Legal Analysis of Some Collective Bargaining Challenges for Employers, Labour Unions and Workers in Zimbabwe post Labour Amendment Act, 2023

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INTRODUCTION

Collective bargaining is the heartbeat or lifeblood of the employer-employee relationship, as it seeks to continuously improve conditions of work or employment for the betterment of the workers and in turn benefitting the employer by spurring productivity from motivated workers. Without the right to collective bargaining, an employment relationship is dead and lifeless, just like the legal adage that without the right to strike, collective bargaining is collective begging. **Section 65 (5)(a)** of the **Constitution of Zimbabwe** entrenches and anchors a justiciable legal right to engage in collective bargaining. Also **sections 2A (1)(f)**, **24**, **25** & **74**-**82B** of the **Labour Act** provides a legal framework for the practical enjoyment of the right to collective bargaining at both the works council and employment council levels. **Labour Amendment Act**, **2023** which was passed as labour legislation in Zimbabwe on 14 June 2023 altered the legal scope of collective bargaining in Zimbabwe. This paper explores and assesses the current state of labour law in Zimbabwe and its negative or positive effects on the right to collective bargaining, which forms the heart and soul of the employment relationship.

ABSTRACT

Labour Amendment Act No. **11** of **2023** (hereinafter referred to as "**Labour Amendment Act**, **2023"**) passed as law by the Parliament of Zimbabwe on 14 June 2023 poses some challenges to the right to collective bargaining for a number of reasons like direct equal footing involvement of government Minister with the employer a party to the collective bargaining agreement at works council and employment council in relation to parastatals or government owned entities, criminalisation of an unlawful strike and watering down or dilution of the autonomy of parties at employment councils, among others. The aforesaid collective bargaining challenges may be a tell-tale sign that local labour legislation may be viewed by some analysts as being out of sync with **ILO Convention No**. **98** covering Right to Organise and **ILO Collective Bargaining Convention No**. **154**.

PARTICIPATION OF RESPONSIBLE GOVERNMENT MINISTER IN THE COLLECTIVE BARGAINING PROCESS AT WORKS COUNCIL AND EMPLOYMENT COUNCIL PLATFORMS

It is worth noting that **section 13** of **Labour Amendment Act**, **2023** repealed the old section 25 (2), (3) and 4 of the Labour Act and replaced the old provisions of section 25 (2) of the Labour Act with some very curious legal provisions of the new **section 25 (2)** of the **Labour Act** worded as follows: ***"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 equal footing with such employer and accordingly is a party to the negotiation of such collective bargaining agreement."*** (emphasis added by underlining). The legal import and ambit of the abovementioned provisions of **section 25 (2)** of the **Labour Act** creates a scenario in terms of which the responsible Government Minister has same equal legal status with the employer party when it comes to collective bargaining process at works council for a statutory corporation, statutory body or

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an entity wholly or predominantly controlled by the State, thereby potentially creating **dual or duplicated employer representatives** at the negotiating table, leading to unequal bargaining power between the employer and employee parties at the collective bargaining negotiating table. Another unintended consequence is that members of the workers committee may feel intimidated and dissuaded from conducting meaningful collective bargaining negotiations at works council due to the participation of the politically powerful responsible Minister on an equal footing with the employer as party, contrary to the objective of voluntary autonomy of parties in the collective bargaining process as required by **ILO Convention No**. **98** on **Right to Organise and Collective Bargaining** as read with **ILO Collective Bargaining Convention 154** . Also a works council is an internal structure of the employer such that it amounts to an overkill on the part of an employer party to be represented by both the line or responsible Minister and the management of that employer when it comes to the negotiation of a collective bargaining agreement. However, one may argue that the involvement of the line Minister in the works council collective bargaining process at shop floor or enterprise level may benefit employees if the Minister chooses to have empathy on such employees after practically appreciating the reality about the plight of works on the ground first hand.

It is an advantage if the responsible Minister become a party to a negotiation of a collective bargaining agreement at works council in terms of **section 25 (2**) of the Labour Act or employment council in terms of **section 74 (7)** of the **Labour Act**, on an equal footing with the employer if that Minister wields his/her political authority and muscle by protecting the legal rights and interests of employees from being cannibalised by any person who may seek to prejudice the workers. The responsible Minister may act as a paternalistic guardian of workers' rights and public interest in the process of negotiating a collective bargaining agreement. However, the responsible Minister may veto a fair and reasonable collective bargaining agreement by sacrificing it on the altar of political expediency due to political pressure to be 'politically' correct, resulting in workers getting disadvantaged. The right to collective bargaining on the part of workers employed by statutory corporation, statutory body or entity wholly owned or controlled by the State is now on trial typical of walking on egg shells. Time will tell and be the best judge about whether this participation of a responsible Minister in works council collective bargaining will produce positive or negative results for the workers since this is an uncharted legal territory which may have some murky waters. **Section 2A (1) (c)** of the **Labour Act** is more poignant where it provides that the purpose of the Labour Act is to advance social justice and democracy in the workplace by providing a legal framework within which employers and employees can bargain collectively for the improvement of conditions of employment.

In addition to the works council collective bargaining set up, **section 74 (7)** of the **Labour** Act gives a line Minister equal footing with an employer as a party to the negotiation of collective bargaining agreement in the following terms: ***" Where a collective bargaining agreement being negotiated 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."*** The provisions of **section 74 (7)** of the **Labour Act** again create a replication of the same scenario at works council in terms of which the responsible Minister for a statutory corporation, statutory body or an entity wholly or predominantly controlled by State has an equal status with an employer as a party to the negotiation of a collective bargaining agreement negotiated by a trade union and employers' organisation or at the employment council level.

DILUTION OF VOLUNTARY AUTONOMY OF PARTIES IN THE COLLECTIVE BARGAINING PROCESS BY THE REPLACEMENT OF VOLUNTARY EMPLOYMENT COUNCILS VIA NEW NAMELESS EMPLOYMENT COUNCILS GOVERNED LIKE STATUTORY EMPLOYMENT COUNCILS

The repeal and substitution of the old section 56 of the Labour Act with a new section 56 of the same Labour Act may symbolise either a good or bad omen for collective bargaining in Zimbabwe. The old section 56 of the Labour Act which used to provide for voluntary employment councils was buried at the legal cemetery by section 23 of the Labour Amendment Act, 2023 which repealed it and substituted it with a new section 56 of the Labour Act with new nameless employment councils. The new **section 56 (2)** of the **Labour Act** ushered in some *sui generis* hybrid or special type of an employment council governed like a statutory employment council, provides as follows: "***The employment councils formed under this section shall be governed by this Act in every respect as if such employment council is a statutory employment council*** . (emphasis added by underlining). This new type of employment councils under the new section 56 of the Labour Act is longer the same as the old voluntary employment council in terms of which existing members of an employment council were not legally forced or compelled to admit new members who wished to join a voluntary employment council.

The mischief which the legislature sought to cure by treading on a tight legal rope by repealing the old legal provision and substituting it by enacting a new section 56 of the Labour Act was to deal with some fetish resistance or refusal by old members of voluntary employment councils to admit or allow new employer and employee members to join such employment councils and also the refusal or resistance by some employers to be bound by collective bargaining agreements generated or produced by the old voluntary employment councils, on the basis of the constitutional right to freedom of association protected and embedded in terms of **section 58** of the Constitution of Zimbabwe. It is fundamental to make it abundantly clear that constitutional rights are not engraved in stone or cast in concrete because **section 86** of the **Constitution of Zimbabwe** gives legal leeway for a limitation of constitutional rights to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society based on openness, justice, human dignity, equality and freedom, taking into account all relevant factors.

The Zimbabwean legislature may have decided to kill two birds with one stone by amending the old section 56 of the Labour Act which provided for voluntary employment councils, by way of abrogating it via a repeal and substitution with re-incarnating a new section 56 of the Labour Act which no longer mentions voluntary employment councils. Some notable cases where some employers created some legal minefield by approaching the High Court of Zimbabwe challenging the application of voluntary employment council collective bargaining agreement to non-member employer on the basis of the constitutional right to freedom of association under section 20 of the old Constitution of Zimbabwe are **Econet Wireless v Minister of Public Service, Labour and Social Welfare and National Employment Council For the Communications and Allied Service Industry HH 350/15 & Netone Cellular (Private) Limited v The Minister of Public Service, Labour and Social Welfare & National Employment Council For the Communications and Allied Service Industry HH 211/15, National Employment Council for Communications and Allied Services Industry v Netone Cellular (Private) Limited SC 124/15 and National Employment Council for the Communications and Allied Services Industry v Netone Cellular (Private) Limited and Another CCZ 17/19.**

The old legal position that members of a voluntary employment council were not forced to admit a new member who wished to join such an employment council was underscored by the Supreme Court

of Zimbabwe in the case of **National Employment Council for the Catering Industry v Catering & Hospitality Industry Workers Union of Zimbabwe SC 08/08.** The afore-cited Supreme Court judgement which gave the old voluntary employment councils legal exemption from being required to admit new members who wished to join such employment councils was watered down by the padlock new **section 56 (4), (5), (6)** of the **Labour Act** which now make it a statutory legal requirement for employment councils to distribute or allocate votes in the employment council to employer and employee members as well as trade union and employers association members based on the parity of votes and proportional representation principles.

Pursuant to the new inclusive and pluralistic provisions of **section 56 (4), (5) & (6)** of the **Labour Act,** on or around **23 January 2024**, the Registrar of Labour dispatched a written circular to all employment councils to amend their constitutions in sync with the new legal framework in terms of which membership to employment councils is now legally open to new members. **Section 56 (9)** of the **Labour Act** further provides that any member wishing to join an employment council without the requisite membership to secure a seat and vote in the employment council as per the applicable employment council constitution, be afforded an observer status to the employment council. These new legal provisions which opened the democratic space at employment councils for new members of employment councils for both employers and employees may be viewed in both positive and negative sense. The positive sense is that these new legal provisions allowing for admission of new members to employment councils abolished the personalisation of employment councils as a personal property or fiefdom of the old members typical of our private thing (known in vernacular languages Shona as “chinhu chedu” and Ndebele as “into yethu”) mentality, to the exclusion of new members. An employment council must not be run like a private club because it is there to protect the interests of the public in the form of employers and employees.

The inclusion of new members in an employment council in terms of the ironclad new **section 56 (4), (5) & (6)** of the **Labour Act** may promote a healthy diversity and sharing of ideas for the smooth functioning of such an employment council via an osmosis or cross pollination of information between many members of the employment council. Also, the addition of new members to an employment council may enhance good corporate governance and prevent corporate governance decay, meltdown or rot for such employment councils by inculcating and promoting good corporate governance as a result of checks and balances by many members who become vigilant watchdogs on each other. Good corporate governance will also help in reducing, alleviating or preventing abuse of employment council resources, money or assets. Some may view the admission of new members to employment councils in a negative sense based on allegations that such an approach may promote splintering and proliferation of trade unions or employers’ organisations into multiple factions driven by rapacious selfish personal aggrandisement ambitions typical of ‘politics of the stomach or belly’, leading to a weakening or erosion of their collective bargaining power or stamina. An employment council is a very important structure and vital cog in labour relations administration because it is a bipartite body with both employers and employees which seeks to assist employer and employee parties to resolve any work related dispute in an amicable way since unresolved disputes are counter-productive.

Also the opening of floodgates for new members to an employment council may result in some unscrupulous employers creating surrogate or yellow dog trade unions to weaken strong trade unions that effectively fight, promote and champion workers’ rights by pitting the former puppet trade unions against the latter vibrant trade unions. Weak trade unions may be used as lapdogs or Trojan horses for some dubious employers to the detriment of workers and derailing their legal right to effective collective bargaining sinking workers in a sea of poverty and oblivion.

Cognisant of the need to have a workable dispute resolution system regarding any dispute about the allocation of votes in employment council to a trade union or employers' organisation, **section 56 (7)** of the **Labour Act** affords any aggrieved party legal recourse to refer such a dispute to the Registrar for determination. In the same vein, **section 56 (8)** of the **Labour Act** gives any trade union or employers' organisation party aggrieved by the determination made by the Registrar a right of appeal to the Labour Court. It is important to note that reference to subsection (4) in section 56 (8) of the Labour Act may be a typographical error by the legal drafters of Labour Amendment Act, 2023 as the correct subsection is (7) and not (4). A multiplicity of trade unions and employers' associations at the collecting bargaining negotiating platform at the employment council may be an albatross around the neck derailing the collecting bargaining process as a result of endless and fruitless negotiations characterised by bickering, posturing and grandstanding, leading to unhealthy deadlocks and stalemates in the collective bargaining process.

Workers bear more brunt if collective bargaining is hamstrung by strife or petty dogfights between a legion of rival trade unions and employers' associations, because it may lead them to lose an opportunity to have wages, salaries and other conditions of employment reviewed and improved for the better since collective bargaining deals with bread and butter issues of the stomach for a living. Trade unions and employers are encouraged to smoothly accommodate each other at employment for the promotion of the bests interests of the employer and employee parties who are the main stakeholders for employment councils by refraining from being at each other's throats and focus on fulfilling the objectives for which employment councils were created by the lawmaker. The addition of new members to employment council may also be characterised as a double-edged sword with both positive and negative consequences.

Some of the positive result of allowing new members to join employment council is that it will promote workplace democracy via an effective representation of employees and employers by representatives of their choice who listen to their views and safeguard their best interests. Also members pay their money to join trade unions or employers' organisations as well as employment councils hence opening legal room for new members to join employment councils will assist with parties seeing the value of their membership money by also having a voting voice and say in the employment council instead of being marooned or stranded on an island of ignorance about how an employment council is run.

CRIMINALISATION OF THE WORKERS' RIGHT TO STRIKE BY IMPRISONMENT/JAIL OR FINE OR BOTH IMPRISONMENT AND FINE

Section 104 of the Zimbabwean **Labour Act** provides for the right of employees to engage in a lawful collective job action or strike and that legislative respect for the right to strike is commendable. Some stringent penalties of 5 years' imprisonment or level fourteen fine or both fine and imprisonment for engaging in an unlawful strike or collective job action were introduced via an amendment to **section 112** of the **Labour Act**. The criminalisation of the right to strike on the part of employees by **section 34** of **Labour Amendment Act**, **2023** and imposition of a penalty of imprisonment for five years or fine not exceeding level fourteen for an offence of going on an unlawful strike sends a chill down the spine of a reasonable person as excessive punishment. The black majority government introduced progressive provisions for the right to strike in Zimbabwe via the Labour Relations Act No. 16 of 1985 after the country attained independence on 18 April 1980 and also later in 2013 via section 65 (3) of the current Constitution of Zimbabwe. During the colonial era, the right to strike did not exist for African workers as the conditions of employment were arbitrary, capricious, nefarious, barbaric, notorious, draconian, unjust and unfair as a relic of colonial labour legislation under the Master and

Servant Act, in terms of which African workers in Zimbabwe before independence were regimented, paddocked and barred from going on strike. The annihilation of the workers' right to strike deals a lethal body blow to the right to resort to collective job action jealously protected and embedded in terms of **section 65 (3)** of the **Constitution of Zimbabwe** and **ILO Convention 87** on **Freedom of Association and the Right to Organise**.

The right to strike is at the nerve centre of the right to collective bargaining as the two work hand in glove in a complementary way. An employee has a right to withdraw his/her labour force by way of a strike and hence strike action must not be criminalised and punished with imprisonment because **section 4A** of the **Labour Act** gives an employee a legal right not to be subjected to forced labour (known in local vernacular languages Shona as 'chibharo' and Ndebele as "iganyavu"). The capacity of an employee to stop work by way of a strike is a hallowed labour law right that deserves serious legal protection by way of decriminalising a strike by employees. A strike by employees is a fair and reasonable legitimate legal right by employees to counter-balances the employer's power at the workplace where there is inherent inequality between the employer and employee premised on the fact that an employee is economically dependent upon an employer to eke out a living.

CONCLUSION

The grey areas infused into the Labour Act by Labour Amendment Act, 2023 need to be addressed so that they do not militate against the enjoyment of the constitutional right to collective bargaining for employers and employees. It is hoped that another amendment to the Labour Act as amended by Labour Amendment Act, 2023 will be considered by the legislature as part of a solution to patch or cure some challenges laid bare by this latest amendment.