV Mateko, Elijah Chiripasi and Others SC 180/20, Loveness Govera & Anor v Netone Cellular (Pvt) Ltd HH 720/20, Darlington Gutu v Netone Cellular (Pvt) Ltd HH 420/21.**

It is common knowledge that the Labour Act is a product of extensive developments and the existence of the Labour Amendment Bill of 2021 is more evidence that the development of the labour laws in Zimbabwe is not static.

These amendments are established through consultations among representatives of Government, business and labour within the auspices of the Tripartite Negotiating Forum.[24] Under the ambit of the TNF, there is the creation of strategic pillars in the form of 'Social Dialogue'. The ILO is making concerted effort and support to institutionalize social dialogue under the Tripartite Negotiating Forum (TNF). This support entails ILO supporting the re-building of trust and respect between and among the tripartite partners and re-convening of dialogues to address the increasing and diverse challenges in the world of work.[25]

The Zimbabwean legislators have been guided by principles that govern the route that an amendment should take to cure the anomaly in the existing legal principles. Thirteen principles had already been identified in 2002 in an effort to establish the amendment in 2007. It was only eight years later that these principles were established through the Labour Amendment Bill of 2021. In a bid to come up with a new labour amendment bill, 37 clauses were identified out of these 13 principles that had been identified. These 13 principles had been identified through the Tripartite Negotiating forum, involving the governments, federation of trade

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[23] T. Kufa, "Brief history of Labour Law in Zimbabwe" Published in January 2021, https://www.linkedin.com/pulse/brief-history-zimbabwe-labour-law-understand-present-we-takudzwa-kufa

[24] F. Machivenyika, "New Labour Bill promises joy, hope" Accessed on 26 January 2022, https://www.herald.co.zw/new-labour-bill-promises-joy-hope/

[25] Tripartite Negotiating Forum: Reinvigorating the social contract 1996-2022 International Labour Organization (ILO)

unions and employer associations. There is also the involvement of trade unions, so far they are the biggest federations. They are the ones who sit on the negotiating table. Then we have the government, represented as well by the Ministry of Labour.

The Committee notes the Government's indication that, in agreement with the social partners, it has initiated the amendment of the Labour Act through Principles that were adopted by the Tripartite Negotiating Forum (TNF) on 1 September 2016. The agreed Principles seek to harmonize the Act with the Constitution and the Convention on the basis of comments of the ILO supervisory bodies. The Committee notes, in particular, the following Principles:

- -Principle 6 (Governance of Employment Councils) provides for the amendment of section 63A (7) to remove the powers of the Minister to appoint a provisional administrator and gives the Labour Court the power to appoint the provincial administrator having given the parties concerned the right to be heard in compliance with section 69(2) of the Constitution.
- -Principle 8 (Right to Organize) provides for: (i) the amendment of section 45 to provide for specific criteria to be considered by the Registrar in registering a trade union (such as the existence of a constitution, existence of an executive board, fixed business address and membership register); (ii) time frames within which the Registrar shall consider applications and register an organization; (iii) the amendment of provisions which give the Registrar excessive discretion to refuse registration of a trade union or employers' organization after receiving objections from the existing organizations; (iv) the amendment of section 51 in relation to the supervision of election of officers of a trade union or employers' organization; and (v) the amendment of sections 28(2), 54(2) and (3), 55 and 120(2) of the Labour Act and section 120(7) and (8) of Act No. 5 of 2015 with a view to streamlining the Minister's powers to regulate administrative issues of trade unions and employers' organizations.

In addition, the Committee notes that Principle 4 (Collective Job Action) provides for the amendment of sections 107, 109 and 112 to remove excessive penalties in case of an unlawful collective industrial action and to decriminalize such actions.

The Committee recalls that it had referred to the following issues: discretionary power of the Registrar to deny registration of trade unions (section 45); extensive powers of the Minister to regulate trade union dues (sections 55, 28(2), 54(2) and (3)); broad powers conferred on

the Registrar and the Minister to investigate and to take over the direction of an employment council (a bipartite body) if there is a belief of mismanagement (section 63A); and powers conferred on the Ministry to investigate trade union organizations and to appoint provisional administrators to manage trade union affairs (section 120).

This article will explore clause by clause of the Labour Amendment Bill in comparison with the current provisions, thereby successfully identify the practicality of such developments. This commentary will show whether the Labour Amendment Bill promotes ease of doing business through streamlining the existing laws with the evolving labour trends.[26]

SPECIFIC AREAS PROPOSED TO BE CHANGED BY THE LABOUR AMENDMENT BILL, 2021

1. Violence, Gender Based Violence and Sexual Harassment at the Work Place.

The Bill started to redefine and prohibit gender based violence and harassment in the work environment. In practice, if a sexual harassment issue is declared at the work place, it is very difficult to prove by the victim. It is difficult to tell the circumstances. The issue of deciding a labour matter on a balance of probability as opposed to criminal matters that are decided beyond reasonable doubt creates the clusters between proving gender based violence under civil law, with which labour law is a part and criminal law. This provision seeks to constrict and provide for sexual harassment issues in a manner that makes it clear to identify and easer to prove.

Prior to the Labour Amendment Bill, **Section 24 of the Constitution** is an aspirational provision of the right to work.[27] In light of this provision section 65 confers labour rights on every person and refers directly to the right to fair and safe practices and standards. By its definition, an act of sexual harassment constitutes a violation of the constitutionally protected right to fair labour standards and also violates the right to full and equal dignity.[28] The right to fair and safe labour standards is realized under the provisions of the **Labour Act [Chapter28:01]** whose primary purpose is regulation of the employer-employee relationship.[29]

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[26] Ibid
[27] ZWALA ('Sexual Harassment in the work place and the Law'
[28] ZWALA ('Sexual Harassment in the work place and the Law'
[29] Ibid

The challenge all along was that Act narrowly defines sexual harassment through the implication from section 8 (h) which provides for unfair labour practices.[30] The ambit of sexual harassment is confined to engaging in unwelcome sexually determined behaviour towards an employee, whether verbal or otherwise, such as making physical contact or advances, sexually coloured remarks or displaying pornographic material in the workplace constitutes commission of an unfair labour practice.[31] Although this definition does not explicitly provide for sexual harassment, the conduct it describes is actually sexual harassment.

The Labour Amendment Bill prohibits violence in the following terms:

"(3) No person shall directly or indirectly act in a manner that amounts to violence and harassment towards another person at the workplace including any action in the course of, linked with or arising out of work— "

The fact that the prohibited violence can be perpetrated "directly or indirectly" means that the source of the violence can be an employee or an employee working through another person who is a fellow employee or a non-employee.[32] These words may also be interpreted to mean encouraging, inciting, recommending, advising, encouraging, threatening violence. This is more elaborate to the extent that it does not limit violence to the actual perpetrators or rather those that are involved in the physical contact. The Bill is more specific to the extent that through the definition of violence, it covers all forms that violence at the workplace can take.

The words ***"linked with or arising out of work"*** are explained in the bill and these are the areas in which violence can occur[33]:

"(a) in the workplace, including public and private spaces where they are a place of work;

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[30] Ibid
[31] Ibid
[32] Ibid
[33] Ibid

(b) in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities;

(c) during work-related trips, travel, training, events or workplace organised social activities;

(d) through work-related communications, including those enabled by information and communication technologies;

(e) in employer-provided accommodation; and

(f) when commuting to and from work."

In the case of ***UASA obo Zulu v Transnet Pipelines***[34] an infamous South African case of a male employee who used to call a fellow female employee his wife and sexually harassed her. This happened for almost a year and in the process, the female employee would consistently condemn the unwelcome acts.[35] The female employee eventually complained against the male employee after he attempted to have sex with her. In the hearing and at arbitration, the male employee maintained that his actions were part of his culture. His dismissal from employment was upheld.[36]

This example above shows the kind of conduct the legislature has sought to seriously curtail in the workplace by coming up with the bill. The legislature was also aware that sexual harassment and violence may extend to other spheres of an employee's life that are linked to the workplace.[37] Sexual harassment issues at the work place are easy to allege and difficult to prove. Acquittal in a criminal court does not mean acquittal in a civil court, the issue of onus of proof is key to determine how to deal with the circumstances of each case.

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[34] UASA obo Zulu v Transnet Pipelines (2008) 29 ILJ 1803.
[35] T. Murewa, "Labour Amendment Bill: Sexual Harassment and Violence" 8 October 2021 https://taumrewa.co.zw/labour-amendment-bill-sexual-harassment-and-violence/
[36] Ibid
[37] Ibid

Unlike previously where a remedy was hollow or ***brutum fulmen***, Labour Amendment Bill, 20211 is proposing a practically enforceable penalty for sexual harassment at the workplace as follows:

"Any person who contravenes subsection (3) shall be guilty of an offence and liable to a fine not exceeding level twelve or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment".

This means that a person found guilty of sexual harassment at the work place is criminally sanctioned and can be jailed for 10 years for such conduct against a fellow. This reflects the how seriously the legislators view sexual offences at the work place and their keen to curtail the behaviour. Further, under an offender is also sanctioned under civil litigation on top of being at the mercy of criminal sanctions. The bill also prescribes dismissal as the appropriate penalty for anyone who is found to have caused Violence and Sexual Harassment.[38]

It expressly states that;

"Notwithstanding anything to the contrary in an employment code or the conditions of service for the employee concerned, any employee who is found after due enquiry by the employer to have engaged on a balance of probabilities in any of the acts for which the employee may be charged for an offence under subsection (5) shall be justifiable grounds for dismissal for that employee whether that employee has been prosecuted or not."[39]

The automatic result of dismissal after due process of disciplinary hearings are conducted and a verdict of guilt is decreed, further shows that the Bill proposes to treat violence at the work place and sexual harassment as a serious offence through the highest penalty of dismissal.

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[38] T. Murewa, "Labour Amendment Bill: Sexual Harassment and Violence" 8 October 2021 https://taumrewa.co.zw/labour-amendment-bill-sexual-harassment-and-violence/

[39] T. Murewa, "Labour Amendment Bill: Sexual Harassment and Violence" 8 October 2021 https://taumrewa.co.zw/labour-amendment-bill-sexual-harassment-and-violence/

The Bill has also proposes to introduce a novel process of imputing liability to pay damages for sexual offences at the workplace. In terms of South African law, an employer can be held liable for damages if he or she fails to take reasonable steps to stop sexual harassment in the workplace. The case of ***Ntsabo v Real Security CC (2003) 4 ILJ 2341*** *is an example* where the court noted that the company had not taken any action against a supervisor who sexually harassed an employee resulting in the employee finding the situation intolerable and resigned. The court ordered maximum compensation in terms of the South African laws because the employer had not acted to do something about the sexual harassment.[40]

2. Prohibition of forced labour

On 22 May 2019, Zimbabwe deposited its instrument of ratification of the Protocol of 2014 to the Forced Labour Convention, 1930 , thereby becoming the thirty-second country worldwide to ratify the Protocol. By ratifying the instrument, Zimbabwe is demonstrating its firm commitment to combating forced labour in all its forms.[41] The efforts to clarify provisions relating to the prohibition of forced labour in Zimbabwe reflects the nation's commitment to strengthen its pledge to international labour standards. Clause 3 of the Bill clause has now clarified the confines of forced labour by setting out what it does not include. It states as follows. ***For the purposes of subsection (1) the term "forced labour" shall not include:***

(a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character;

(b) any work or service which forms part of the normal civic obligations voluntarily undertaken by the citizens of a fully self-governing country;

(c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of the Prisons and Correctional Service or other public authority authorised by law to rehabilitate offenders and that the said person is

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[40] Grogan J Dismissal, Discrimination and Unfair Labour Practices 2nd ed (Juta Cape Town 2007)

[41] ILO, "Zimbabwe joins efforts to combat forced labour" 2019

not hired to or placed at the disposal of private individuals, companies or associations;

(d) any work or service exacted by a public authority in virtue of any law in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, epidemic, pandemic or epizootic diseases, invasion by animal, insect or vegetable pests, and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population:

This clarity in the Bill is in a bid to remove all inconsistences existing in the principal Act in relation to what amounts to forced labour. This also helps those who monitor such behaviour to be able to tell the difference without confusing forced labour with normal obligations and expectation of working in a given circumstance.

3. Protection against discrimination

Gender is evident across all domains of society and labour is not an exception.[42] Strategies to promote equal participation of women and men require a holistic approach. In this regard, gender perspectives cut across all of the strategic objectives of the ILO with the broad goal being the attainment of gender equality.[43] In line with its international obligation to bring promote social justice in the world, the ILO has a role to play the advocate of the link between economic efficiency and social justice at the workplace. Gender equality is a matter of human rights, social justice, economic efficiency and sustainable development.[44]

The Labour Act prohibits discrimination in wages on the basis of sex.[45] Labour Code also prohibits discrimination against a current or prospective employee on grounds of race, tribe, place of origin, political opinion, colour, creed, gender, pregnancy, HIV/AIDS status, any disability in relation to the determination or allocation of wages and salaries.[46]

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[42] Madhuku, L, 'Gender Equality In Employment: The Legal Framework In The Case Of Zimbabwe'(DISCUSSION PAPER NO. 19) ILO 2001

[43] Ibid

[44] Madhuku, L, 'Gender Equality In Employment: The Legal Framework In The Case Of Zimbabwe'(DISCUSSION PAPER NO. 19) ILO 2001

[45] Madhuku L Labour Law in Zimbabwe (Weaver Press Harare 2015)

[46] Ibid

As a general rule, Zimbabwe does not expressly discriminate against women in the area of labour. However, on a close analysis and in practice, the labour practices in the nation have a lot of aspects which discriminate women. It is such aspects of the principal act as opposed to the Bill which are the subject of this analysis.[47]

The Labour amendment bill has broadened the way for women to treated equally with men in the workplace. The provision is now specific on the fight against discrimination in the work place particularly in relation to remuneration.[48] The principal Act is amended by the repeal of subsection (2a) and the substitution of— **"(2a) *Every employer shall pay equal remuneration to male and female employees for work to which equal value is attributed without discrimination on the grounds of sex or gender."***

4. Protections of employee's right to fair labour practices

Working struggles over the years have sought to place restraint on the arbitrary powers of the employers and infuse in the employment relationship, values based on notions of fairness, equity and social justice, including the right to fair labour practices and standards.[49] The 2013 Constitution of Zimbabwe entrenches the broad right to fair labour practices. The right is given effect to in Part III of the Labour Act (Chapter 28:01), which provides an exhaustive list of unfair labour practices which can be committed by employers, trade unions, workers' committees, and other persons.

The Labour Act predates the 2013 Constitution. The constitutionalisation of the right to fair labour practices necessarily carries with it the attendant difficulties of reconciling the new rights and the pre-existing regulatory framework.[50] The first labour right enshrined under s 65(1) is the right to fair labour practices and standards." The Constitution does not define the terms "fair labour practices and standards." This has given rise in conservative and unitarist quarters saying that there is therefore no exhaustive definition of the term "fair labour standards" and that the concrete parameters of its content has to wait for elaboration by

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[47] Ibid

[48] Gwisai M Labour and Employment Law in Zimbabwe: Relations of Work Under Neo-Colonial Capitalism (Zimbabwe Labour Centre Harare 2006)

[49] Munyaradzi Gwisai, "Enshrined labour rights under s 65(1) of the 2013 Constitution of Zimbabwe: the right to fair and safe labour practices and standards and the right to a fair and reasonable wage" VOLUME 3 ISSUE 1 2015 UNIVERSITY OF ZIMBABWE STUDENT JOURNAL

[50] Kasuso T. G, "Revisiting the Unfair Labour Practice Concept in Zimbabwe" 2021, Zimbabwe Open University

judicial practice.[51] However, pluralist view favours a board definition of fair labour practices and fair labour standards.

Fair labour standards under domestic law. A starting point perhaps is to take the labour standards specified in section 65 itself as examples of fair labour standards. Firstly, these include the right to safe labour standards and to fair and reasonable wages under s 65 (1). Further are the various standards and practices specified in s 65 such as respect of organisational, associational and collective bargaining rights, the right to collective job action, the right to just, equitable and satisfactory conditions of work, the right to equal remuneration for similar work between men and women and the right to fully paid maternity leave.[52]

Note that unlike its South African equivalent, the Zimbabwean Act did not provide a substantive definition of unfair labour practice in relation to acts or omissions that arise between the individual employer and employee.[53] This is a major weakness in the Act.

The Bill has amended section of the principal Act in relation to violence at the workplace to form part of unfair labour practice as follows:

Section 6 ("Protection of employees' rights to fair labour standards") of the principal Act is amended by the insertion after subsection (2) of the following subsections—

"(3) No person shall directly or indirectly act in a manner that amounts to violence and harassment towards another person at the workplace including any action in the course of, linked with or arising out of work—

(a) in the workplace, including public and private spaces where they are a place of work;

(b) in places where the worker is paid, takes a rest break or a meal, or uses sanitary, washing and changing facilities;

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[51] n 17 above
[52] Ibid
[53] Ibid

(c) during work-related trips, travel, training, events or workplace organised social activities;

(d) through work-related communications, including those enabled by information and communication technologies;

(e) in employer-provided accommodation; and

(f) when commuting to and from work

5. Employment of young persons

The ability of Zimbabwean families to take care of children has been compromised by a collapsing economy, compounded by COVID-19.[54] About 4.3 million people in rural communities, including children, are food insecure this year. The World Food Programme indicates that at least 60% of the population of Zimbabwe need food aid.[55]

The current economic trends in Zimbabwe has probed not only adult citizens but young citizens to look for means of survival. In the past decade, the demand for employment has increased seen by young persons below the age of 18 years being employed. The demand for cheap labour has also increased in the sphere of employers in a bid to curtail the high demands given by adult employees.

The legal working age population varies from country to country based on national laws and practices. In Zimbabwe, all persons 15 years and older are considered to be of working age.[56] Persons in employment were defined as all those of working age (15 years and above) who, during the 7 days preceding the interview, were engaged in any economic activity to produce goods or provide services for pay or profit only.[57] They comprise, employed persons "at work", that is, who worked in a job for at least one hour during the reference period and employed persons "not at work" due to temporary absence from a job during the reference period for reasons such as illness, maternity leave, parental leave, training, bad weather etc. but continue to be attached to that job.[58]

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[54] More children in Zimbabwe are working to survive: what's needed, https://theconversation.com/more-children-in-zimbabwe-are-working-to-survive-whats-needed-149033

[55] 2019 Labour Force Child Labour Survey report is produced by the Zimbabwe National Statistics Agency (ZIMSTAT)

[56] 2019 Labour Force Child Labour Survey report is produced by the Zimbabwe National Statistics Agency (ZIMSTAT)

[57] Ibid

[58] Child labour and the law in Zimbabwe : an employers' guide to legislation pertaining to working children / EMCOZ, 1998.

Zimbabwe has ratified all key international and regional instruments, which relate to the welfare and the rights of children. These include the UN Convention on the Rights of the Children 1989, the ILO Minimum Age Convention, 1973 (No. 138) and the Worst Forms of Child Labour, 1999 (No. 182). At continental level, Zimbabwe ratified in 1995 the African Charter on the Rights and Welfare of Children. In relation to domestic laws, both the Labour Act and Children's Act have undergone progressive amendment in a bid to align these legislations with the provisions of the ratified conventions.

An example is the provision which makes the abuse of children in the process of involvement in child work in the Labour Act, including also the minimum age of entry into employment being 15 years except for work that can compromise the person's safety, health and morals which is pegged at 18 years.

A review of the Bill shows a sign of tightening laws on the employment of persons, in a bid to curb this practice by increasing the penalty a person found guilty of conducting child labour. The Bill under clause seven proposes a stricter penalty for anyone who is found guilty for child labour by the deletion of "level 7" and "two years" and the substitution of "level 12" and "ten years"
easing trade sanctions on goods produced in child labour prone markets.

6. Termination of Fixed term contracts

Common law practice in relation to the general termination of contracts of employment has been clarified to improve clarity. The expansion of lawful forms of termination of employment to include resignation and retirement on the part of the employee and upon misconduct of the given employee and retrenchment on the part of the employer. Even a person who is dismissed through a disciplinary process is now entitled to a retrenchment package. The principal Act has been amended in that respect as follows;

"Section 12 ("Duration, particulars and termination of employment contract") is amended—

- *.....*
- ***by the repeal of subsections (4a) and (4b) and the substitution of the following—***

"(4a) A contract of employment may be terminated only, on the part of an employee, by his or her resignation or retirement, and in the following cases on the part of an employer—

Specifically, termination of fixed term contracts has been elaborated. Fixed term contracts have been elaborated because there was not much regulation to this type of contract. The major restriction has been that an employer cannot terminate a fixed-term contract and replace the employee especially when they would have created a legitimate expectation.[59] The law has a way that it then determines what amounts to legitimate expectation on the part of an employee, and having established that, then unfair dismissal in that regard can be alleged. The proposed Bill shows a greater regulation for this type of contract.

Some advantages of fixed term contracts of employment in the economy and national development agenda of tackling unemployment and poverty in society

The Supreme Court of Zimbabwe, applying the ***pacta sund servanda*** legal doctrine in the landmark judgment ***locus classicus*** case of **Kundai Magodora and Others v Care International SC 24/14**,ubiquitously made it abundantly clear that a fixed term contract of employment is legally binding and enforceable between an employer and employee under Zimbabwean labour law[60]. The rationale for the legal enforceability of a fixed term contract is deeply rooted in legal doctrines of freedom of contract, privity of contract and sanctity of contract which underscore the legal principle that a person or party with full legal capacity to enter into a contract is legally bound by his/her/its contract by virtue of the application of the time-honoured legal adage the signor beware also known as ***caveat subscriptor*** rule. In a developing economy with scarce jobs like Zimbabwe, fixed term contracts of employment may offer stop-gap solutions by availing much needed jobs to some section of society in dire straits or need for employment. This is clearly an advantage which a fixed term contract offers in the employment relationship for both big and small employers. There are many pros or merits which a fixed term contract of employment offer in that it is easy to terminate for both employer and employee if the employment relationship proves futile, nugatory and

[59] C . Mavhondo and T. Murewa, "Commentary on certain aspects of the Labour Amendment Bill" 2021 law.co.zw

[60] C. Mucheche, A Practical Guide to Labour Labour Law, Conciliation, Mediation and Arbitration in Zimbabwe (2014), 2nd Ed, Zimlaw Publications.

unproductive unlike a permanent contract where parties may be stuck with each other for a long period of time even though they may be mired in an employment relationship which may be toxic, unproductive or typical of hell on earth. A fixed term contract of employment is a time-bound contract with an in-built specific date of commencement and date of expiry/lapse or end normally described as self-terminating date by effluxion of time. There is no headache in understanding the date of termination of a fixed term contract of employment such that one does not require a rocket scientist or legal genius to glean or tell its date of demise or end. Fixed term contracts of employment offer an impetus for economic growth by allowing flexibility in the employment relationship in terms of commencement and expiry thereby allowing competitiveness on the part of both employer and employee.

Fixed term contract as a performance measurement tool for employee job performance

In some employment relationships, a fixed term contract of employment is a useful performance measurement tool for an employer to gauge the job or work performance by an employee. It is interesting to note that government of Zimbabwe has recently progressively embraced a transparent system of a fixed term contract tied to performance in respect of cabinet ministers and permanent secretaries so that every person occupying that government job must justify keeping it by good work performance. If any employee fails to perform under a fixed term contract of employment, it is easy for an employer to amicably part ways with such an employee at the end of the contract without any legal liability accruing against the employer. With a fixed term contract of employment as a barometer of performance, an employee with good work performance may keep a job while an employee with bad or poor work performance may lose a job.

Some distinct advantages of fixed term contract of employment in terms of employment creation by government's development partners like charities, not for profit organisations and non-governmental organisations (NGOs)

One obvious merit of a fixed term contract of employment is that it allows some non- profit making organisations to ease unemployment in the country by employing some people. Due to its flexible nature, a fixed term contract of employment has been widely and progressively

used in Zimbabwe by government's development partners like some donor funded organisations, charities, not for profit organisations and non-governmental organisations (NGOs). There is a strong legal impetus for retaining other than demolishing employment opportunities availed and created by the flexible nature of a fixed term contract. There is no point is slaying the goose that lays the golden eggs by destroying a fixed term contract regime thereby suffocating creation of new jobs or employment. If an employer and employee genuinely make a choice of using a fixed term contract of employment in terms of creating an employment relationship, that freedom of contract ought to be respected by the law and any other person.

Tacit renewal/relocation of a fixed term contract of employment under the common law also reinforced by labour legislation

An employer or employee in a fixed term contract of employment has a readymade exit avenue or divorce remedy which makes termination of an unworkable employment relationship simple, less expensive and fast. The sunset date or expiry date of a fixed term contract of employment is the date of its end as stated within the contract signed by both employer and employee parties unless by operation of the law there has been a tacit renewal/relocation or implied renewal or legal metamorphosis of such fixed term contract where by default of an employer to practically enforce work stoppage, an employee keeps working after the expiry an employer remunerates such employee as was held by the Supreme Court of Zimbabwe in **Tobacco Processors Zimbabwe (Private) Limited v Tongoona Mutasa and Others Judgment No. SC 12/21.**

Legal mutation of a fixed term contract of employment into a contract without limit of time/open ended contract or permanent contract

Another distinct advantage of fixed term contracts of employment is to instil and promote individual performance as it provides a countdown where the day of reckoning comes for a poor work performer. In a fixed term contract of employment, once days are numbered for a deadwood at work, the exit door for leaving will be wide open. There is no need to overburden any employer with a poor work performer whose dismal results will be common cause or commonplace. Protectionist law is sometimes helpful to curb abuses and exploitation by some

rogue malcontents in society where necessary but overprotection legislation typical of an octopus grip may be counter-productive. Our labour law as its stands already provides some progressive protection to any unscrupulous abuse of the legal regime of fixed term contracts of employment by entrenching or embedding a legal mutation of a fixed term contract of employment into an open ended contract of employment by virtue of the ironclad legal provisions of **section 12 (3a)** of **the Labour Act** aptly and succinctly worded in mandatory/peremptory/obligatory/compulsory terms as follows: "***A contract of employment that specifies its duration or date of termination, including a contract for casual work or seasonal work or for the performance of some specific service, shall despite such specification, be deemed to be a contract without limitation of time upon the expiry of such period of continuous service as is-***

(a) fixed by the appropriate employment council; or

(b) prescribed by the Minister, if there is no employment council for the undertaking concerned, or where the employment council fixes no such period;

and thereupon the employee concerned shall be afforded the same benefits as are in this Act or any collective bargaining agreement provided for those employees who are engaged without limit of time." (emphasis added by underlining).

Statutory implied or deemed renewal or rollover of a fixed term contract of employment

Zimbabwean labour law as it is in its current state or form has some legal strands ring-fencing a fixed term contract of employment for the protection of an employee from capricious or arbitrary unfair dismissal by an employer. This legal protection of a fixed term contract of employment from forced abortion of such contract is manifest in **section 12B(3)** of the **Labour Act** carefully coined dual core legal provisions in the following express terms, " ***An employee is deemed to have been unfairly dismissed-***

(b)if, on termination of an employment contract of fixed duration, the employee-

(i) had a legitimate expectation of being re-engaged; and

(ii) another person was engaged instead of the employee."

Suffice to mention that for a fixed term contract of employment employee to successfully sustain a case of unfair dismissal relying on **section 12B(3)(b)(i) and (ii)** of **the Labour Act,** such aggrieved employee must prove both requirements as a block namely legitimate expectation of renewal of a fixed term contract upon its expiry and that the employer engaged another person instead of the aggrieved employee. Suffice to reiterate that the careful use of the word person by the legislature in **section 12B(3)(b)(ii)** of **the Labour Act is not restrictive but has a blanket application to both natural person known as people or juristic/legal person like a company or some other corporate legal body known as a legal *persona*.** Proving one requirement like legitimate expectation only is not enough as it remains a pie in the sky for the aggrieved employee who also fails to prove the second requirement that his/her job was snatched by another person engaged or hired by the employer instead of him/her as the aggrieved employee. Both the two or twin or hybrid legal requirements set out in the Labour Act must be satisfied before a fixed term contract employee can cry foul alleging deemed unfair dismissal relying on legal anchors spelt out in terms of **section 12B(3)(b)** of the **Labour Act.**

Enter Labour Amendment Bill, 2021 into the legal fray of fixed term contracts

The proposed Labour Amendment Bill seeks to amend section 12 of the Act in relation to termination of fixed term contracts in the following manner;

in the case of a fixed term contract, upon the expiry of the period of the contract without the need to give notice under subsection (4):
Provided *that—*

(i) notwithstanding anything in such contract to contrary no fixed term contract shall be for less than twelve months except—

A. ***in the case of employment that by its nature is casual or seasonal employment; or***

B. ***the contract is for the performance of some specific service which may be completed before that time;***

C. ***any fixed term contract that purports to be for a period off less than twelve months shall be deemed to be a contract for an indefinite period.***

D. ***if the majority of employees engaged by the same employer are on fixed term contracts, and at any time when an employee's employment is terminated on the expiry of his or her fixed term contract, then the provisions of sections 12C and 12D shall apply to such termination as if it was retrenchment.***

(d).....

- .....
- ***for the breach of an express or implied term of contract, upon such breach being verified after due inquiry under an applicable employment code or in any other manner agreed in advance by the employer and employee concerned."***

LAW ABOUT CLACULATION OF DAMAGES IN LIEU OF REINSTATEMENT FOR A PERMANENT CONTRACT AND FIXED TERM CONTRACT OF EMPLOYMENT

General rule about calculation of damages

The general rule about damages for wrongful or unlawful dismissal from employment is that they are designed to put the innocent party in the position he/she would have been had the contract been duly performed as per the contractual agreement and fetters binding the parties. The object of damages is to place a party in the position he or she would have been save for the premature termination of contract as was set out in the case of **Goedhals v Graaf-Reinet Municiplality 1955 (3) SA 482** in which **HALL J, at 487C-E said:**

"The general principle upon which damages are to be assessed was laid in Victoria Falls and Transvaal and Power Co Ltd v Consolidated Langlaate Mines Ltd 1915 AD at p22, where it is stated that, so far as possible, the person injured must be placed in the same position as he would have been if the contract had been performed. On this principle it appears to me that the question which the trial court would

have to decide in order to assess damages in this case is what would be the opportunity of finding water be worth to the plaintiff under the circumstances of the case."

Quantification of damages for unlawful termination of a permanent contract of employment

The approach to be adopted in quantifying damages in lieu of reinstatement for a permanent employee as set out by the Supreme Court per GUBBAY CJ in the case of **Gauntlet Security Services v Leonard 1997(1) ZLR 583 (S)** where he enunciated the following:

" ***The employee is entitled to be awarded the amount of wages or salary he would have earned save for the premature termination of his contract by the employer. He may also be compensated for the loss of any benefits which he was contractually entitled to and of which he was deprived in consequence of the breach."***

From the above, it can be gleaned that damages in lieu of reinstatement for a wrongful or unlawful termination of a permanent contract of employment are made up of salaries and benefits from the date of dismissal up to the date the aggrieved employee gets alternative employment or is reasonably expected to get alternative employment, less any mitigation of loss by such employee. See **Ambali v Bata Shoe Company Ltd 1999 (1) ZLR 417 (S), Nyaguse v Mkwasine Estates (Pvt) Ltd 2000 (1) ZLR 571 (S) at 575C-D, Leopard Rock Hotel Company (Private) Limited v Van Beek 2000 (1) ZLR 251 (S) at 256B-C, Oliver Chiriseri v Plan International SC 56/02.**

It is important to note that damages in lieu of reinstatement are made up of back-pay salaries and benefits and also the compensation for job loss which is usually a lump sum award of salaries and benefits from the date of dismissal up to the date the employee gets alternative employment or is reasonably expected to get alternative employment. See **Leopard Rock Hotel Company (Private) Limited v Van Beek 2000 (1) ZLR 251 (S) at 254H-255A, Kuda Madyara v Globe & Phoenix Industries (Pvt) Ltd t/a Ran Mine SC 63/02 at pages 5-7.** Damages in lieu of reinstatement arising out of wrongful or unlawful dismissal of an employee are calculated using the rate of salary applicable at the time of dismissal as was stated by the Supreme Court in the case of **Redstar Wholesalers v Mabika SC 52/05.**

An employee who is a victim of a wrongful or unlawful termination of a permanent contract of employment cannot sit on his laurels by remaining idle and doing nothing but has a legal obligation to mitigate his/her loss by looking for alternative employment or some other income generating activity from the date of dismissal from employment but the employer has the onus to prove that an employee did not mitigate loss. See **Zupco v Daison SC 87/02.** The duty to mitigate loss arise when an employee has been dismissed from employment not when an employee is on suspension. An employee who gets another job whilst on suspension automatically terminates the original contract of employment by repudiation unless that original contract allow such employee to enter into for dual or multiple employment. Commenting on an employee who had elected to terminate his contract of service by taking alternative employment whilst on suspension by way of repudiation, the Supreme Court said the following in **Zimbabwe Sun Hotels (Private) Limited v Lawn 1988 (1) ZLR 143 (S) at 153 A-B:**

" ***But I am inclined to go further and hold positively that the respondent was shown on the probabilities to have elected to terminate his contract of service in reliance upon the appellant's breach in suspending him without pay. His remedy therefore lay in delict and not in contract, but I express no view whether or not he might succeed in a claim for damages, since altogether different considerations will apply."***

Quantification of damages for unlawful or premature termination of a fixed term contract of employment

The formula or approach to be adopted in quantifying damages for unlawful or premature termination of a fixed term contract of employment was elaborately set out in **Myers v Abrahamson 1952 (3) SA 121 (C) at 127D-E** in the following terms:

" ***The measure of damages accorded such employee is, both in our law and English law, the actual loss suffered by him represented by the unexpired period of the contract less any sum he earned or could reasonably have earned during such latter period in similar employment."***

In quantifying damages for unlawful termination of a contract of employment, the court is required to place the employee in the position he would have been save for the premature

termination. See **Zimbabwe Revenue Authority v Chester Mudzimuwaona Judgment No. SC 04/18** wherein the Supreme Court had this to say:

" ***It was contended that the court a quo erred in law by quantifying damages as if the respondent was a permanent employee prior to his dismissal, yet it is clear from the contract that he was on a fixed term contract."***

Controversial clauses in the Bill about imposed duration of fixed term contract of employment via a ban on fixed term contract of less than 12 months coupled with application of retrenchment formula to compensation for a fixed term contract

The Bill has further regulated the operation of fixed term contracts by providing that no fixed term contract shall be for less than twelve months. In other words, this means that all employers who make use of fixed term contracts' duration to twelve months in alignment with the Bill in the event that it is passed into law. The provision is not cast in stone as it unequivocally accepts that fixed-term contracts of less than 12 months are permissible in setups where the work is of a casual or seasonal nature as well as in situations where the work is of a specific service for example in the agricultural sector.[61] However, this attempt to ban fixed term contracts of employment and application of retrenchment formula to the termination of affixed term contract of employment may be controversial as it may create a legal absurdity. The legislature ought to leave the issue of negotiation of the duration of a fixed term contract to the parties or social partners at works council internally or externally by the applicable employment council or the Minister of Labour as envisaged by **section 12(3a)** of the **Labour Act.** There is no cogent basis or compelling justification for applying retrenchment compensation formula to the termination of a fixed term contract of employment. It is trite law that when a fixed term contract of employment runs its full term form date of commencement to date of expiry, an employee is not entitled to be paid any damages for termination of a fixed term contract of employment on account of reaching its date of expiry. However, where a fixed term contract of employment is prematurely terminated, an employee is entitled to be paid damages for such premature termination of a fixed term contract calculated using the unexpired period of that fixed term

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[61] C . Mavhondo and T. Murewa, "Commentary on certain aspects of the Labour Amendment Bill" 2021 law.co.zw

contract of employment less any mitigation. See **Zimbabwe Revenue Authority** v **Chester Mudzimuwaona Judgment No. SC 04/18** wherein the Supreme Court had this to say:

" ***Mr Mucheche conceded, properly in my view, that a distinction had to be drawn reinstatement to a contract without limit of time and one of fixed duration. The dispute between the parties does not and cannot extend beyond the life span of the contract. If a contract is for a fixed term it automatically expires at the end of the specified period unless the parties thereto mutually agree to its termination. So too do any obligations entered into for performance by the parties to the contract. By accepting that the dispute of the parties did not extend beyond the life of the contract, Mr Mucheche was in effect conceding that there was no place for a claim of consequential damages. Such a claim would only properly arise if there was a legitimate expectation that the respondent would be offered permanent employment, which was never the contention."***

A fixed term contract of employment by its very nature has a self-termination or a self-destruct provision in it if it completes its full term and has not been tacitly or expressly renewed. When parties enter into a contract the law frowns upon any re-writing of such a contract. The computation of damages in lieu of reinstatement for a fixed term contract of employment only arise in relation to a fixed term contract prematurely terminated before its expiry as was enunciated by the Supreme Court in **Zimbabwe Revenue Authority v Chester Mudzimuwaona Judgment No. SC 04/18** as follows:

" ***What is at issue is the computation of damages for the unexpired period of the contract. In terms of clause 3.1 of the contract the appellant had the sole discretion in deciding whether or not to offer the respondent a permanent position. When the respondent was dismissed the appellant had not exercised that discretion. As a consequence the court a quo ought to have given effect to that clause. Its failure to do meant it was extending the period of the contract on its own volition contrary to the wishes of the parties as expressed in the contract. It was therefore a serious misdirection on its part to award damages for a period beyond the date of termination as stipulated in the contract. The court a quo***

completely ignored the agreement that had been entered into between the parties which stipulated the duration of the contract."

Also the rigid and intrusive provision of saying a fixed term contract of employment of less than 12 months is deemed a contract without limit of time or permanent contract is a legally unnecessary interference with the doctrine of sanctity of co tracts and employer and employee parties' freedom of contract which amounts to a breach of freedom of trade and occupation jealously guarded in terms of **section 64** of the **Constitution of Zimbabwe** which provides:

" ***Every person has the right to choose and carry on any profession, trade or occupation, but the practice of a profession, trade or occupation may be regulated by law."***

The doctrine of sanctity of contracts was classically spelt out in the case of **Book v Davidson 1988 (1) ZLR 365 (S)** as follows:

" ***There is however another tenet of public policy, more venerable than any thus engrafted onto it under recent pressures, which is likewise in conflict with the idea of freedom of trade. It is the sanctity of contracts....If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice. Therefore you have this paramount public policy to consider- that you are not lightly to interfere with this freedom of contract....to allow a person of mature age , and not imposed upon, to enter into a contract, to obtain the benefit of it, and then to repudiate it and the obligations which he has undertaken is, prima facie at all events, contrary to the interests of any an every country."***

Such legal rigidity may worsen the unemployment as some potential employers who may not be able to employ some employees for more than 12 months will shun hiring or employing an employee out of fear of being saddled with a huge legal and financial liability created by stringent provisions indirectly outlawing a fixed term contract of less than 12 months by misclassifying it as a permanent contract of employment. The fear of sudden heavy liability

on the part of a prospective employer willing to assist a jobless employee by employing him/her on a fixed term contract of employment for less than 12 months only to be overburdened with permanent employment liability is typical of fear of an avenging spirit known in shona as "ngozi" or ingozi in ndebele, vernacular languages respectively.

7. Retrenchment and compensation for loss of employment on retrenchment

It follows that, of all the forms of termination of employment, retrenchment is heavily regulated because the benefits lean more to the employer who has resorted to that alternative than the employee who is met with the reality of termination they were not economically prepared for. It only makes sense that the Bill further clarifies more clauses in relation to retrenchment laws in Zimbabwe because of the effects it has in the labour market.

The Labour Amendment Bill proposes more elaborate definitions of "capacity to pay", an "employer" and to "retrench" including aspects that are not in the principal act. The following changes were made:

(1) In this section— "capacity to pay", in relation to an assessment of an employer's capacity to pay a minimum or an enhanced retrenchment package, shall not be deemed to be affected by any action of the employer done in contemplation of retrenchment that diminishes or apparently diminishes his or her capacity to pay a minimum or an enhanced retrenchment package, and includes any action done at any time up to twelve months before the retrenchment; "employer" for the purposes of this section includes any person, entity or trust that is a successor to the employer, whether domiciled in Zimbabwe or not; "retrench", with reference to the date on which an employment contract is terminated for the purpose of retrenchment, means any date specified by the employer that is not earlier than the date on which the employer lodges written notice of retrenchment in terms of subsection (3)(a) and not later than the date on which the employer lodges written notice of retrenchment with the Retrenchment Board in terms of subsection (5) (and in the absence of such specification, the latter date shall be presumed to have been the intended date).

The bill has also specified on the time limit of paying a retrenchment package unless better terms are agreed. The bill obliges the employer to negotiate the retrenchment package as follows:

(2) Unless better terms are negotiated and agreed between the employer and the employee or employees concerned or their representatives— (a) a minimum retrenchment package shall be payable by the employer as compensation for retrenchment not later than 60 days from the date on which the retrenchment takes effect, unless the affected employees agree to a longer or shorter or staggered period of payment of the package; and (b) if the employees concerned or their representatives, having alleged that the employer has the capacity to pay an enhanced retrenchment package, and having satisfied the Retrenchment Board to that effect, the enhanced retrenchment package shall be payable with effect from the notification of the Retrenchment Board's decision.

The negotiations for the retrenchment package have been opened to the employer and the employees to negotiate better terms than the minimum retrenchment package. The outcome of such negotiations in the Bill are termed as the "agreed retrenchment package". The Bill proposes for the existence of an agreed retrenchment package, which in my view gives the parties leverage to give their own input. It makes retrenchment a less arbitrary discourse of the employer because having followed the lengthy process of having retrenchment approved on the part of the employer, the Bill enhances the bargaining power of the employees. This is achieved by not limiting employees who have been retrenched to minimum retrenchment package but also to an agreed retrenchment package established through negotiations.

The Bill further makes the "agreed retrenchment package" binding after having been agreed upon by parties, and the repercussions of the employer's failure to pay the same, is likened to those of failure to pay the already provided minimum retrenchment package as follows:

(6) If it is alleged by any employee or employees or their representatives that any agreed retrenchment package or minimum retrenchment package has not been paid within the time or times stipulated or agreed, such employee, employees or their representatives must, before proceeding to enforce the package in terms of subsection (7), satisfy the Retrenchment Board to that effect in the form of an affidavit in which the extent of non-compliance shall be clearly set forth,

whereupon the Retrenchment Board shall notify the employer of the allegation in writing and afford him or her an opportunity to make representations to the Board in writing in rebuttal of the allegation, and if no such representations are received or the Board is satisfied that compliance has not been made with the minimum or agreed package, the Board shall issue a certificate (hereinafter called a "non-compliance certificate") to that effect in which the extent of non-compliance shall be clearly set forth.

Restrains have also been placed on the employer's failure to pay the retrenchment package wherein he is obliged to show that he is genuinely incapacitated in that regard. The bill introduces non-compliance certificates in the event of a non- complying employer who neglects, refuses or fails to pay the employees either their agreed retrenchment packages or minimum retrenchment package. This has been done through the insertion of a new section 12C in the following way:

12CC Non-payment of retrenchment package due to fraudulent, reckless or grossly negligent conduct by employer

(1) If an employer alleges in terms of section 12C (9) partial or total incapacity to pay the minimum retrenchment package and it emerges in the course of proceedings in terms of section 12C (9) and (10) that there are indications prompting a reasonable suspicion that —

(a) the employer deliberately stripped the assets of the business or otherwise degraded it in contemplation of retrenchment; or

(b) the business of the employer was or is being carried on—

(i) recklessly; or

(ii) with gross negligence; or

(iii) with intent to defraud any person or for a fraudulent purpose;

the Retrenchment Board or the employment council, as the case may be, having invited the employer concerned to respond to the allegations by way of affidavit within a specified time, and not having received such affidavit within the specified time or not being satisfied that the affidavit constitutes an adequate response to

the allegations, may issue a provisional statement setting forth its grounds for believing that the business of the employer was being carried out in manner described in subparagraphs (i), (ii) or (iii), and serve copies of the statement to the employer and to any employee or representative of employees who requests the statement.

One can safely say that the Labour Amendment Bill is a step in the right direction in this regard by further regulating retrenchment and the payment of retrenchment package.

8. Maternity leave

Social values place greater emphasis on the paid work of employees than on the unpaid work of family carers.[62] This affects women who attempt to balance their responsibilities as paid employees with those as unpaid caregivers and homemakers.[63]Gendered assumptions have led to "systemic barriers" that have carried through to the workplace. Such barriers obstruct the rights of women to attain full-time employment by placing the care-giving role of women in opposition to the role of the "ideal worker".[64]The ideal worker is perceived as a person who functions in the primary role of full-time employee and who has little or no role as a family carer for the purposes of childbearing or childrearing. The ideal worker is assumed to be male (a gendered assumption) and workers with care-giving responsibilities are excluded from performing as ideal workers.[65]Social ideals reflect further that an employer is more likely to consider a man, rather than a woman, to be the type of employee who can work long hours without interruption.[66]Thus, most women are in reality excluded from fulfilling the role of the ideal worker.[67]

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[62] Dancaster and Cohen "Family Responsibility Discrimination Litigation: A Non-Starter?" 2009 2 *Stell LR* 221 228; Cohen "The Efficacy of International Standards in Countering Gender Inequalities in the Workplace" 2012 33 *ILJ* 19 24.

[63] Cohen 2012 *ILJ* 30.

[64] Cohen 2012 *ILJ* 30; and Clarke and Goldblatt "Gender and Family Law" in Bonthuys and Albertyn (eds) *Gender, Law and Justice* (2007) 195 203.

[65] Cohen 2012 *ILJ* 30.

[66] Adams "The *Family Responsibilities Convention* Reconsidered: The Work-Family Intersection in International Law Thirty Years On" 2013-2014 22 *Cardozo J, Int'l and Comp L* 201 211; Bonthuys "Gender and Work" in Bonthuys and Albertyn (eds) *Gender, Law and Justice* (2007) 245 249 250; Dupper "Maternity Protection in South Africa: An International and Comparative Analysis (Part One)" 2001 3 *Stell LR* 421.

[67] Adams 2013-2014 *Cardozo J, Int'l and Comp L* 208; Huysamen "Women and Maternity: Is There Truly Equality in the Workplace Between Men and Women, and Between Women Themselves?" in Malherbe and Sloth-Nielsen (eds) *Labour Law Into the Future: Essays in Honour of D'Arcy du Toit* (2012) 46; Smit "The Changing Role of the Husband/Father in the Dual-Earner Family in South Africa" 2002 33(3) *Journal of Comparative Family Studies* 401 402.

Although women are not considered as "ideal workers", the labour participation of women has been increasing steadily over several years.[68]For instance, the labour force participation of women has increased from 38 per cent in 1995 to 53,3 per cent in 2018.[69] The increased labour participation of women has added to the conflict between work and care in South Africa.[70] South Africa has a large percentage of households headed by women. This is particularly true in rural areas, where women live apart from their husbands and care for the children.[71] These households are often vulnerable and lack financial resources. This means that more women from rural homes must seek income-producing employment.[72]Therefore, women often fulfil dual roles as both worker and carer.

However, owing to their care-giving responsibilities, women are more likely to be found in atypical employment that allows them to work on a part-time basis. Part-time employment provides an employee who has care-giving responsibilities with the dual benefits of income and flexibility.[73] When women cannot reconcile their work and care-giving responsibilities, they tend to resort to voluntary withdrawal from employment by resigning for the purpose of attending to their care-giving responsibilities.[74] To address these issues and in the interest of affording equal opportunities to men and women in the workplace, maternity leave was first legislated in South Africa via provisions in the now-repealed Basic Conditions of Employment Act 3 of 1983.[75] The objectives of providing for maternity leave are the protection of the health of the woman and child after birth and the provision of a necessary bonding period between mother and child.[76]

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[68] *Quarterly Labour Force Survey - P0211: 4th Quarter 2018* Appendix 1, Table 2 (Quarterly Labour Force Survey 2018) (2 February 2019) http://www.statssa.gov.za (accessed 202001-05).

[69] Cohen and Gosai "Making a Case for Work-Life Balance for the South African Employee" 2016 37 *ILJ* 2237

[70] Clarke and Goldblatt in Bonthuys and Albertyn *Gender, Law and Justice* 198; Bonthuys in Bonthuys and Albertyn *Gender, Law and Justice* 247.

[71] Dupper, Olivier and Govindjee "Extending Coverage of the Unemployment Insurance-System in South Africa" 2010 21 *Stell LR* 438 447; Huysamen in Malherbe and Sloth-Nielsen *Labour Law Into the Future: Essays in Honour of D'Arcy du Toit* 65; *Masondo v Crossway* (1998) 19 *ILJ* 180 (LC) 181C.

[72] Haas "Parental Leave and Gender Equality: Lessons from the European Union" 2003 20(1) *Review of Policy Research* 91.

[73] Dancaster and Baird 2008 *ILJ* 22, 35; Behari "Daddy's Home: The Promotion of Paternity Leave and Family Responsibilities in the South African Workplace" 2016 37(2) *Obiter* 346 360.

[74] nternational Labour Conference (98th Session) Resolution concerning gender equality at the heart of decent work (Geneva, 19 June 2009) (Resolution on Gender Equality at the Heart of Decent Work) 6.

30 Behari 2016 *Obiter* 348; Smit "Family-Related Policies in Southern African Countries: Are Working Parents Reaping Any Benefits?" 2011 42(1) *Journal of Comparative Family Studies* 18.

[75] James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* 45.

[76] James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* 46.

Zimbabwe has experienced a wave on women empowerment in the past decade. This has greatly influenced the development of our laws, particularly in labour. In this case, women have always been perceived as subject to victimisation or somewhat discrimination when it comes to pregnancy during the course of employment contract. In the principal Act, employees have challenged the laws on maternity leave in areas relating to:

- One year qualifying service for maternity leave.
- Only three pregnancies with one employer.
- The law is silent on miscarriage and stillbirth
- No right to antenatal days for pregnant mothers
- No right to paternity leave for men

In the same string, the Labour development will also see the qualifying periods for maternity leave being scrapped bringing relief to expecting mothers.[77]According to Section 18 of the Labour Act, a female employee has to serve their employer for at least a year to qualify for 98 days of paid maternity leave.

In this case, the labour bill seeks to amends section 18 of the Labour Act to align it with section 65(7) of the Constitution. This is meant to ensure that women employees have the right to fully paid maternity leave for a period of 3 months by removing qualifying periods, prescribed intervals for maternity and a maximum number of times for enjoying the right to maternity leave under one employer as shown above.

The provision reads:

"A female employee shall be entitled to be granted a maximum of three periods of maternity leave with respect to her total service to any one employer during which she shall be paid her full salary: Provided that paid maternity leave shall be

[77] Kasuso TG Reflections on the Constitutional Protection and Regulation of Individual Labour Law and Employment Rights in Zimbabwe (LLD-thesis University of South Africa 2021)

granted only once during any period of twenty-four months calculated from the day any previous maternity leave was granted."[78]

The importance of paid work in the lives of many people makes the conditions of employment of utmost importance. The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction social security becomes a necessity. It is hoped that the liberal payment of maternity leave proposed by the Bill will not result in young women or women of child bearing age not been exposed to subtle discrimination form employment by some employers out of fear of financial burden for unlimited paid maternity leave. One option may be to consider a maternity leave fund maybe at employment council or employer-employee contributory fund bodies like under National Social Security Authority (NSSA) or Zimbabwe Manpower Development Fund (ZIMDEF) so that the burden of employers paying maternity leave is alleviated for the benefit of both employers and female employees. Child production is a national duty where government as a beneficiary of population growth ought to also chip in to lessen the financial load on employers and enhance good maternity leave benefits for female employees of child bearing age.

Social security in such an instance is usually in the form of benefits that accrue despite absence from work. In order to limit the scope of the right to maternity leave and the benefits attached to it reference and focus will be on women engaged in jobs with legally prescribed hours and regular wages that are recognised as income sources on which income tax must be paid.

For the advancement of the right to fair and safe labour practices and standards the right to fully paid maternity leave is guaranteed in the Constitution and is specifically prescribed for at least three months. The provision of such a right in effect means that any other law, practice, custom or conduct by employers that prescribes otherwise is of no force or effect.

Women in both the private sector and public service are entitled to maternity leave which is provided for comprehensively in both the Labour Act and the Public Service Act. Labour

[78] Labour Act Chapter 28:01

legislation goes beyond the minimum ninety days to prescribe ninety-eight days maternity leave.

In light of the above, women rights organisations have always criticised the Act for 'deciding' for women as to when they should have children. The labour amendment bill has proposed the deletion of "who has served at least a year" on the right of a female employee to be accorded maternity leave which is paid for. This removes the restrictions placed on women at the workplace over their right to have children at intervals of their choices. The Bill affords female employees the right to get pregnant at any time during the course of their employment without demarcations of time.

However, we cannot totally fault the legislators of the principal Act in this regard, because the crafters of the Labour Act had foreseen the absurdity that would be created by the newly proposed provision in relation to maternity leave. There is a probability of massive stigma that will be created on women in search of employment because employees will not be keen to employ female employees, especially young female employees who have the potential of getting pregnant more often. This will be a possible way for employers to evade paying female employees on maternity leave, who can possible get pregnant each year.

What the Bill has failed to do, is to keep Zimbabwe up to standard set by other jurisdictions such as South Africa and the United Kingdom which are actively advocating the practice of paternity leave. This can cure the cons that the new provisions are already posing. With the introduction of parental leave in South Africa, adoption leave and commissioning parental leave, the LLAA retains the right to maternity leave and deletes the entitlement to family responsibility leave for the birth of a child. The addition of parental leave is regarded as essential considering the inadequacy of the three days of family responsibility leave previously provided for in the BCEA, which was the only leave entitlement upon which fathers could previously rely in relation to the birth of a new-born baby.[79]

Paternity leave is not provided for in terms of the Labour Act Zimbabwe but the practice male employees can be entitled to at least five (**5**) working days paid leave on the birth of a child.

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[79] Behari "The Effect of the Labour Laws Amendment Bill 2017 on Shared Parental Responsibilities" 2018 39 *ILJ* 2148.

Paternity leave with pay is usually available to members of staff employed on fixed-term contracts. Paternity leave must be taken within seven days of the birth of the child, except in exceptional circumstances. Where a member of staff has more than one spouse, paternity leave shall be granted in respect of one spouse only. Paid paternity leave may only be taken once every twenty-four months.

Manipulation of this provisions is not only at the instance of employers, but employees as well. Unscrupulous female employees can frequently get pregnant while at the employment environment leaning on the fact that they have fully paid maternity leave. Sight will be lost to the fact that massive prejudice will be visited on production on the employer's business. There are two sides to this issue, to the extent that inasmuch it is trusted that the legislators are keen to promoting fair labour standards, especially for women at the workplace, the employer is placed at a disadvantage.

9. Contracts for hourly work

A new section 18A will be inserted in the Labour Act Chapter 28:01 to include regulation of contracts of hourly work.

(1) No employer shall engage an employee on terms that the employee will be paid only for the hours that such employee actually works—

(a) on terms that prohibit such employee from being employed by another employer or on his or her own account, during the hours when he or she is not working for the first mentioned employer;

(b) if the effect of such contract is that in any consecutive period of two months the employee earns less that the minimum remuneration or wage fixed in a collective bargaining agreement as the minimum rate of remuneration or minimum wage for the undertaking or industry, and grade and type of occupation governed by that collective bargaining agreement, in which event the employee concerned shall be entitled to be paid the difference between what he or she has earned in that period of two months and one month's remuneration or wage;

(c) if such contracts are prohibited by the collective bargaining agreement governing the undertaking, industry and grade and type of occupation.

10. Labour Broking

The adoption of labour broking agreements is now an increasing trend within African markets, and the coming in of COVID 19, which has probed most companies to downsize in a bid to minimize costs has, actually encouraged the move to the increasing use of temporary workers.[80] It is obvious, that the adoption of permanent workers has its own pros and cons, where skill and training is key, for other roles particularly for unskilled labour, broking may be a more optimal option over dealing with the employment processes.[81]

Labour broking which is also known as "**labour-hire**" is a form of **labour** intermediation or subcontracting.[82] This occurs when **labour brokers** make workers available to third-party clients[83] that assign their duties and supervise the execution of their work. [84]

The use of temporary employment services (TES), better known as labour brokers, is not unique to western nations but is also dominant form of employment in African jurisdictions like South Africa, Namibia and Zambia for example[85]. The South African Labour Relations Act 66 of 1995 makes provision for a Temporary Employment Service to exist, creating a threefold relationship between the labour broker, the client and the worker.[86]

The call for the removal of labour brokers is one that has been echoed amongst a number of organised trade unions, most notably by South Africa's largest trade union federation, the Congress of South African Trade Unions (COSATU).[87] One of the reasons for this is that in many ways, labour brokers have been supplying what are, in effect, permanent employees to their clients. This means that the worker may essentially perform the same roles and functions

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[80] Melusi Moyo, 'The Right To Strike In Zimbabwe's Labour Law: A Liability Or A Trap At Worst? A Dissertation Submitted In Partial Fulfilment Of A Bachelor Of Laws Honours Degree, Midlands State University, Faculty of Law, 2014

[81] Behari "The Effect of the Labour Laws Amendment Bill 2017 on Shared Parental Responsibilities" 2018 39 *ILJ* 2148

[82] Ibid

[83] C. Mucheche, Unpacking Labour broking law in Zimbabwe, South Africa and Namibia, (2015), 1st Ed, Zimlaw Publications.

[84] Gwisai M Labour and Employment Law in Zimbabwe: Relations of Work Under Neo-Colonial Capitalism (Zimbabwe Labour Centre Harare 2006)

[85] C. Mucheche Constitutionalism and Contemporary Labour Law Developments in Zimbabwe, Namibia and South Africa: Labour Broking , Termination on Notice and Sexual Harassment, (2017), 2nd Ed, Zimlaw Publications.

[86] Ibid

[87] Ibid

as those of a permanent employee of the client but not be afforded the same protections as a permanent employee.[88]

This has historically left the temporary employee sometimes at ransom and vulnerable to unfair labour practices, abuse, inhumane and degrading treatment in the workplace and the concomitant fear of termination at the will of the employer, without any concrete legal recourse[89]. Prior to the 2014 amendment to the Labour Relations Act in South Africa, it stipulated that the labour broker (the deemed employer) and the client are jointly and severally liable in respect of contraventions of conditions of service, the minimum and maximum standards as set out in the Basic Conditions of Employment Act 1997 (BCEA), and arbitration awards that regulate the terms and conditions of service.[90] It would not be unfair to say that until recently government has not heeded the call to regulate or ban labour brokers with any sense of enthusiasm or urgency. The situation is however more complicated than meets the eye. To simply ban labour brokers to satisfy the calls made by the trade unions represents a conundrum for the government. This is because a large section of the South African workforce is employed by labour brokers and labour brokers are widely considered as a platform for first-time job seekers as well as labourers to secure employment.[91]

In light of all these concerns and the resultant widespread protests against labour brokering in South Africa, the LRA was amended in 2014 to introduce protections for employees in precarious employment.[92] The amendments did not ban labour brokering, they instead strengthened the regulations to provide greater protection for workers placed in temporary employment services.[93] For the most part, this purpose has had the effect of increased protection for marginal workers and the introduction of a legislative framework to ensure temporary services are indeed temporary. [94]

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[88] Ibid

[89] C.Mucheche, Constitutionality of Labour Broking in South Africa, (2017), 1st Ed, Zimlaw Publications.

[90] Gwisai M Labour and Employment Law in Zimbabwe: Relations of Work Under Neo-Colonial Capitalism (Zimbabwe Labour Centre Harare 2006)

[91] Ibid

[92] Ibid

[93] Freek Schiphorst, 'THE INSTITUTIONALISATION OF COLLECTIVE BARGAINING IN ZIMBABWE: A PIG IN A POKE FOR TRADE UNIONS?' Employment & Labour Studies Programme, Institute of Social Studies, PO Box 29776 – 2502 LT The Hague – The Netherlands

[94]Ibid

In the South African case of **Assign Services (Pty) Limited v National Union of Metalworkers of South Africa and Others**[95], the interpretation of the amendment was tested, and the question was raised whether the deeming provision in the section resulted in a "sole employment" relationship between a worker and a client or a "dual employment" relationship between a labour broker, a worker and a client.[96] The Constitutional Court held that the interpretation of the section must be one that is cognisant of the purpose of section 23 of the Constitution and of the LRA as a whole. The Court interpreted Section 198 to mean that for the first three months the labour broker is the employer and after that period the client becomes the sole employer.[97]

The recent developments in the labour law spectrum have given a strong indication that labour brokers may not be banned for the foreseeable future and that a regulatory approach that monitors and enforces compliance with labour legislation may be the preferred approach going forward.[98]

Coming closer to home, the concept of labour broking in Zimbabwe was still a talk in the labour streets of Zimbabwe and it was not spelt out in the Labour Act[99]. The labour amendment bill now codifies the aspect of Labour broking which was only existent in practice and not on paper. Section 18B sets out the regulations on labour brokerage arrangements. It begins by defining what labour brokerage amounts to in the following way;

"labour brokerage arrangement" means an agreement whereby a person (the third party) wishing to engage other persons in the capacity of employees (the employees) enters into a contract or other arrangement with a principal (the labour broker) by the terms of which the labour broker manages the payroll or other services in connection with the remuneration and other benefits of the employees and is directly responsible for the discipline including the dismissal of

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[95] **CCT 194/1**

[96] Hudson, M. and Hawkins, L. (1995). Negotiating Employees Relations: How to negotiate in the New Work-Place Environment. Pitman.

[97] Ibid

[98] Ibid

[99] C. Mucheche, Consolidated labour dispute resolution law and labour broking in Zimbabwe, (2021), 1st Ed, Zimlaw Publications.

the employees and the third party assigns their duties and supervises the execution of their work.

The bill also proposes that employees under labour brokerage agreements shall not be discriminated in any way from the treatment of ordinary employees through imposing contracts which shall have conditions no less favourable than;

(a) other employees in that grade or occupation employed by the same employer; or

(b) the collective bargaining agreement for the undertaking or industry, where the third party only employs its employees in terms of a labour brokerage arrangement.

In that string, the labour bill sought to protect employees under labour brokerage agreements in such a way that, as a result of the uniqueness of their contracts, they should not be treated in any way less than normal employees. It further makes the main employer and third party employer liable jointly or severally for any damages that arise out of unfair labour practice towards the employees under labour brokerage agreements. It states as follows:

(3) Unless the labour brokerage arrangement specifies unambiguously which of the parties to the arrangement is responsible for the payments or damages in question, the labour broker and the third party are jointly and severally liable for any payments or damages to the employee arising out of any grievance or dispute or unfair labour practice."

11. Effect of collective bargaining agreements negotiated by workers committees

Collective bargaining is concerned with the relations between employers acting through their management representatives and organized labour.[100] It is concerned not only with the negotiation of a formal labour agreement but also with the day- to- day dealings between management and the union.[101] Because the management of the people in so many organizations is closely intertwined with union- employer relationships, it is essential that the

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[100] Munyaradzi GwisaiLabour and Employment Law in Zimbabwe: Relations of Work under the Neo Colonial Capitalism(2007) 344.

[101] Ibid

practitioner of management and the employees develop a sound knowledge of collective bargaining[102] negotiated by workers committees. Furthermore, the effect of collective bargaining extends beyond these establishments that are unionized. The right to strike is one of the major facets of the right to collective bargaining for without the right to strike on the part of employees[103], collective bargaining may be collective begging[104]. It impacts upon the economy as a whole, upon the practices of non-union organisations and upon the society at large.[105]

Collective bargaining according to Salamon (1957)[106] is a method of determining terms and conditions of employment, which utilizes the process of negotiation and agreement between representatives of management and employees.[107] It provides a formal channel through which the differing interests of management and employees may be resolved on a collective basis. Mulvey (1986) defines collective bargaining as a system based on self-determination with the contracting parties voluntarily assuming responsibility for reaching an agreement and honouring that agreement.[108] According to International Labour Organization (ILO) Convention No. 98, by Nyman C (1981 p.4) , collective bargaining is seen as a voluntary negotiation between employers' organizations and workers' organizations with a view to regulating terms and conditions of employment by collective agreements.[109]

The Amendment Bill has proposed the amendment of section 25 of the principal Act, which deals with the effect of collective bargaining agreements negotiated by the works council in to the extent that:

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[102] C. Mucheche, A Guide to Collective Bargaining Law and Wage Negotiations in Zimbabwe, (2013), 2nd Ed, Zimlaw Publications.

[103] C. Mucheche, Labour Law and Industrial Relations in Zimbabwe,(2019), 1st Ed,International Encyclopedia of Laws, Belgium

[104] C. Mucheche, A comparative study of the justiciability of the labour right to strike under the constitutions of Zambia, Zimbabwe and South Africa, (2015), 1st Ed, Zimlaw Publications.

[105] Dr Isaac Chaneta 'Collective Bargaining' University of Zimbabwe – Harare, Zimbabwe, PeCOP Journal of Social and Management Sciences

[106] Hudson, M. and Hawkins, L. (1995). Negotiating Employees Relations: How to negotiate in the New Work-Place Environment. Pitman.

[107] Freek Schiphorst, 'THE INSTITUTIONALISATION OF COLLECTIVE BARGAINING IN ZIMBABWE: A PIG IN A POKE FOR TRADE UNIONS?' Employment & Labour Studies Programme, Institute of Social Studies, PO Box 29776 – 2502 LT The Hague – The Netherlands

[108] Mulvey C. (1986). Alternatives to Arbitration: Overview of Debate, Unwin

[109] Hudson, M. and Hawkins, L. (1995). Negotiating Employees Relations: How to negotiate in the New Work-Place Environment. Pitman.

"(2) Where a collective bargaining agreement negotiated by a workers committee involves an employer which is a statutory corporation, statutory body or an entity wholly or predominantly controlled by the State, the Minister responsible for that body, corporation or entity shall be deemed to be a party on an equal footing with such employer and accordingly is a party to the negotiation of such collective bargaining agreement.".

This clause proposes to include the Minister as a representative of the State (as the employer) to take part in the negotiations. By such token, the CBA in question will have equal representation.

The economic literature has long debated the role of collective bargaining for labour market performance, but paid little attention to the system of collective bargaining as a whole. Studies have mostly examined the presence or relevance of collective bargaining rather than its functioning. For example, many analyses of countries with predominantly firm-level bargaining, such as the United Kingdom or the United States, have focused on the role of trade union membership.[110] Union membership is a reasonable proxy of collective bargaining coverage in countries with predominantly firm-level bargaining. But it is not sufficient for measuring the scope of collective bargaining, as many workers who are not affiliated to a trade union are also covered by collective bargaining – via *erga omnes* clauses and, in countries with sectoral or multi-level bargaining, administrative extensions.[111] Bargaining coverage is therefore in general a more appropriate proxy for the relevance of collective bargaining.[112]

However, to capture the role of collective bargaining for labour market performance, it is important to go beyond coverage by looking at its main features and actual functioning. Collective bargaining coverage in Italy is comparable to that in the Netherlands or the Nordic

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[110] For OECD countries, Freeman (1988[90]) found no effect of unionisation on unemployment, while Nickell (1997[85]) and Nickell and Layard (1999[86]) found a positive correlation. Scarpetta (1996[84]) suggested that a high unionisation rate tends to reinforce the persistence of unemployment. Other papers exploited policy reforms in particular countries to study the relationship of unionisation with employment: Blanchflower and Freeman (1993[27]) used the Thatcher reforms in the United Kingdom, finding no effect on unemployment and the probability of leaving unemployment. Maloney (1997[88]), by contrast, found that the reform in New Zealand that led to a sharp reduction in unionisation caused a significant increase in employment.

[111] Hijzen, Martins and Parlevliet (2019[103])

[112] Nickell and Layard (1999[86]),

countries.[113] Similarly, Australia and Germany have comparable coverage. As Chapter 2 shows, these systems are nevertheless very different. It is therefore important to also consider the characteristics of the system itself.[114] This echoes Aidt and Tzannatos (2008[6]) in their review of trade unions, collective bargaining and macroeconomic performance in which they concluded that, more than trade union density or coverage, what matters most is the functioning of the "entire package".[115]

In terms of main features, most attention has been directed to the role of centralisation, i.e. the predominant level of bargaining. In the early 1980s, the corporatist view suggested that by guaranteeing that wage-setters recognise broader interests, centralisation, intended as national bargaining, can deliver superior outcomes in terms of macroeconomic and labour market performance (Cameron, 1984[7]).[116] However, opponents pointed out that wage increases would be restrained or resource allocation would be more effective if market forces were allowed to play a larger role, bringing the example of the United States or the United Kingdom after Thatcher to support this view.[117]

To reconcile these opposing views, Calmfors and Driffill (1988[8]) proposed the influential "hump-shape" hypothesis, which suggested that both centralisation and decentralisation perform well in terms of employment while the worst outcomes may be found in systems with an intermediate degree of centralisation, i.e. sectoral bargaining. In this intermediate case, organised interests are "strong enough to cause major disruptions, but not sufficiently encompassing to bear any significant fraction of the costs for society of their actions in their own interests" (Calmfors and Driffill, 1988[8]).

The paper by Calmfors and Driffill had the merit to suggest that the relationship between the degree of centralisation and performance does not need to be monotonic. This hypothesis was behind the critical stance on sectoral bargaining systems in the 1994 *OECD Jobs Strategy* (OECD, 1994[9]) which recommended decentralising collective bargaining given the

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[113] Ibid
[114] Ibid
[115] Ibid
[116] Corporatism is a "system of social organisation that has at its base the grouping of men according to their community of their natural interests and social functions, and as true and proper organs of the state they direct and co-ordinate labour and capital in matters of common interest" (Cameron, 1984[7]).
[117] Ibid

impossibility to have full centralisation of bargaining systems.[118] However, later empirical studies did not provide much backing for this hypothesis.[119]

Another key feature of collective bargaining systems is the degree of wage co-ordination across bargaining units. Soskice (1990[15]) suggested that co-ordinated systems of sectoral bargaining may be as effective as national bargaining systems at adapting to aggregate economic conditions. Subsequent studies found that co-ordination plays a key role in improving the performance of sectoral bargaining.[120]

More recently, Boeri (2014[20]) revived the debate by suggesting that "two-tier" bargaining systems (i.e. where firm-level bargaining can only top up sectoral bargaining) are worse than fully centralised and fully decentralised systems, as they are not able to respond appropriately either to a microeconomic shock or a macroeconomic one.[121]

All in all, the characterisation and estimation of the economic effects of collective bargaining systems have proven to be a major challenge, leading to a proliferation of indicators for centralisation and co-ordination as well as econometric specifications.

13. The Works Council to be consulted also on issues to do with paid educational leave

An employer should value the effort by employees to improve on their academic/professional qualifications in order to keep abreast of the social, political, economic and technological changes that affect the business world. Leave shall be granted to staff writing examinations after approval by the applicants' immediate Manager, HR Manager and CEO. Study leave will be granted to employees writing examinations in fields related to their profession or any other relevant course of study for the advancement of the organisation. Such leave should typically

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[118] OECD (1997[10]), Traxler, Blaschke and Kittel (2001[11]), Aidt and Tzannatos (2002[12]), Bassanini and Duval (2006[13]) and Eurofound (2015[14]).

[119] Ibid

[120] – see the review in Aidt and Tzannatos (2002[12]) as well as the evidence in Elmeskov et al. (1998[16]), OECD (2004[17]), Bassanini and Duval (2006[13]), OECD (2012[18]) and Eurofound (2015[14]). The 2006 *Reassessed OECD Jobs Strategy* (OECD, 2006[19]) embraced this "augmented" version of the Calmfors-Driffill hypothesis which entailed that decentralised and centralised or co-ordinated bargaining systems result in better employment performance than sectoral bargaining systems.

[121] Boeri (2014[20])

not exceed **twelve (12) days** per year. Study Leave in excess of the twelve (**12**) working days will be taken as annual leave.

Previously, in Zimbabwean labour legislation there is no such thing as paid study leave except in the Public Service . Therefore, if the employee has such a requirement, he must apply for paid annual leave in accordance with the employer's annual leave policy.

The Labour Bill has added another aspect which the Works council is supposed to be consulted by the employer in relation to paid educational leave before a decision is reached. This adds to the issues that the Works Council is supposed to be consulted before a decision is made.

13. Removal of the powers of the Minister to specify an amount as membership fees in relation to requirements of the formation of a trade union

Organized labour exerts a strong influence upon the individual organization and upon the economic, social and political climate of a country. When the employees of an establishment are represented by a union, policies and practices affecting the employment relationship that were formerly decided by management alone become subject to joint determination. Wages, hours and other terms of employment are bargained jointly between union representatives and employer representatives. When management contemplates taking certain personnel actions, it takes into account the likely attitude and position of the trade union on such matters.[122]

Certain actions that had been conducted between managers and employees (as individuals) before the entrance of the union are now carried on through union officials. [123]The attitudes of the union leaders and their members affect management programme of technological innovation, productivity improvement, job evaluation and setting of workload standards. Such a situation therefore, calls for the understanding of industrial relations which describe and outline empirical findings and tools that explain the complex nature of interactions between employer and employees in their many contrasting often contradictory aspects. I hope, in

[122] Dr Isaac Chaneta 'Collective Bargaining' University of Zimbabwe – Harare, Zimbabwe, PeCOP Journal of Social and Management Sciences

[123] Dr Isaac Chaneta 'Collective Bargaining' University of Zimbabwe – Harare, Zimbabwe, PeCOP Journal of Social and Management Sciences

using the article, readers will gain some insight into the rich diversity and yet underlying coherence of industrial relations.[124]

14. Application for registration of trade unions

Workers in Zimbabwe have had an unquestionably raw deal, from both the pre-independence and post-independence governments. They have also had a tough time from their own trade unions, primarily because of the paucity of rank-and-file organising and strengthening.[125]

This clause amends section 33(2) of the principal Act which required an application for registration to go through accreditation proceedings where a party had to state whether or not he or she wishes to appear in support of his or her representations at accreditation proceedings. The bill has deleted this part of the provision in an Application for registration of a trade union.

15. Additional provisions (f) and (g) on the requirements for application for registration

The Committee recalls that it had previously asked the Government to provide detailed information on the activities of the Zimbabwe Human Rights Commission (ZHRC) related to trade union rights. The Committee welcomes the detailed information provided by the Government. It notes, in particular, that the ZHRC Education, Promotion and Research Unit conducts awareness campaigns to educate the general public on labour rights, as well as principles of trade unionism; its Complaints Handling and Investigations (CHI) Unit is responsible for receiving complaints regarding alleged violations of trade union rights and carrying out investigations, as appropriate; its Monitoring and Inspections Unit monitors the human rights situation in the country, assesses the country's observance of human rights and freedoms and undertakes media monitoring, law development monitoring and monitoring of judicial decisions which have a bearing on trade union rights.

The ZHRC is currently setting up a thematic working group (TWG) on economic, social and cultural rights for the advancement of socio-economic rights, which include labour and trade

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[124] Alexander, M. and Green, R (1992). Workplace Productivity: Issues and Evidence-Industrial Relations Research Series No. 2 Industrial Relations and Workplace Productivity. Department of Industrial and Labour Relations, Caberra

[125] N. Jazdowska, "Will They Ever Learn? Worker Representation in Zimbabwe's Manufacturing Industry 1980-1998" A Published Phd Thesis, Coventry University October 2001

union rights. The ZHRC recognizes that it has an important role to play as regards the advancement of trade union rights. According to the Government, with the operationalization of the new TWG, the visibility of the ZHRC in the promotion, protection and enforcement of trade union rights will be further enhanced.

The Committee notes with ***concern*** the allegations submitted by the ZCTU regarding the ban imposed by the ZRP in March and April 2016 on protest actions by the Zimbabwe Banks and Allied Workers Union and the arrest, on 20 July 2016, of nine members of that union for protesting against non-payment of employees' terminal benefits after termination of their employment contracts.

While noting that according to the ZCTU their case is pending in the criminal court, the Committee notes the Government's indication that although the unionists in question were briefly detained and questioned by the police in connection with the protest action, no criminal charges were raised against them, and therefore, no such case is pending before the courts. The Committee further notes the Government's indication that the dispute in question is being addressed by the Ministry of Public Service, Labour and Social Welfare, that the hearing on the dispute was held on 24 November 2016 and that the ruling on the matter is expected to be made in 30 days.

With respect to the Commission of Inquiry's recommendation that steps be taken by the authorities to bring to an end all outstanding cases of trade unionists arrested under the Public Order and Security Act, the Committee notes the Government's indication that with the exception of two cases for which the ZCTU must facilitate closure, all cases noted by the Commission of Inquiry have been closed and no charges are pending before the courts. In this respect, the Committee also notes the ZCTU's indication that previously reported pending cases were closed, save for one case in respect of which the ZCTU will engage with the Government for the matter to be withdrawn.

The Committee had previously requested the Government to provide information on the progress achieved in bringing the labour and public service legislation into conformity with the Constitution and the Convention.

The Labour Amendment Bill proposes additions to the requirements for an application for registration of a trade union to include:

(f) whether the trade union or employers organisation has a head office at a physical address;

(g) proof in the form of the minutes of, and a register of attendance at, a meeting signed by the participants thereof constituting the leadership of the trade union, employers organisation or federation thereof." This is a commendable

16. Duty to provide information to Registrar

Trade unionism in Zimbabwe is highly censored as much as the right to form, join and participate in the same is an express right enshrined in the Constitution. The Labour Amendment Bill further intensifies the requirements needed to be met by registered trade unions to avoid suspension or ultimate cancellation of certificate of registration. The regulation from the level of application for registration, the requirement for application for registration as well as duties of trade unions after registration is tight to the extent that there are heavy penalties for non-compliance.

The insertion of a new section 34 A after section 34 of the principal Act shows further how trade unionism is heavily regulated in Zimbabwe. This new section sets out the duties of trade union to avail to the Registrar—:

(a) within thirty days of receipt of its auditor's report, a certified copy of that report and of the financial statements;

(b) by the 31st of March of each year, a certified statement by its secretary, showing the number of members as at 31st of December, of the previous year;

(c) within thirty days of receipt of a written request by the Registrar; an explanation of anything relating to the statement of membership, the auditor's report or financial statements;

(d) within thirty days of an appointment or re-appointment or election or re-election of any office bearer, a written return of his or her name and work address;

(e) within thirty days after any change of address for the service of documents, a written statement for the new address for the service of documents.

And failure to do so by the registered trade union attracts a penalty of suspension from operation or in the worst scenario of non-compliance, cancellation of a certificate of registration, as set out in subsection (2) which sets out as follows:

(2) Where a trade union, employers organization or federation fails to comply with subsection (1), the Registrar—

(a) shall by written notice require the trade union, employers organization or federation to comply with any provision of subsection (1) with which it has failed to comply, within sixty days of the notice, upon expiry of which if no compliance is made the Registrar shall notify the trade union, employers organisation or federation concerned that it has been suspended for a period not exceeding 60 days from operating as a registered entity and is therefore prohibited from benefitting from any check-off scheme or enjoying the other privileges of an entity registered under this Act;

(b) shall uplift the suspension as soon as compliance is made with the relevant provision of subsection (1) or if no compliance is made by the end of the period of suspension, shall cancel the certificate of registration of the trade union, employers organisation or federation and remove its name from the register if no compliance is made with the relevant provision of subsection (1)."

Apparently it is not possible to reform the law in Zimbabwe without long standing state control and repression.[126] The demand for compulsory participation, consultation, accountability and openness by registered trade unions are open for debate on such issues that can only be realized by members of the labour market. Workers are demanding effective and democratic organizations, whether in government or in the unions. People are actively discussing political, economic, and social issues that are running together with the right to form, join and participate in trade unions in Zimbabwe.[127] The sleeping giant is beginning to wake up in Zimbabwe.

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[126] R. Saunders,"Trade Union Struggles for Autonomy and Democracy in Zimbabwe" 1991, ZCTU

[127] Labor and Economic Development Research Institute (LEDRIZ). 2004. Statistical Databank. Harare, Zimbabwe: LEDRIZ.

17. Considerations relating to registration or variation, suspension or rescission of registration of trade unions or employers organizations

This clause has amended section 45 of the principal Act by deletion of subsections 1(a)(iv) and (2) where the provision no longer requires the desirability of reducing, to the least possible number, the number of entities with which employees and employers have to negotiate. Where any person asserts that there should, in any particular case, be any departure from the general rule referred to in subparagraph (iv) of paragraph (a) of subsection (1), the burden of proving such assertion shall lie on such person in no longer provided for.

18. Supervision of election of officers

This clause removes the powers of the minister in taking part in the supervision of election of officers.

19. Collection of union dues

Minister has power to control and regulate trade union elections, postpone or change venue of trade union, power to set aside union elections, fixing qualifications for officers of trade unions, change procedures for conducting an election, regulate, collection and use of union dues, interference in approving and amending collective bargaining agreements, investigate trade unions, imposition of levies on trade unions, sweeping powers to make law. Ministerial interference in trade union work appears to be excessive to the extent that fragments of repression from state through the acts of the Minister are high.

20. Formation of employment councils otherwise than under section 57 and admission of new parties to employment councils

In Zimbabwe, the provision for National Employment Councils has been there since 1980. National Employment Councils, once known as Industrial Councils, have been in existence since 1934 in some cases they were named Bargaining Councils.

In simple terms, National Employment Councils are representative bodies of employer and employee organisations. The National Employment Council is ordinarily made up of structures namely: Council, the Executive Committee, Negotiating Committee and a Local Joint Committee.

However, certain Collective Bargaining Agreements for specific sectors have developed structures that include Exemptions Committees, Job Evaluation Committees, etc. Key to these structures are Designated Agents (DA) who may be conciliators and arbitrators responsible for resolving disputes in their particular industry in terms of provisions envisaged in Sections 63 and 98 of the Labour Act (Cap 28:01).

The Labour Amendment Bill proposes elaborate requirements for formation of employment councils in relation to formation, registration, membership, voting process and dispute resolution. The bill elaborates the regulation of employment councils. It begins by explaining who is an employer member and employee member.

21. Designated agents of employment councils

This clause comes in with a repeal of section 63(3b) wherein in the principal act had specified that once a designated agent has been authorised to determine an issue of unfair labour practice, then the labour officer shall not have jurisdiction over the matter. The Labour Amendment Bill now retains the jurisdiction of the labour by setting out a time frame within which the labour officer shall not have jurisdiction and upon the expiry of such a time, then the labour officer shall have jurisdiction.

The substitution of the following sections—

"(3b) Subject to subsections (3c) and (3d) where a designated agent is authorised to redress any dispute or unfair labour practice in terms of subsection (3a), no labour officer shall have jurisdiction in the matter during the first thirty days after the date when the dispute or unfair labour practice arose, but a labour officer may assume such jurisdiction (and exercise in relation to that dispute or unfair labour practice the same powers that a designated agent has in terms of this section) after the expiry of that period if proceedings before a designated agent to determine that dispute or unfair labour practice have not earlier commenced.

The provisions of the bill come in to monitor the competency and effectiveness of designated agents to whom disputes of unfair practices have been referred. Failure to act with the level of competence or any evidence of complaints against the designated agent will move the Registrar to replace them.

23. Clause 27 "Submission of collective bargaining agreements for approval or registration")

This clause gives a substitution of section 79 of the principal act in relation to the submission of collective bargaining agreements for approval by the registrar. The bill has now eliminated subsection 2(c) where the Minister shall no longer consider whether the collective bargaining agreement is unreasonable or unfair, having regard to the respective rights of the parties.

The Minister no not only direct the Registrar not to register such collective bargaining agreement until it has been suitably amended by the parties thereto. Rather the Minister shall in writing specify the issue of public interest at stake and thereafter he may direct the Registrar not to register such collective bargaining agreement until it has been suitably amended by the parties thereto.

24. Amendment of registered collective bargaining agreements by Minister

Section 81 of the principal act has been amended

25. Binding nature of registered collective bargaining agreements

The bill has elaborated the right to participate in collective bargaining agreement negotiations through insertion of new provisions at the beginning of section 82 of the Labour Act Chapter 28:01. This sections speaks to the binding nature of collective bargaining agreements (CBA), and therefore the insertion of the following provisions:

"(a1) For the avoidance of doubt it is declared that—

(a) to secure just, equitable and satisfactory conditions of work in conformity to section 65(4) of the Constitution, it is in the public interest that these conditions be uniformly established through a system of free collective bargaining established by law;

(b) by this Act, every employer, employee, employers organisation, trade union or federation thereof is free to engage in collective bargaining by having the opportunity directly or indirectly under section 56 to obtain representation in an employment council;

accordingly, it shall not be a lawful excuse for those who did not avail themselves of the opportunity referred to in paragraph (b) to fail to abide by or claim not to be bound by a collective bargaining agreement freely negotiated for their industry."

These provisions map the way forward to minimizing various disputes and grievances arising out of the binding nature of CBAs in a way that other parties will dispute being bound by something they did not accent to and worst still take part in its making. The Labour Amendment Bill has in other words removed barriers to effective collective bargaining. In that string, because for the avoidance of doubt, parties have been afforded the right expressly to participate in negotiations of CBAs, in future disputes against already registered collective bargaining agreements.

26. Powers of labour officer

The entire section 93 will be repealed by the bill and substituted particularly, subsection 2 of section 93 has been stretched to include the manner in which a certificate of settlement can be enforced in the event of default. In the bill, it now reads as follows:

(2) If the dispute or unfair labour practice is settled by conciliation, the labour officer shall record the settlement in writing, which shall be registrable with the relevant court for enforcement upon default. The certificate of settlement to enable enforcement shall be issued by the labour officer and it shall have the effect for purposes of enforcement, of a civil judgment of the appropriate court. The idea of making a certificate of settlement enforceable is commendable as it will discourage some parties from rendering a certificate of settlement a dead end or dead rubber by refusing to comply with it as was happening in the past under a legal regime where a certificate of settlement was not enforceable. In the past before this Bill, faced with an unenforceable certificate of settlement, a party with a certificate of settlement in its favour was forced to undergo merry-go round and a thicket of other cumbersome procedures seeking to enforce such certificate of no settlement by starting a fresh cause of action relying on **section 8(e)** of the **Labour Act** for unfair labour practice by reason of refusal or failure to comply with a certificate of settlement by the defaulting party. It is commendable that the bill seeks to re-introduce compulsory arbitration as a labour dispute resolution for a dispute of right in addition to the already existing legal framework for voluntary arbitration for a dispute of

interest for non-essential service sector[128]. It is worth mentioning that compulsory arbitration applies to both a dispute of right and a dispute of interest where employees involved in the dispute are employed under an essential service as defined by law.

Jurisdiction of the Labour Officer

Section 93(5)(c) has been amended to remain with the provision that if a labour officer fails to solve the dispute of unfair labour practice, he may now only refer the dispute or unfair labour practice to compulsory arbitration if the dispute or unfair labour practice is a dispute of right without first making a ruling that, upon a finding on a balance of probabilities that the employer or other person is guilty of an unfair labour practice. The bill has deleted the operation of subsections (5a) and (5b) which involves the labour officer making a ruling on a dispute of unfair labour practice and the process of registration of such a ruling.

More often than not, employees find themselves in wrong courts because of lack of legal guidance. In other circumstances, time of appeal would lapse while employees waste time approaching the wrong courts and application for condonation for late appeal may be more complicated. As a results of this misdirection disposal of labour disputes is delayed. The common adage that justice delayed is justice denied becomes a common setback in resolution of labour disputes.

The issue of jurisdiction is one of the frequently raised preliminary issues when labour matters are brought before the adjudicators. Labour officers are empowered to adjudicate on labour matters in terms of section 93 of the Labour Act Chapter 28.01. In discharging their duties they are also guided by Labour (Settlement of Disputes) Regulations, 2003 Statutory Instrument 217 of 2003. While labour officers are entitled to adjudicate on labour disputes by the aforementioned section they do not have jurisdiction to entertain labour disputes where there is a National Employment Council for the industry in which the dispute emanated.

Section 63(3b) of the Labour Act provides that, where a designated agent is authorised to redress any dispute or unfair labour practice in terms of subsection (3a), no labour officer shall have jurisdiction in the matter. This provision takes away jurisdiction from labour officers

[128] C. Mucheche, Commercial and Labour Law Arbitration: International Commercial Transactions Law in Zimbabwe and South Africa, (2020), 1st Ed, Zimlaw Publications.

where there is a National Employment Council for the undertaking in which the dispute arise. The powers of the labour officers on section 93 apply *mutatis mutandis* to designated agents.

Labour officers are left with managerial employees who do not fall under the NEC and any other employees who do not fall under National employment councils like domestic workers. It must be noted that employers are bound by the collective bargaining agreements of NECs for the sectors they fall under whether they are part of the agreement or otherwise. In most cases employees would approach labour officers instead of designated agents and their cases usually suffer complications where a *point in limine* of jurisdiction is raised during the proceedings. Labour officers must refer the complainants to the appropriate NEC to avoid unnecessary delays in resolving the disputes.

Other than powers vested in them on section 93 of the Act, Labour officers are also empowered to hear matters to do with code of conduct in terms of section 101(6). The section provides that, if a matter is not determined within thirty days of the date of the notification referred to in paragraph (*e*) of subsection (3), the employee or employer concerned may refer such matter to a labour officer, who may then determine or otherwise dispose of the matter in accordance with section *ninety-three.* Paragraph *(e)* notifies any person who is alleged to have breached the employment code that proceedings are to be commenced against him in respect of the alleged breach. Once the alleged offender of misconduct is notified the matter should be determined in 30 days and where the matter is not determined either part can approach the labour officer who would dispose the matter by making a determination or deal with the matter in terms of section 93.

The other circumstances where labour officers have jurisdiction is when an employee appeal against a decision made in terms of National Employment Code of Conduct which is referred to as Statutory Instrument 15 of 2006. In term of section 8(6) of the National Employment Code of Conduct, a person or party who is aggrieved by a decision or manner in which an appeal is handled by his or her employer or the Appeals Officer or Appeals Committee, as the case may be, may refer the case to a Labour Officer or an Employment Council designated agent, as the case may be, within seven working days of receipt of such decision. However

there is a judicial president which clarified that SI 15 is *ultra vires* to the provisions of section 101 and 92D of the Labour Act and its applicability is mired in controversy.

Labour officers are also empowered to determine on the cases where employment council refuses to approve a code made by works council at company level. section 101(1c) provides that where an employment council refuses to approve a code made by a works council in terms of subsection (1a) or (1b), the works council may refer the matter to a labour officer, and the determination of the labour officer on the matter shall be final unless the parties agree to refer it to voluntary arbitration.

Employees must be guided accordingly so that they don't delay labour dispute resolution by approaching the wrong adjudicators with their labour matters. It must be also noted that no labour officer shall intervene in any dispute or matter which is or is liable to be the subject of proceedings under an employment code, nor shall he intervene in any such proceedings once they have started. A person who is aggrieved by a determination made under an employment code, may, within such time and in such manner as may be prescribed, appeal to the Labour Court.

The Labour Amendment Bill has introduced subsection (7) in relation to the regulation of the powers of labour officers when faced with disputes of unfair labour practices that involve an employer which is a statutory corporation, statutory body or an entity wholly or predominantly controlled by the State. The Minister responsible for that body, corporation or entity shall be deemed to be a party on an equal footing with such employer and accordingly is a party to such dispute or unfair labour practice.

Some disadvantages that were created by the removal of a Labour Officer's jurisdiction in terms of section 8 of Statutory Instrument 15 of 2006 (S.I. 15 of 2006)

i. As a result of confusion around appeals to labour officers in terms of section 8 of S.I. 15 of 2006 where an employer has conducted disciplinary proceedings, there are some cases with a record ubiquitous chequered history of being unresolved for **many years and the adage finality to litigation rings an alarm bell.** There is a pedigree of case authorities underscoring the principle of **finality to litigation and avoiding merry go round or stop go to approach to legal cases before a court of law. See Ndebele v Ncube**

1992 (1) ZLR 288 (S), Chimponda and Anor v Muvami 2007 (2) ZLR 326, Leonard Dzvairo v Kango Products SC 593/14, Chituku and 2 Others v IDBZ and 3 Others HH 414/21, Wangayi v Mudukuti HB 155/17.

ii. The divesture of a Labour Officer's jurisdiction in terms of section 8 of S.I. 15 of 2006 may create a backlog of cases at the Labour Court as the Labour Court becomes congested with many disputes which ordinarily were supposed to be resolved via conciliation in terms of section 93 of the Labour Act as per the provisions of section 8(7) of S.I. 15 of 2006. Conciliation as an alternative dispute resolution(ADR) mechanism provided for in terms of section 8(7) of S.I. 15 of 2006 is cheaper, faster and less complicated than litigation before a formal court of law like the Labour Court where the procedure about Labour Court Rules may be cumbersome for a self-actor thereby creating a barrier to access to justice in violation of **section 69** of the **Constitution of Zimbabwe**. Courts of law are not created for academic debate but to give practical solutions to real life situations and hence it is always desirable to bring finality to cases rather than clogging courts with cumbersome roundabout legal sideshows or drama to delay matters. The ***raison d'tre*** for the Supreme Court *locus classicus* in **Dalny Mine v Banda 1999(1) ZLR 220 (S)** is that the Labour Court must not decide labour matters on technicalities but on the merits by adopting any one of the following options:

1. **Rehearing a matter on the merits to cure any procedural irregularities; or**
2. **Remitting a matter back for a denovo hearing.**

iii. The Labour Court is a creature of statute and its appeal powers and jurisdiction are derived from legislative provisions like **section 89 of the Labour Act,** more particularly the instructive provisions of **section 89 (2)** couched as follows;

" ***In the exercise of its functions, the Labour Court may-***

(a) in the case of an appeal-

(i) conduct a hearing into the matter or decide from the record; or

(ii) confirm, vary, reverse or set aside the decision, or order or action that is appealed against, or substitute its own decision or order; "

iv. The new generation, contemporary or emerging Supreme Court authorities revolving around lack of jurisdiction by a Labour Officer under section 8 of S.I 15 of 2006 are likely to be changed if the Labour Amendment Bill is passed into law as it has clauses which seek to cement and reinvigorate the jurisdiction of a Labour Officer under the same legal provision by amending section 101 of the Labour Act to clear any ambiguity. Grafting of jurisdiction in terms of section 8 of S.I.15 of 2006 under section 92D of the Labour Act is legally untenable and unpalatable because section 92D does not apply to proceedings under the national code of conduct but only in relation to proceedings under some other employment code of conduct cognizable in terms of section 101 of the Labour Act.

v. The correctness of the Supreme Court reasoning that a Labour Officer lacks jurisdiction in terms of section 8 of S.I. 15 of 2006 is debatable because section **92D** of the **Labour Act** which the Supreme Court opined that it applies to appeals from disciplinary proceedings under a national employment code of conduct distinctively apply to appeals under the other employment code of conduct registered in terms of section 101 of the Labour Act such as works council or employment council code of conduct not the national employment code of conduct. S.I. 15 of 2006 gives a Labour Officer unique (***sui generis***) jurisdiction in terms of **section 8** of **S.I. 15** of **2006** as read with **section 93** of the **Labour Act**. **Section 92D** of the **Labour Act** is worded as follows:

"A person who is aggrieved by a determination made under an employment code, may, within such time and in such manner as may be prescribed, appeal to the Labour Court".

In practice, a number of works council or employment council do have provisions prescribing the time and manner of an appeal to the Labour Court once an employer has concluded disciplinary proceedings in terms of a registered employment code of conduct but the national employment code of conduct has a unique separate legal appeal procedure that does not go to the Labour Court directly but goes via a Labour Officer. The legal distinction between an alternative employment code registered in terms of section

101 of the Labour Act and the national code of conduct S.I. 15 of 2006 is also visibly noticeable and discernible from the wording of **section 12B(2)** of the **Labour Act** which makes the two different codes of conduct mutually exclusive in terms of scope of application.

vi. Some of the new Supreme Court cases under the new legal era about the absence of a labour officer's jurisdiction to hear an appeal under section 8 of S.I. 15 of 2006 where misconduct disciplinary proceedings are finalized are **Misheck Mabeza v Sandvik Mining and Anor Judgment No. SC 91/19 , Esau Zhou v The City of Harare Judgment No. SC 175/2020 & Tafadzwa M. Sakarombe N.O and Anor v Montana Carswell Meats (Private) Limited Judgment No. SC 44/20, Living Waters Theological Seminary v Rev Chikwanha Judgment No. SC 59/21 Nicholas Mukarati v Pioneer Coaches (Private) Limited Judgment No. SC 34/22.**

vii. It is trite law that a new question of law can be raised at any stage of legal proceedings but there is a legal caveat that it must not create or result in prejudice to the other party. See guidelines about raising a new question of law generally set out in **Muchakata v Netherburn Mine 1996 (1) ZLR 153 (S).**

viii. The literal rule of statutory interpretation require that the ordinary grammatical meaning of words used in a statute or legislation like **section 8(6) & (7)** of **S.I. 15 of 2006** be interpreted as they are without doing any violence to legislation or dismembering legislation. Under the constitutional principle of separation of powers, the role a court of law is to interpret law as passed by the legislature and not to make law. A court of law must apply law as it is not as it ought to be. The ordinary and grammatical words used in the body of such judgment or legislation must be used to interpret the legal meaning thereof. See **Chegutu Municipality v Manyora 1996 (1) ZLR 262(S).**

ix. Section 8 of S.I. 15 of **2006** endows and bestows a Labour Officer or Employment Council Agent with jurisdiction where an employer has exhausted disciplinary proceedings in clear and unambiguous terms as follows:

(6) A person or party who is aggrieved by a decision or manner in which an appeal is handled by his or her employer or the Appeals Officer or Appeals Committee, as the case may be, may refer the case to a Labour Officer or

Employment Council Agent, as the case may be, within seven working days of receipt of such decision.

(7) The Labour Officer or Employment Council Agent to whom the case has been referred shall process the case as provided for under section 93 of the Act."

The reasoning the by Supreme Court that the jurisdiction of a Labour Officer in terms of section 8 of S.I. 15 of 2006 is ***ultra vires*** **section 101** of **the Labour Act,** is with due respect potentailly legally faulty and misplaced because the very same section 101 of the Labour Act give full legal recognition to S.I. 15 of 2006 from a reading of **section 101(9)** of the **Labour Act**.

x. The general jurisdiction of a Labour Officer to resolve labour disputes in terms of **section 93** of the **Labour Act [Chapter 28:01**] has been reaffirmed and validated by the Constitutional Court of Zimbabwe in various leading cases like **Isoquant Investments (Private) Limited t/a ZIMOCO v Memory Darikwa Judgment No. CCZ 6/20 and Willmore Makumire v Minister of Public Service, Labour and Social Welfare Judgment No. CCZ 01/20.**

xi. In passing and without derogating from the legally binding nature of current Supreme Court judgments about the legal interpretation of section 8 of S.I. of 2006 until a new law is enacted stating otherwise, it is worth noting that the lawmaker is seeking to amplify jurisdiction and powers of a Labour Officer in dealing with misconduct matters finalised under an employment code of conduct to be subject to conciliation in terms of section 93 of the Labour Act by correcting a *lacuna* or legal gap under section 8 of S.I. 15 of 2006 via **section 32 of the Labour Amendment Bill** worded as follows:

" ***Section 101 (" Employment Codes of Conduct") of the principal Act is amended-***

(a) by insertion of subsection (1) after the word "manner prescribed" of and on payment of a prescribed fee";

(b) by insertion of the following proviso in subsection (5)

" ***Provided that at the conclusion of such proceedings and notwithstanding anything to the contrary in an employment code, at the instance of any party aggrieved by those proceedings may appeal to a labour officer within 30 days of***

the conclusion of proceedings whereupon the labour officer shall attempt to conciliate the dispute in terms of section 93 or exercise any other power provided in that section."

Restoration of compulsory arbitration in labour dispute resolution mooted by the Labour Amendment Bill

27. Effect of reference to compulsory arbitration

The use of alternative dispute resolution in labour matters was a rarity in Zimbabwe until the country introduced a new statutory instrument under the Labour Act.[129] The new statutory provisions introduced a raft of measures into the law and brought about changes to the usual procedure. The new provisions introduced conciliation as a form of dispute resolution[130], which was to be spear headed by labour officers[131]. It also introduced compulsory arbitration, which was to be conducted under the terms of the Zimbabwean Arbitration Act (Chapter 7:15).

In conciliation proceedings, parties to the dispute appear before the conciliator, in accordance with section 93(1) of the Labour Act, which deals with the conciliation of labour disputes and unfair labour practices referred by an employee to the conciliator.[132] Under this provision, the conciliator attempts to resolve the dispute between the parties failing which he or she will issue a certificate of no settlement which would result in the parties going for compulsory arbitration in terms of section 93(5a)[133] or voluntary arbitration in terms of section 93(5b) of the Labour Act. The distinction with compulsory arbitration is that the parties do not choose an arbitrator as that is done by the labour officer appointed by the Ministry of Labour and with

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[129] Section 93 of Labour Act (Chapter 28:01)
[130] Section 93(1) of the Labour Act.
[131] C. Mucheche, A Practical Guide to Labour Law, Conciliation, Mediation and Arbitration I Zimbabwe, (2014), 2nd Ed, Zimlaw Publications.
[132] Nyasha Brighton Munyuru, 'Step forward or backward? Zimoco v Darikwa on alternative dispute resolution in labour matters' International Bar Association
[133] Labour Act (Chapter 28:01)

voluntary arbitration parties agree to direct the dispute to be dealt with by an arbitrator chosen by the parties.[134]

The approach of the Constitutional Court: Isoquant Investments (Pvt) Ltd t/a Zimoco v Memory Darikwa

The Applicant in the matter terminated on notice the employment contracts of 17 of its employees. Aggrieved with that decision, the employees lodged a complaint to the National Employment Council for Motor Industry (NEC) that the Applicant had failed to pay their retrenchment packages.

The Respondent, a designated agent (DA), was requested to redress the issue through conciliation. At conciliation, the DA made an order that the Applicant pay its former employees their retrenchment packages in terms of section 12C (2) of the Act. The DA applied to the Labour Court for the confirmation of that order against the applicant.[135]

The Applicant challenged the constitutionality of section 93 (5a) and 93 (5b) of the Labour Act and argued that the provisions violated its rights to equal protection of the law and to administrative justice, as contained in section 56 (1) and 68 (1) of the Constitution of Zimbabwe respectively. The Labour Court referred the constitutional questions to the Constitutional Court. The apex court held that there were no proceedings before the court *a quo* in terms of section 93 (5a) of the Act which warranted the court *a quo* to refer the matter to the Constitutional Court to determine the questions of the constitutionality of section 93 (5a) and 93 (5b).

The decision of the Constitutional Court of Zimbabwe in ***Zimoco v Darikwa***[136] acknowledges the role played by alternative dispute resolution mechanisms in the resolution of labour matters. The court emphasised the faith of the legislature in conciliation as an effective process for consensus seeking and as an important first step prior to disputes becoming

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[134] Nyasha Brighton Munyuru, 'Step forward or backward? Zimoco v Darikwa on alternative dispute resolution in labour matters' International Bar Association

[135] Nyasha Brighton Munyuru, 'Step forward or backward? Zimoco v Darikwa on alternative dispute resolution in labour matters' International Bar Association

[136] CCZ 6/20

subject to arbitration or adjudication.[137] The Court stated that conciliation is a process that does not involve the use of power by a third party to resolve a dispute between the parties, as compared to arbitration and adjudication.

In the cyclostyled judgement, the court distinguished between conciliation and arbitration wherein it held that conciliation as a mechanism gives the parties to the dispute the opportunity to resolve it by agreement through voluntary participation, whereas, under arbitration, there is a third party involved who will make a binding decision on behalf of the parties. The court also held that, conciliation, unlike arbitration, enables the parties to be in control of the outcome of the dispute resolution process.[138]

Furthermore, the court eschewed the legislature from outlining a procedure that the conciliator ought to follow in dispute resolution, but indicated that the conciliator is to be conferred with more powers under section 93(1) of the Act which provides that a labour officer to whom a dispute or unfair labour practice has been referred, or to whose attention it has come, shall attempt to settle it through conciliation or, if agreed by the parties, by reference to arbitration. The court further held that section 93(1) is wide enough to be interpreted to mean that it clothes a labour officer with the powers necessary to enable him/her to discharge the duty imposed on him/her in the conducting of conciliation.

Under this clause, section 98 of the principal Act to the effect that the arbitrator to whom the dispute of unfair labour practice has been referred to him is now obliged to deliver an arbitral award within 90 days of the hearing.[139] The amendment bill has place a time frame within which arbitration should have been completed so as to bring finality to litigation. The Labour Amendment Bill has also taken away the powers of arbitration in relation to determining costs of arbitration and that prerogative has been left to Labour officers. The bill has also inserted a provision for punishment of employees who engage in collective job action when a dispute has been referred to compulsory arbitration.[140]

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[137] *Zimoco v DarikwaCCZ 6/20* at page 9-10

[138] *National Union of Metalworkers of SA and Others v Cementation Africa Contracts (Pty) Ltd (1998) 19 ILJ 1208 (LC)* at para 21 (the 'NUMSA' case).

[139] Nyasha Brighton Munyuru, 'Step forward or backward? Zimoco v Darikwa on alternative dispute resolution in labour matters' International Bar Association

[140] Nyasha Brighton Munyuru, 'Step forward or backward? Zimoco v Darikwa on alternative dispute resolution in labour matters' International Bar Association

28. Employment codes of conduct"

The Bill has amended section 101 of the principal Act in relation to the registration of employment codes of conduct to the extent that the Registrar after an application by an employment council or a works council, may register an employment code of conduct after payment of a prescribed fee. The bill has ushered in the need to have a fee to be paid before a code of conduct at the work place can be registered.

The principal Act had placed a provision that the Labour officer shall not have jurisdiction over a matter that has been dealt with in terms of an employment code of conduct. The Labour Amendment Bill has inserted a new provision which gives the labour officer to try and conciliate a dispute of unfair labour practice provided that a party who is aggrieved by the proceedings prescribed by the employment code of conduct, who after the completion of the hearing, appeal to the Labour officer against the outcome at the hearing. The Bill has done so by the insertion of subsection (5) to the principal act which provides as follows;

"Provided that at the conclusion of such proceedings and notwithstanding anything to the contrary in an employment code, at the instance of any party aggrieved by those proceedings may appeal to a labour officer within 30 days of the conclusion of the proceedings whereupon the labour officer shall attempt to conciliate the dispute in terms of section 93 or exercise any other power provided for in that section.";

The Bill has specified the time limit within which this appeal can be lodged so as to ensure finality to litigation.

The Amendment Bill has also ushered in two new provisions in relation to employment codes of conduct which allows employment codes of conduct to be reviewed after every five years. The bill has introduced subsections 11 and 12 which provides as follows:

"(11) Every registered employment code of conduct shall be subject to review every five years, and the provisions of this section shall apply with regards to the registration of a reviewed employment code of conduct. (12) If after the lapse of the five years a registered employment code of conduct has not been reviewed

within three months of the lapse of the five-year period the employment code of conduct shall be deemed deregistered.".

This provisions allows employment codes of conduct to change together with the changing trends in the labour market and growing technologies which improves its practicality to the industry within which it applies. A good example is the COVID-19 era that change the whole perspective of employers and employees in performing their duties. The ways of working and production have been changes totally by the new realities brought about by COVID-19, including working from home, working virtually and the provisions of the old employment codes of conduct which spelt the opposite of the new trends in the labour market.

However, five years appears to be a very long period within which employment codes of conduct are allowed to function without the pressure of deregistration. Aggrieved parties cannot wait that long in order to be able to directly challenge a given employment code of conduct.

29 Liability of persons engaged in unlawful collective action

There is no legal basis for the right to strike under common law given that employees have a duty to provide service to the employer.[141] This position was underscored in the case of **Girjac Services Pvt (ltd) v Mudzingwa**[142] . In this case, the appellant employee had been arrested at the instance of the employer on allegations of theft. He was subsequently acquitted, having been initially released on bail, during which time he did not render his services to the employer. The employee later sought to resume work with full pay from the date he had been arrested up to the date of his acquittal.[143]

The High Court had ordered that the employee be reinstated with full back pay and benefits. On appeal to the Supreme Court, it was held that that the employee was not entitled to absent himself from work because he had been arrested. He was not incapacitated from working and should have tendered his services. He could not blame his absence on his employer for having

[141] Gwisai, above
[142] 1999 (1) ZLR 243 (S).
[143] Gwisai op cit note 1 at 1, Machingambi op cit note 5 at 2

wrongfully caused his arrest, there having been reasonable suspicion that he had committed an offence.[144]

It logically follows therefore that embarking on a strike amounts not only to a breach by the employee of the duty concerned, but also to a misconduct which entitles the employer to summarily dismiss the employee without incurring any legal liability for such course of action[145]. This position was evident from the so called no work no pay principle[146], relied on by the Supreme Court in the above case, which entitled the employer to withhold an employee's salary should they fail to tender their services. It is also sad to note that despite the fact that the court admitted that the employer's decision to cause the arrest of the employee concerned was wrong, it still thought it wise not to blame the employer.

Section 65(3) specifically guarantees the right to strike, hence making it justiciable. The section reads as follows;

"Except for members of the security service, every employee has the right to participate in collective job action including the right to strike... but a law may restrict the exercise of this right in order to maintain essential services"

It is worthy note that as with all other rights, the right to strike in section 65(3) of the Constitution is not absolute. For instance, the same section stipulates that a law may restrict the exercise of the right concerned in respect of essential services.[147]

The Bill has specifically inserted a new provision in relation to liability of essential service workers who engaged in an unlawful collective job action which is stricter than non-essential service workers. It has added two provisions to the extent that:

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[144] Machingambi, op cit note 5 at 2

[145] Freund Khan's Labour and the Law 3 ed (1983) at page 292, cited in Machingambi, op cit note 5 at 2 . See also Caleb Mucheche A Practical Guide to Labour Law in Zimbabwe 1 ed (2013) at page121. The author acknowledged the importance of the right to strike, arguing that it is one of the most formidable and potent weapons at the disposal of employees in the entire global village.

[146] Ibid

[147] Melusi Moyo, 'The Right To Strike In Zimbabwe's Labour Law: A Liability Or A Trap At Worst? A Dissertation Submitted In Partial Fulfilment Of A Bachelor Of Laws Honours Degree, Midlands State University, Faculty of Law, 2014

(a) in the case where collective action relates to an essential service, a fine not exceeding level 14 or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment;

(b) in any other case, to a fine not exceeding level 14 or in the case of failure to pay the fine to imprisonment not exceeding one year

This provision puts essential service providers to task to avoid participating in unlawful collective job action which has a bearing on affecting production and the provisions of essential services. This can be termed a step in the right direction in curtailing unlawful collective job action especially on service providers whose duties the interruption of endangers immediately the lives, personal safety or health of the whole or part of the general populace. However, one might look on the side of terror to criticise this step by the law makers in challenging the massive restrictions and repression placed on essential service workers who participate in unlawful collective job action. This gesture might be misunderstood by many to mean that essential service workers are discriminated from other service providers to the extent that their ability to participate in possibly even lawful collective job action is severely monitored and sanctioned to avoid even the slightest opportunity of participation.

Thus, any unwarranted interference with the right in question would warrant the intervention of the Constitutional Court as the supreme constitutional adjudicator. This therefore represents a great milestone in so far as the need to protect the right to strike in Zimbabwe is concerned.[148]

It is also important to note that since the right to strike is now provided for under the Bill of Rights, principles relating to constitutional interpretation will be applied in case of disputes relating to the exercise of this right.[149] In particular, the preamble to the Constitution emphasises the issue of commitment to upholding and defending fundamental human rights. Section 3 of the Constitution contains the founding values upon which Zimbabwe is founded. Fundamental human rights is singled out as one of those principles.[150]

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[148] Ibid

[149] Ibid

[150] Melusi Moyo, 'The Right To Strike In Zimbabwe's Labour Law: A Liability Or A Trap At Worst? A Dissertation Submitted In Partial Fulfilment Of A Bachelor Of Laws Honours Degree, Midlands State University, Faculty of Law, 2014

Chapter 2 of the same Constitution also outlines what are referred to as national objectives which are intended to guide State institutions and agencies of government at every level.[151] In particular, section 11 talks about the need to foster fundamental human rights and freedoms. The obligation in this last respect being to protect fundamental rights and freedoms contained in the Bill of Rights and to promote their full realisation and fulfilment.[152] Thus, there is a thread of 'fundamental human rights' running throughout these provisions. It is not difficult to appreciate how important the aforesaid Constitutional provisions are vis-a-vis the right to strike.[153] This is so because they are a constant reminder to Constitutional adjudicators on the need to ensure the full realisation of human rights, of which strike action is one of them.

30. Cessation of Collective Job action

Section 111 of the principal act has been repealed

31. Offences under Collective Job Action

Section 112 of the principal act has been repealed to the extent that the Bill has specifically pointed out the provisions the violation of, amounts to an offense. Special mention is made to sections 104(3), 105 and 106(2)(b) whose violation amounts to punishment set out in the following sections.

32. Investigation of Trade unions and employer organizations

In relation to the monitoring of the affairs of trade unions and employer organizations set out in section 120 of the principal act, the labour amendment bill had amended certain provisions such as subsection (7) by deletion of "or confirm the appointment of a provisional administrator pursuant to the proviso (b). The current position brought about by the amendment is that the Minister's powers in relation to the appointment of an administrator who shall administer the affairs of the trade union or employer organization is confined to making an application to the Labour Court for such appointment and the deletion of his

[151] Ibid
[152] Ibid
[153] Ibid

prerogative to appoint a provisional administrator set out in the principal Act has been done away with.

Moreover, the Minister is only allowed to appoint a provisional administrator pending the determination by the Labour Court of an application to appoint an administrator in the limited circumstances that there is a real risk and possibility that unless the Minister makes such an appointment, the funds, property or records of employment council will be lost, disbursed or destroyed. Besides the circumstances set out above, the Minister cannot appoint a provisional administrator.

Conclusion

Conclusively, it is worth mentioning that labour is dynamic in an ever changing society and hence there is need to constantly tailor make labour law amendments to move with changing times and societal dynamics. Also labour amendments must seek to reconcile the competing interests of both employers, employees, investors and other stakeholders in Zimbabwe. Consequently, there is need for a wider stakeholder consultation by Parliament of Zimbabwe for a healthy robust debate before the Labour Amendment Bill is passed into law so that the law making process produces a good progressive law for society and its people.